

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TORONTO GARDETTE,

Defendant-Appellant.

UNPUBLISHED

April 28, 2000

No. 193519

Washtenaw Circuit Court

LC No. 95-004256-FC

ON REMAND

Before: Holbrook, Jr., P.J., and Gribbs and Markey, JJ.

PER CURIAM.

This case has been remanded to us for reconsideration in light of *Gray v Maryland*, 523 US 185; 118 S Ct 1151; 140 L Ed 2d 294 (1998), which addresses the use of a redacted confession made by a nontestifying codefendant in a joint trial. Originally, we held that it was not error requiring reversal for the trial court in the case at hand to admit into evidence the redacted statement of defendant's codefendant. *People v Gardette*, unpublished opinion per curium of the Court of Appeals, issued September 11, 1998 (Docket No. 193519), slip op at 2. Finding nothing in *Gray* that warrants reversing that decision, we again affirm.

In *Bruton v United States*, 391 US 123, 135-137; 88 S Ct 1620; 20 L Ed 2d 476 (1968), the United States Supreme Court concluded that a defendant's constitutionally protected right to confront the witnesses against him¹ is violated by the introduction at trial of an unredacted confession by a nontestifying codefendant that facially implicates the defendant in the crimes charged. In *Richardson v Marsh*, 481 US 200, 211; 107 S Ct 1702; 95 L Ed 2d 176 (1987), the Court held that a confession "redacted to eliminate not only the defendant's name, but any reference to his or her existence," fell outside of the protection offered by *Bruton*. The issue under review in *Gray* was "whether redaction that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol, still falls with *Bruton's* protective rule." *Gray, supra* at 192. The *Gray* Court concluded that such redactions "are similar enough to *Bruton's* unredacted confessions as to warrant the same legal results." *Id.* at 195.

The confession in *Gray* had been redacted by leaving a blank space whenever the defendant's name appeared. "Consequently, the police detective who read the confession into evidence said the

word ‘deleted’ or ‘deletion’ whenever” the defendant’s name appeared. *Gray, supra* at 188. The *Gray* Court observed that a jury faced with a confession in which a defendant’s name is replaced with those, or conceptually similar redactions, will likely just assume that the redaction refers to the defendant. *Id.* at 193. Further, the Court was concerned that such conspicuous editing will only serve to draw a jury’s attention, thereby actually encouraging the jury to speculate on the identity of “Mr. Blank.” *Id.* Finally, the *Gray* Court concluded that because such alterations are directly accusatory, they facially incriminate the defendant in the precise manner forbidden by *Bruton*. *Id.* at 194-196.

The redactions in the case now before us are not analogous and do not implicate the same concerns. Here, defendant’s name was replaced with the reference, “the other guy.”² This does not unduly invite the jury to speculate about “the other guy’s” identity, nor does it facially incriminate the defendant. Other than the reference’s indication that “the other guy” is male, it offers no description that would necessarily point an accusatory finger at the defendant. See *Harrington v California*, 395 US 250, 253; 89 S Ct 1726; 23 L Ed 2d 284 (1969). It also does not focus the jury’s attention on the existence of the editing in the same way a blank space or the verbally repeated “deleted” would.

The *Gray* Court did not indicate that all forms of redaction would compromise a defendant’s right of confrontation. Indeed, it offered the following example as an acceptable redacted statement.

“Question: Who was in the group that beat Stacy?

“Answer: Me, deleted, deleted, and a few other guys.” App. 11

Why could the witness not, instead, have said:

“Question: Who was in the group that beat Stacy?

“Answer: Me and *a few other guys*.” [*Id.* at 196 (emphasis added).]

The redaction in the case at hand is in the same class as the approved of example offered by the *Gray* Court.

Furthermore, if the phrase “the other guy” were to be found constitutionally objectionable, this would invariably lead to a situation where the existence of any person other than the person who made the statement would have to be removed from the statement before it could be introduced at a joint trial. Such editing could improperly lead a jury into believing that the codefendant had acted alone when he had not. This type of redaction could also undermine the usefulness of the statement against the person who made it. For example, in the description of the crime offered by the codefendant in this case, it was “the other two guys” who forced the two victims from the car at gun point and ultimately shot the fleeing male victim while the codefendant stood several feet distant. If the existence of “the other two guys” is eliminated from the account, then the statement becomes nonsensical. Even if the existence of only defendant is removed from the statement, the narrative would become unintelligible unless erroneous facts were added. For example, how could the other man have been on both sides of the car forcing the occupants out at the same time? You would have to alter the statement to indicate that the man on the driver’s side of the car forced the passenger out while still on the driver’s side of the car.

This then would not match the testimony of the female victim who stated that she was ordered out of the car by one man while the other two forced her companion out of the car. While a defendant's right to confront the witnesses against him should not be undermined by allowing facially incriminating statements like the ones in *Bruton* and *Gray* into evidence, neither should a jury be purposefully misled by the judicially approved alteration of evidence. The integrity of the judicial system is compromised by both occurrences.

Accordingly, in light of the cautionary instructions given regarding the proper use of the statement, we conclude that defendant's Sixth Amendment rights were not violated by the introduction of the redacted statement of his codefendant.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Roman S. Gibbs

/s/ Jane E. Markey

¹ US Const, Am XI.

² There are actually three perpetrators identified in the codefendant's statement. The other two men are identified collectively as "the two guys," and individually as "the one guy" and "the other guy."