STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 5, 2013
v	No. 310076 Midland Circuit Court
JUSTEN ALAN EVANS, Defendant-Appellant.	LC No. 11-004930-FH

Before: HOEKSTRA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

BOONSTRA, J. (*concurring*).

I concur in the majority opinion, and write separately only to try to lend further clarity to the Confrontation Clause analysis.

Defendant argues that introduction of codefendant's statement about the paintball gun ("it's Justen's") violated the rule of *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). "In *Bruton*, the United States Supreme Court held that a defendant is deprived of his Sixth Amendment confrontation rights when a nontestifying codefendant's confession that inculpates the defendant is introduced at a joint trial." *People v Pipes*, 475 Mich 267, 269; 715 NW2d 290 (2006).

In addition to alleging *Bruton* error, defendant suggests that the admission of codefendant's statement directly violated the Confrontation Clause. "The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker* (*On Remand*), 273 Mich App 56, 60-61; 728 NW2d 902 (2006). See also *Crawford v Washington*, 541 US 36, 59, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Blending these arguments, defendant contends that *Bruton* bars the admission of all testimonial statements by non-testifying codefendants in a joint trial. While I agree with the majority that a *Bruton* violation occurred in this case, I would reject defendant's effort to extend *Bruton* to bar the admission of all testimonial statements by non-testifying codefendants in a joint trial.

On its face, *Bruton* bars the admission of a non-testifying codefendant's "confession" where that confession also implicates the defendant. *Bruton*, 391 US at 126, 137. In this case,

codefendant's statement ("it's Justen's") was not a "confession" at all; to the contrary, it suggested non-involvement in the crime by codefendant, and served only to tie defendant to the stolen item. Therefore, the first question before us is whether *Bruton* applies at all in this case. I agree with the majority that it does, although in doing so I will endeavor to supply the missing link between the applicability of *Bruton* and the finding of a *Bruton* violation.

While the rule in *Bruton* has often been described as relating to the admission of a codefendant's "confession" (and indeed it was a "confession" that was at issue in *Bruton*), the Court in *Bruton* explained that its concern was not with whether the codefendant's statement confessed wrongdoing by the *codefendant*, but rather with the untested unreliability of a statement by the codefendant incriminating the *defendant*:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored . . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed. [*Bruton*, 391 US at 135-136 (citations and footnotes omitted)].

Our Michigan Supreme Court thus has described the "basic tenets of *Bruton*" as providing that "codefendant statements are 'inevitably suspect' because of the strong potential for blame shifting." *People v Banks*, 438 Mich 408, 420-421; 475 NW2d 769 (1991). The Court did so in the context of codefendant statements that were not incriminating of the codefendants themselves, but that were incriminating only of the defendant. Consequently, I conclude that *Bruton* applies not only to "confessions" of non-testifying codefendants, but to *statements* of codefendants that are incriminating of the defendant, without regard to whether they also implicate the codefendants in the crime.[1]

In this case, codefendant's statement ("it's Justen's") clearly and facially implicated defendant relative to his possession of the stolen property. Codefendant clearly was motivated to shift blame to defendant. Codefendant did not testify at trial, and could not be cross-examined.

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[1] In *Banks*, the Court addressed the applicability of *Bruton* to codefendant statements that were redacted to eliminate references to the defendant. See also *Richardson v Marsh*, 481 US 200; 107 S Ct 1702; 95 LEd2d 176 (1987), We need not address that issue in this case, however, as there apparently was no effort to redact references to defendant prior to the admission of codefendant's statement ("it's Justen's").

Under these circumstances, the admission of codefendant's statement incriminating defendant constituted a *Bruton* violation. However, the reason that there was a *Bruton* violation was not simply because the statement was "testimonial," as the majority suggests, but rather because it was a statement of the codefendant that implicated defendant, where the codefendant could not be cross-examined.[2]

I also would find that the admission of codefendant's statement did not violate the Confrontation Clause or the rule of *Crawford*, 541 US at 59 n 9. The majority does not find any such violation either, but the majority does not address this issue beyond its *Bruton* analysis. Because I believe that the two prongs of the analysis are separate, and in order to make explicit what is perhaps implicit in the majority's analysis, my further *Crawford* analysis follows.

"The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker* (*On Remand*), 273 Mich App 56, 60-61; 728 NW2d 902 (2006), citing *Crawford*, 541 US at 59, 68. However, "the Confrontation 'Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004), quoting *Crawford*, 541 US at 59 n 9; see also *People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007).

Codefendant's statement was clearly testimonial because it was given in response to police questioning. *Garland*, 286 Mich App at 10; *Washington*, 547 US at 822. However, the statement was not offered to prove its truth and therefore advance the prosecution's theory of the case against defendant, but rather to prove its falsity and therefore implicate codefendant's credibility. Using codefendant's statement in this manner does not implicate the Confrontation Clause. See *Crawford*, 541 US at 59 n 9; see also *Chambers* 277 Mich App at 10-11.

For these additional and clarifying reasons, I concur in the majority opinion.

/s/ Mark T. Boonstra

[2] For the reasons noted by the majority, I agree that the *Bruton* error was harmless.