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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MOLLIE NORMA MELCHOR,

Defendant and Appellant.

F064342

(Super. Ct. No. VCF252351B)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Gerald F. Sevier, Judge.

David D. Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Julie A. Hokans, Deputy Attorneys General, for Plaintiff and Respondent.

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Mollie Norma Melchor pleaded no contest to first degree robbery (Pen. Code, § 211)¹, first degree burglary (§ 459), two counts of grand theft of a firearm (§ 487, subd. (d)(2)), and elder or dependant adult abuse (§ 368, subd. (b)(1)), and admitted a prior conviction allegation. The trial court sentenced her to eight years in state prison.

On appeal, Melchor contends that the trial court prejudicially erred when it denied her pre-plea motion to dismiss the information based on violations of her Fifth Amendment rights. Melchor contends that the error requires her convictions be reversed and the case dismissed with prejudice. We disagree and affirm.

STATEMENT OF THE FACTS²

On May 9, 2010, 81-year-old Israel Reyna was inside his home when three females came to the door and asked about buying some plants from him. Reyna went outside to show the women the plants, at which point he was grabbed from behind by a male and forced to the ground. The man held a gun to Reyna's head and demanded his money. The man removed Reyna's wallet from his pants and took about \$140. The man then removed Reyna's belt and used it to tie Reyna's hands in front of him. After awhile, when he felt it was safe to do so, Reyna got up and went inside the house where he noticed a cell phone and two rifles were missing.

Detective Kevin Kroeze spoke with Alexis Solis about the incident. Solis said that she was a passenger in a truck along with Melchor and Tiffany Robinson; Julian Alderete was driving the truck. On the way back from a trip to a casino, Alderete drove the truck to a home outside Goshen, where he told the three females to contact the "old man" at the residence to distract him and that Alderete was going to hide in the bushes. After the women made contact with the man in the residence, Solis saw Alderete "put up his finger

¹ All further statutory references are to the Penal Code unless otherwise stated.

² The facts are taken from the preliminary hearing because Melchor pled no contest to the charges.

across his mouth as if to say be quiet or not say anything.” Solis became scared and returned to the truck. At one point, she looked back and saw Alderete put a gun to the man’s head and force him to the ground. Solis stayed near the truck with Robinson. A few minutes later, Melchor returned to the truck. On redirect examination, Detective Kroeze testified that he believed that Solis had said Melchor returned to the truck with a cell phone and wallet.

Detective Kroeze spoke with Melchor on June 7, 2011, following her arrest on a warrant in Kings County. Melchor was advised of and waived her *Miranda*³ rights. She first claimed that when she arrived at the house, she did not know what was going on, but she later admitted that Alderete knew the man and did not want the man to recognize him. Melchor told Detective Kroeze she had taken a box with jewelry from the house.

PROCEDURAL HISTORY

On May 12, 2011, a criminal complaint filed in Tulare County charged Melchor and Alderete jointly with various counts stemming from the robbery and burglary that took place on May 9, 2010. Alderete was also charged with additional crimes not involving Melchor. The preliminary hearing was scheduled for both defendants on July 5, 2011, but Melchor was not able to be transported as originally planned because she had pending matters in Kings County.

While Melchor was awaiting her preliminary hearing, the prosecution went to trial against Alderete and filed a motion on July 25, 2011, to compel Melchor to testify in Alderete’s case, offering use immunity under section 1324. At a hearing on August 2, 2011, Melchor objected, asserting that her Fifth Amendment right could only be

³ *Miranda v. Arizona* (1966) 384 U.S. 436.

protected by a grant of transactional immunity. The trial court granted use immunity and ordered Melchor to testify because it believed she was adequately protected.⁴

At Alderete's trial, Melchor answered the prosecution's questions, including that she knew Robinson and Solis; that she had known Alderete for 40 years; and that she had spoken to Detective Kroeze. When she was asked if she had gone to a house in Goshen on May 9, 2010, with Alderete, Melchor pled the Fifth Amendment and was directed by the trial court to answer additional questions. After the trial court assured her that none of her testimony could be used against her, Melchor acknowledged that she had gone to the house in Goshen with Alderete, Solis and Robinson and that everyone had gotten out of the car. Melchor testified that all of the women, including herself, met with the old man and that Alderete was behind them. When Melchor was asked if she had seen Alderete do anything, she said "no," and refused to answer any more questions. The trial court then found her in contempt.

The following day at trial, Melchor continued to assert her Fifth Amendment right, with her own attorney further arguing for her right to transactional immunity. After Melchor's counsel informed Melchor that she needed to answer the questions if she did not wish to be held in contempt, Melchor stated that she would, but neither the prosecution nor the defense made any further inquiries of her.

Melchor's preliminary hearing was then held on August 15, 2011; she was held to answer. An information was filed August 25, 2011, charging Melchor with the same crimes she was earlier charged with, this time individually.

On August 29, 2011, Melchor pleaded not guilty to the charges and denied the allegations. That same day, Melchor filed a motion to dismiss the information pursuant to section 1099, which was heard and denied on September 15, 2011.

⁴ On our own motion, we take judicial notice of the order, which is contained in Julian Alderete's appellate file. (Evid. Code, § 452, subd. (d).)

On October 13, 2011, Melchor withdrew her not guilty plea and pleaded no contest to the counts in the information and admitted the prior conviction allegations associated with one count. The trial court gave an indicated sentence of eight years in state prison. At sentencing on December 14, 2011, the trial court struck Melchor's prior strike conviction and sentenced her to a total of eight years in state prison.

Melchor requested and was granted a certificate of probable cause.

DISCUSSION

Melchor contends that the trial court erred when it denied her motion to dismiss the charges pending against her. Specifically, she claims that the trial court's order that she testify for the People in Alderete's trial deprived her of her Fifth Amendment right against self-incrimination. She also contends that the trial court's grant of use immunity, instead of transactional immunity, under section 1324 did not provide her with protection equivalent to that provided by the Fifth Amendment. Finally, she claims that the trial court was required to use the procedure set forth in section 1099. We disagree with each of her claims.

Fifth Amendment Right Against Self-Incrimination

The Fifth Amendment to the United States Constitution provides that “[n]o person ... shall be compelled in any criminal case to be a witness against himself” The California Constitution provides a similar privilege: “Persons may not ... be compelled in a criminal cause to be a witness against themselves” (Cal. Const., art. I, § 15.) The privilege against self-incrimination includes two facets: (1) the privilege of a defendant, in a criminal proceeding against that defendant, not to testify at all and (2) the privilege of a person, as a witness in any proceeding, civil or criminal, to refuse to answer particular questions which may tend to incriminate him or her in criminal activity. (*Cramer v. Tyars* (1979) 23 Cal.3d 131, 137.)

On appeal, Melchor first contends that forcing her to testify in Alderete's trial violated her Fifth Amendment right as a defendant not to testify in a criminal proceeding.

Melchor argues that, because she had the same charges pending against her for the May 9, 2010, crimes against Reyna as Alderete did, she, as a defendant and unlike an uncharged witness, had an absolute right not to testify in the criminal matter against Alderete.

Melchor relies, inter alia, on *Cramer v. Tyars*, *supra*, 23 Cal.3d 131, 137; *United States v. Echeles* (7th Cir. 1965) 352 F.2d 892, 897; *People v. Whelchel* (1967) 255 Cal.App.2d 455, 460, as well as Evidence Code section 930 for her contention. But each authority relied upon by Melchor merely recognizes the undisputed privilege of a defendant in a criminal proceeding against that defendant not to be a witness against himself. (See *Cramer v. Tyars*, *supra*, 23 Cal.3d at p. 137 [pursuant to the Fifth Amendment and the parallel California Constitution provision, as codified in Evidence Code section 930, “[i]n a criminal matter a defendant has an absolute right not to be called as a witness and not to testify”]; *United States v. Echeles*, *supra*, 352 F.2d at p. 897 (original italics) [the Fifth Amendment “gives any person the right to refuse to answer questions which might tend to incriminate him” but also prohibits “any person who is on trial for a crime *from being called to the witness stand*”]; *People v. Whelchel*, *supra*, 255 Cal.App.2d at p. 460 [under Fifth Amendment and parallel provision of California Constitution, “no person shall ‘be compelled in any criminal case to be a witness against himself.’”].) Evidence Code section 930 provides that, to the extent that such privilege exists under the Constitution of the United States or the State of California, “a defendant in a criminal case has a privilege not to be called as a witness and not to testify.”

Melchor provides no authority for the position that an individual, who is a defendant in a separate action, has a Fifth Amendment right not to be compelled to testify against a defendant in another matter. Melchor’s claim therefore fails.

Section 1324

Melchor next contends that the use immunity granted her was not an adequate substitute for the privilege against self-incrimination. As noted, *ante*, the Fifth

Amendment also provides the privilege of a person, as a witness in any proceeding, civil or criminal, to refuse to answer particular questions which may tend to incriminate him or her in criminal activity. (*Cramer v. Tyars, supra*, 23 Cal.3d at p. 137.)

California and federal “immunity statutes” provide that a witness who invokes the Fifth Amendment privilege against self-incrimination can be compelled to testify if, upon the prosecutor’s request, the court grants the witness immunity from prosecution based on the compelled testimony. (§ 1324; 18 U.S.C. §§ 6002, 6003.) Two kinds of immunity – use immunity and transactional immunity – have constitutional sanction. Use immunity protects a witness only against the actual use of his or her testimony and the fruits of that testimony, whereas transactional immunity protects him or her against later prosecution related to matters about which he or she testified. (*People v. Campbell* (1982) 137 Cal.App.3d 867, 872; see also *People v. Hunter* (1989) 49 Cal.3d 957, 973, fn. 4; *Kastigar v. United States* (1972) 406 U.S. 441, 449-453.) Use immunity may overcome and replace the constitutional privilege only if, after the immunity is granted, it leaves the witness in the same relative position, vis-à-vis prosecution, as if the witness had simply claimed the privilege. (*Kastigar v. United States, supra*, 406 U.S. at pp. 458-459.) The immunity must “give protection equivalent to that which attends the refusal to testify about matters which incriminate.” (*People v. Campbell, supra*, 137 Cal.App.3d at p. 873.)

Here the prosecutor requested an order requiring Melchor to answer questions, based on the prosecution’s offer of use immunity to the witness under section 1324. While earlier versions of section 1324 required a grant of transactional immunity when a witness claiming a privilege against self-incrimination was compelled to testify (*People v. Superior Court (Perry)* (1989) 213 Cal.App.3d 536, 538, fn. 2), section 1324 was amended in 1996 to require that a witness with a valid privilege against self-incrimination need only be granted use immunity before being compelled by the court to testify. (Stats. 1996, ch. 302, § 1, pp. 2266-2267; see Assem. Com. on Public Safety on Assem.

Bill No. 988 (1995-1996 Reg. Sess.) as amended Jan. 4, 1996, p. 1.) Section 1324 now reads, in relevant part:

“In any felony proceeding ... if a person refuses to answer a question ... on the ground that he or she may be incriminated thereby, and if the district attorney of the county or any other prosecuting agency in writing requests the court, in and for that county, to order that person to answer the question ..., a judge shall set a time for hearing and order the person to appear before the court and show cause, if any, why the question should not be answered ..., and the court shall order the question answered ... unless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction, and that person shall comply with the order. After complying, and if, but for this section, he or she would have been privileged to withhold the answer given ... by him or her, no testimony ... compelled under the order or any information directly or indirectly derived from the testimony ... may be used against the witness in any criminal case. But he or she may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, ... in accordance with the order. Nothing in this section shall prohibit the district attorney or any other prosecuting agency from requesting an order granting use immunity or transactional immunity to a witness compelled to give testimony” (§ 1324.)

Melchor argues that forcing her to testify under a grant of use immunity in Alderete’s trial regarding the underlying facts of the charges pending against her violated her privilege against self-incrimination because use immunity did not provide her “protection equivalent to that which attends the refusal to testify about matters which incriminate.” Melchor claims forcing her to testify allowed the prosecution numerous advantages in her own upcoming trial: to learn whether Melchor would deny, or attempt to explain, her statements to Detective Kroeze; to view her demeanor while testifying; to inform the prosecution of whether she was likely to testify in her own trial; and that any testimony by Melchor would enhance the effectiveness of any future examination of her in her own trial.

We agree with respondent that Melchor’s claim fails because it is entirely speculative. Had Melchor chosen to proceed to trial, she would have had an absolute

right not to testify. And, had she chosen to testify at her own trial, her testimony at Alderete's trial would not have been admissible to impeach her own trial testimony even if she had provided entirely inconsistent testimony. (§ 1324; see also *Withrow v. Williams* (1993) 507 U.S. 680, 705 (O'Connor, J., conc. in part and dis. in part) [describing "true Fifth Amendment claims" as "the extraction and use of *compelled* testimony"].) Additional claims by Melchor about how the prosecution would use her testimony at Alderete's trial to their advantage are purely speculative.

Section 1099

Finally, Melchor alleges an "additional" and "independent" ground requiring that the trial court grant her motion to dismiss, namely that section 1099 is the "exclusive" procedure for forcing her, as a defendant, to testify. Section 1099 provides:

"When two or more defendants are included in the same accusatory pleading, the court may, at any time before the defendants have gone into their defense, on the application of the prosecuting attorney, direct any defendant to be discharged, that he may be a witness for the people."

Section 1101 further provides that the order mentioned in section 1099 "is an acquittal of the defendant discharged, and is a bar to another prosecution for the same offense."

(§ 1101.)

Melchor relies on *People v. Yeager* (1924) 194 Cal. 452, 488, for the proposition that a codefendant cannot be compelled to be a witness for the prosecution unless the provisions of section 1099 "were put in force." But *People v. Yeager* involved a case in which the defendants were jointly indicted and jointly tried. (*People v. Yeager, supra*, at pp. 487-489.) The plain language of section 1099 further demonstrates that it applies only where defendants are jointly indicted and jointly tried.

Because Melchor and Alderete were tried separately, her argument fails.

DISPOSITION

The judgment is affirmed.

Franson, J.

WE CONCUR:

Gomes, Acting P.J.

Poochigian, J.