[J-144-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 244 Capital Appeal Docket
	:	
Appellee	:	
	:	Appeal from the Order of the Court of
	:	Common Pleas of Philadelphia County
v.	:	dated April 30, 1998 at No. 9501-580 2/3
	:	
	:	Argued: October 17, 2000
MICHAEL OVERBY,	:	
	:	
Appellant	:	
	:	
	:	

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

MR. JUSTICE CAPPY **DECIDED: October 24, 2002**

This is a direct review of a sentence of death imposed by the Court of Common Pleas of Philadelphia County.[1] Although Appellant, Michael Overby, alleges numerous errors related to his convictions for first-degree murder[2], robbery[3] and conspiracy[4], we address only the issue related to Appellant's confrontation rights. Bruton v. United States, 391 U.S. 123, 136 (1968). For the reasons stated herein, we hold that the trial court erred in admitting the statement of Appellant's co-defendant in the manner in which it was

[1] See 42 Pa.C.S. §§722(4), 9711(h)(1); Pa.R.A.P. 702(b) and 1941.

[2] 18 Pa.C.S. §2502(a).

[3] 18 Pa.C.S. §3901.

[4] 18 Pa.C.S. §903.

redacted and that such error was not harmless. Accordingly, we reverse the judgment of sentence and remand for a new trial as to all charges.

The convictions arose out of the following set of facts.[5] Ronald and June Pinkett, neighbors of Lillian Gaines, the victim, saw Isaac Young, Appellant and Gaines outside of Gaines' home between 5:00 and 5:30 a.m. on September 28 1990. N.T., 7/10/1996, p. 90, 166-67. June Pinkett testified that she had seen Appellant in Gaines' presence on previous occasions. Id. at 94-95. She stated that on the morning of the murder, she observed Gaines crying and that she overheard a discussion concerning Gaines owing money to Appellant or some other third person. Id. at 91. Pinkett asked Gaines if everything was okay and Gaines responded that everything was fine. Id. Appellant allegedly told Ms. Pinkett to mind her own business and the three individuals then went into Gaines' residence. Id. at 91, 98.

Edzina Fletcher, Gaines' roommate, found Gaines early that morning with her hands and feet bound and a piece of cloth in her mouth.[6] Id. at 31-32. Gaines' pants were partially pulled down. Id. at 33. Fletcher noted that a 19" television was missing from the home. Id. at 36.

Later that day, Dwayne Elliott, Appellant's co-defendant, tried to exchange a 19" television for drugs. N.T., 7/12/1996, p. 9; N.T., 7/12/1996, p.24.

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[5] As explained infra, Appellant was tried for the crimes in question on two separate occasions. The evidence presented at both trials was substantially the same. However, these facts are recounted from the evidence presented at the second trial.

[6] The medical examiner concluded that in his opinion, Gaines' cause of death was manual strangulation and suffocation by forcing Gaines' head into the couch. N.T., 7/12/1996, p. 49. In addition, the examiner testified that Gaines was further mistreated as her anus was distended and split into four radiating lacerations consistent with a large object being forced into the anus. Id. at 53-54. The examiner believed that this injury was caused by a broom handle or beer bottle being forced into the anus, but acknowledged that a penis could have made the insertion. Id.

In January of 1992, Nicole Schneyder was brought into the police station by a plain-clothes police officer for questioning regarding the murder of Gaines. She gave a statement to Detective Dominic Mangoni, a detective in the homicide division of the Philadelphia Police Department. Detective Mangoni recorded the statement verbatim and after the statement was taken, Schneyder reviewed and signed it. N.T., 7/12/1996, p. 21. Schneyder informed the police that on the day before the incident, Appellant told her that he was going to "run up", i.e., rob someone because he needed some money. N.T., 7/12/1996, p. 22. Schneyder also informed the police that about a week following the incident, Elliott told her that he was involved in the Gaines incident. Id. at 23. Elliott also told Schneyder that: Appellant, another person and he were just there to rob the house, but that Gaines gave Appellant "a hard way to go,"; that Appellant told Elliott to grab her; that Elliott grabbed her and held her while another person tied her up, Id.; that Appellant strangled her, Id. at 23-24; and that then, Elliott removed Gaines' television from her house and took it to Miss Babe's house to sell, Id. at 24.

Based upon the above information, the police arrested Appellant and charged him with first-degree murder, robbery and conspiracy related to the murder of Gaines. The matter proceeded to preliminary hearing at which Appellant, Elliott and Young were present. At the preliminary hearing, the Commonwealth called Schneyder as a witness. She recanted her prior statement to the police. She testified that she did not remember speaking with either Appellant or Elliott. Further, she admitted that she made the statements, but asserted that she made them in order to "tell them [the police] what they wanted to hear so [she] could get out of homicide." N.T., 1/10/1995, p. 13. Over objections by defense counsel, Schneyder's prior statement to the police was admitted under Commonwealth v. Brady, 507 A.2d 66 (Pa. 1986), as a prior inconsistent statement of an

available witness.[7] The portion of Schneyder's statement that contained Elliott's inculpatory statement to Schneyder was redacted to omit any reference to Appellant. At the conclusion of the hearing, the court determined that the Commonwealth presented sufficient evidence to proceed in its case against Appellant and scheduled the case for trial.

At the first jury trial, Appellant was tried jointly with Isaac Young and Elliott.[8] Nicole Schneyder did not appear as a witness. She was declared unavailable and her preliminary hearing testimony wherein she recanted her statement to the police was read to the jury. After the preliminary hearing testimony was read at trial, Nicole Schneyder appeared. The Commonwealth and both defense counsels declined to call her as a witness. The court also allowed Detective Mangoni to read the prior statement that Schneyder made at the police station. Although counsel initially objected to Detective Mangoni's testimony, when faced with the choice of either renewing an objection to Mangoni's testimony or calling Nicole Schneyder to the stand, defense counsel did not further object to Mangoni's testimony. Following the trial, Appellant was convicted of robbery and conspiracy. The jury was undecided on the first-degree murder charge with regard to Appellant and as to all charges against Elliott. The trial court declared a mistrial, and subsequently scheduled a retrial.

At the second trial, a similar procedure was used involving the testimony of Schneyder. At the conclusion of the second trial, Appellant was convicted of first-degree murder. The jury found co-defendant, Elliott, guilty of robbery, but not guilty of murder and conspiracy. During the penalty phase, the Commonwealth incorporated the testimony that

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[7] Although Appellant asserts that the preliminary hearing statement was erroneously admitted under Brady at both trials, we need not address this argument, since we find that the court erred in admitting the statement pursuant to Bruton.

[8] Following the presentation of most of the Commonwealth's case, the trial court granted Young's motion for judgment of acquittal based on a demurrer.

indicated that the killing occurred during a robbery, as well as the previous convictions for robbery and conspiracy. Following the penalty phase, the jury found one aggravating circumstance -- that the killing occurred in the perpetration of a felony[9] -- and no mitigating circumstances and sentenced Appellant to death. [10]

Appellant appealed to this court, asserting, *inter alia*, that Elliott's hearsay statement to Nicole Schneyder, as redacted at both trials, violated his right of confrontation under the Sixth Amendment of the United States Constitution.[11] Bruton v. United States, 391 U.S. 123, 136 (1968). Appellant urges that he is entitled to a new trial. We agree.[12]

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[9] 42 Pa.C.S. §9711(d)(6).

[10] The Rules of Criminal Procedure provide that an appeal in a criminal matter is from a judgment of sentence. See, e.g., Pa.R.Crim.P. 720. In this case, although the convictions for robbery and conspiracy occurred following the first trial, Appellant was not sentenced for these convictions until after the first degree murder conviction. Rather, he was sentenced for all the convictions at the same sentencing hearing. Thus, this appeal is Appellant's first opportunity to raise any issues related to the first trial., As we ultimately determine that Confrontation Clause violations occurred at both trials we will vacate the judgment of sentence as to all charges.

[11] Appellant raises two other alleged violations of the Confrontation Clause pursuant to Commonwealth v. Bujanowski, 613 A.2d 1227 (Pa. Super. 1997)(implying that recantation testimony of an unavailable witness was not admissible under Commonwealth v. Lively, 610 A.2d 7 (Pa. 1992), since it was unreliable) and Commonwealth v. Bazemore, 614 A.2d 684 (Pa. 1992)(defense must have full and fair opportunity to cross-examine witness at prior hearing in order for testimony to be admissible at a later hearing where the witness is unavailable). There is no reason to address these issues, since we are reversing the judgment of sentence based on a Confrontation Clause violation pursuant to Bruton.

[12] In the Statement of Questions Involved, Appellant asserts that trial counsel was ineffective for failing to object to the manner in which the statements were redacted. However, in the argument portion of his brief he also raises and develops the assertion that the trial court erred admitting the statements given the manner in which they were redacted. In light of Appellant's full development of this issue in a direct appeal capital matter, it is unnecessary to address the issue in terms of trial counsel's ineffectiveness. Although Appellant has failed to present the issue in his Statement of Questions Involved in compliance with Pa.R.A.P. 2116, it would be inappropriate for this court to decline review of
(continued…)

Appellant's argument, that we address today, implicates the Confrontation Clause of the United States Constitution. The Confrontation Clause provides that "in all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Confrontation Clause is applicable to the States through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400 (1965). Although the origins of the Clause are obscure[13], the United States Supreme Court has reiterated that the fundamental right that the Clause seeks to preserve is the defendant's right to a fair trial. Id. at 405; see also Lee v. Illinois, 476 U.S. 530, 539-40 (1986); Bruton, 391 U.S. at 126. The right of confrontation contributes to the perception as well as the reality of fairness in the criminal justice system by promoting an open contest between the accused and the accuser. In addition to serving these "symbolic goals … the right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials." Lee, 476 U.S. at 540. Thus, at its most basic level, the Sixth Amendment seeks to ensure that the trial is fair and reliable by preserving an accused's right to cross-examine and confront the witnesses against him.

(…continued)
the issue related to the alleged trial court error, merely on the basis of what amounts to appellant's awkward phrasing of the Statements of Questions Involved.

Additionally, as made clear infra, Appellant would be hard-pressed to demonstrate trial counsel's ineffectiveness related to this claim, as counsel objected to the admission of the statement and then also objected to the redaction. Accordingly, this case presents a question of trial court error, which was preserved by trial counsel's objections.

[13] Scholars postulate that the right of confrontation was recognized as a result of the trial of Sir Walter Raleigh, where Raleigh was convicted solely on the basis of an affidavit of questionable reliability by an alleged co-conspirator who did not appear in court. Richard D. Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011 (February 1998); Alfredo Garcia, The Winding Path of Bruton v. United States: A Case of Doctrinal Inconsistency, 26 Am. Crim. L. Rev. 401 (1988).

In order to protect these rights, the Court has developed different analyses under the Confrontation Clause depending on how a statement is used at trial. For example, where a hearsay statement, given by a non-testifying declarant, is offered as evidence to establish the guilt of the non-declaring defendant, the court must consider whether it was admitted pursuant to either a "firmly rooted hearsay exception" or contains "particularized guarantees of trustworthiness." Ohio v. Roberts, 448 U.S. 56, 66-67 (1980). Only if the hearsay statement was admitted under such circumstances will such a statement be deemed to respect the non-declaring defendant's right of confrontation. Roberts; see also Lilly, 527 U.S. at 124-25; Bourjaily v. United States, 483 U.S. 171 (1987)(admission of co-conspirator hearsay statement did not violate the Confrontation Clause because it fell within a firmly rooted hearsay exception); Lee, 476 U.S. at 543. On the other hand, where a hearsay statement is not admitted against the non-declaring co-defendant as evidence, then the court must consider whether sufficient precautions have been taken to insulate the non-declaring co-defendant from spillover prejudice due to the admission of the hearsay statement. Gray v. Maryland, 523 U.S. 185, 195 (1998); see also Richardson v. Marsh, 481 U.S. 200 (1987); Lee, 476 U.S. at 542 (explaining the purpose of the Bruton rule); Bruton. Where the precautions are insufficient, then the admission of the statement violates the non-declaring co-defendant's right to confront and cross-examine the witnesses against him. Bruton, 391 at 137; see also Gray; Richardson. Thus, in order to determine what Confrontation Clause analysis is proper in this case, we must initially consider whether the hearsay evidence, Elliott's statement to Schneyder, was offered to establish the guilt of Appellant, the non-declaring co-defendant.

In this case, it is clear that Elliott's statements, offered via the preliminary hearing testimony of Nicole Schneyder, were admitted against Elliott as evidence. However, the Commonwealth never argued that Elliott's statement was admissible against Appellant as evidence, nor does the Commonwealth raise such an argument to this court. Indeed, the

Commonwealth redacted the statement to omit Appellant's name, demonstrating its intent to offer the statement only against Elliott. Thus, the statement was not offered to establish the guilt of Appellant and our Confrontation Clause analysis proceeds pursuant to Bruton and its progeny.

In Bruton, defendant-Bruton and his co-defendant were tried at a joint trial. At the joint trial, the co-defendant's confession to a postal inspector was admitted against the co-defendant/declarant as substantive evidence. Bruton, 319 U.S. at 124. The trial court gave an instruction to the jury, informing it that the confession could only be used against the co-defendant/declarant and could not be considered against defendant-Bruton, since the statement was inadmissible hearsay with regard to Bruton. Id. at 125. Following a conviction, Bruton appealed on the basis that the admission of the statement at trial violated his right of confrontation and that the instruction was insufficient to protect his confrontation rights.

The Court granted certiorari to consider the question last addressed in Delli Paoli v. United States, 352 U.S. 232 (1957), "whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence." Bruton, 319 U.S. at 123-24. The Court explained that the basic premise of Delli Paoli -- that a jury could follow instructions with regard to these types of statements -- no longer held true. Although the court conceded that in most cases, the jury can and will follow the judge's instructions, where there is a "powerfully incriminating extrajudicial statement", the risk that the jury will not and cannot follow the instructions is simply too great and the consequences of such a failure too vital to the defendant, "that the practical and human limitations of the jury system cannot be ignored." Id. at 135. Accordingly, the Court ultimately concluded that "in the context of a joint trial, we cannot accept limiting

instructions as an adequate substitute for petitioner's constitutional right of cross-examination." Id. at 136.

Over time, the Court has further defined the contours of the rule first expressed in Bruton. The Court has recognized that there may be various remedies to avoid a Confrontation Clause violation. For example, in Richardson v. Marsh, 481 U.S. 200 (1987), Clarissa Marsh was tried jointly with her co-defendant. At the joint trial, the co-defendant's confession was admitted against him as substantive evidence. However, the statement was redacted to omit any and all reference to Marsh. Id. at 203-04. Marsh testified at trial and admitted to being at the scene of the crime, but stated that she had no prior knowledge of any intent to commit a crime. Id. at 204. Similar to the situation in Bruton, the court instructed the jury that the co-defendant's confession could not be considered against Marsh. Id. at 205.

Following her conviction and affirmance of the judgment of sentence on direct review, Marsh filed a writ of habeas corpus. Marsh argued that the admission of the co-defendant's statement at the joint trial violated her right of confrontation since, even though references to her were redacted, the statement incriminated her when linked with other evidence offered at trial, i.e., her own testimony that she was present at the scene of the crime. The Court granted certiorari to consider whether Bruton applies to situations where the statement is only incriminating when considered with other evidence offered at trial. Id. at 206.

The Court acknowledged the rule expressed in Bruton, but distinguished the situation in Richardson on the basis that the statement in Bruton expressly implicated the defendant, whereas in Richardson, the statement only became incriminating when linked with evidence introduced later at trial. Id. at 208.

> Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that 'the defendant helped me commit the

> crime' is more vivid than inferential incrimination and hence more difficult to thrust out of mind.

Id. Accordingly, the Court implied that the holding in Bruton was limited to a confession that was "incriminating on its face" and could be complied with by redaction.[14] Id. at 208-09.

This court has applied the Confrontation Clause jurisprudence developed by the Supreme Court. In Commonwealth v. Johnson, 378 A.2d 859 (Pa. 1977), we held that consistent with Bruton the Commonwealth could introduce a redacted statement into evidence at a joint trial only if that statement did not refer to the other defendant. Further, prior to the Court's decision in Gray v. Maryland, 523 U.S. 185 (1998)[15], we held that the

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[14] Although the Court determined that the redaction did not violate Marsh's right of confrontation, ultimately the Court remanded the case for further consideration in light of the fact that the prosecutor sought to undo the effect of the limiting instructions by encouraging the jury to use the statement when considering the case against Marsh. Richardson, 481 U.S. at 211.

[15] Most recently, in Gray v. Maryland, 523 U.S. 185 (1998), the Court considered the scope of the protective rule first announced in Bruton by examining its decisions in both Bruton and Richardson. In Gray, the Court explained that Richardson placed those statements that incriminate by inference outside the scope of the Bruton rule. Id. at 195. However, "inference pure and simple cannot make the critical difference, for if it did, then Richardson would also place outside Bruton's scope confessions that use shortened first names, nicknames, descriptions…." Id. Thus, in considering whether the inference was outside the scope of Bruton, a court must consider "the *kind* of, not simply the *fact* of" inference that it raises. Id. at 196. Where the inferences do not refer directly to the defendant and become incriminating only when linked with other evidence at trial, those inferences fall outside the scope of the Bruton rule. Id. at 195-96 (noting that Richardson placed outside the scope of Bruton, those statements that only incriminate inferentially). On the other hand, where the inferences "involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and involve inferences that a jury ordinarily could make immediately" then the admission of such statements violate the protective rule announced in Bruton. Id. Ultimately, the Court held that a confession which substituted blanks, the word "delete," or an obvious symbol violated the Confrontation Clause. Id. at 192, 197.

Gray has no relevance to our holding today, since this court has previously determined that Gray announced a new rule of law that should not be applied retroactively. (continued…)

substitution of a co-defendant's name with the letter "X" or similar redaction did not violate the Confrontation Clause. See Commonwealth v. Miles, 681 A.2d 1295, 1300 (Pa. 1996)(following Commonwealth v. Lee, 662 A.2d 645 (Pa. 1995)). However, in Miles, we also indicated that the use of a co-defendant's nickname in a statement was a violation of the Bruton rule. See id. at 1301.

Thus, based upon the above, it is clear that a statement cannot expressly implicate a non-testifying co-defendant. Marsh, Johnson. If the implication only arises following the introduction of other evidence at trial, then redaction and a limiting instruction may be sufficient to cure the potential prejudice to the defendant. Marsh. However, where an express implication exists, a jury instruction is insufficient to cure the prejudice to the non-testifying co-defendant and the statement violates the Confrontation Clause. Bruton. Employing these rules in the case at hand, we find that the statement at issue expressly implicated Appellant in the crime in violation of the Confrontation Clause.

At the first trial, the Commonwealth read the record of Nicole Schneyder's preliminary hearing testimony to the jury. The court admitted the record as a prior recorded statement of an unavailable witness. The record contained, inter alia, the following portions of Schneyder's prior statement to Detective Mangoni:

> Question [by Detective Mangoni]: Nicole, do you have any knowledge concerning her [Gaines'] murder?

(…continued)
See Commonwealth v. Lopez, 739 A.2d 485, 500 n.18 (Pa. 1999). However, our opinion today does not rely on the holding in Gray; rather we look to Gray only for the Court's clarification of the distinction between Bruton and Marsh. Any discussion of Gray is limited to demonstrate the Court's development of Confrontation Clause law. Neither our analysis or discussion of this matter would be altered in the absence of the Court's decision in Gray, since ultimately, this case turns on the fact that the statements, as admitted, violated the rule set forth in Bruton.

> Response: Yeah. On Thursday the day before she was killed Michael Overby, they call him Hickey, and me were talking in his car….

N.T., 11/21/1995, p.23. Thereafter, the following part of Schneyder's statement to the police containing Elliott's hearsay statement was read to the jury,

> [Response continued]: He [Elliott] said that Lillian opened the door and he said that Lillian gave X a hard way to go. He said that it was him, another person and X, and that they went into the house and Lillian didn't want to give up any stuff and X told him, Wayney, to grab her, and then he grabbed her and held her while another person tied her up. He said that X strangled her.

N.T., 11/21/1995, p. 24-25. In this portion of the statement, Appellant's name was substituted with "X".

Detective Mangoni then took the stand to read the statement that Schneyder gave at the police station.[16] Detective Mangoni read, in pertinent part,

> Question: Nicole, do you have any knowledge concerning her [Gaines'] murder?
> Response: Yeah. On Thursday the day before she was killed X, they call him X.

N.T., 11/21/1995, p. 64. Appellant's counsel immediately objected to the redacted testimony on the basis that the jury was informed that "X" was Appellant. Id. at 64-66. The court then gave the Commonwealth the opportunity to correct the statement. Detective Mangoni then read the statement as it should have been read in the first instance, without the redaction, so that it read as follows:

> Question: Nicole, do you have any knowledge concerning her [Gaines'] murder?
> Response: Yeah. On Thursday the day before she was killed Michael Overby, they call him Hickey, and me were talking in his car….

[16] As noted infra on page 4, Appellant's counsel initially joined the objection raised by Elliott's counsel to the admission of Detective Mangoni's reading of the statement. N.T., 11/21/1995, pp. 13-15. However, when given the choice of either renewing his objection to Mangoni's testimony or calling Nicole Schneyder to the stand, counsel chose not to object to Mangoni's testimony. Id. at 51-52.

Id. at 66-67.

When Detective Mangoni read that portion of the police statement containing Elliott's hearsay statement, Appellant's name was changed to "A" instead of "X". During the jury instructions, the court instructed the jury that "under the United States Constitution, each person who's on trial has a right to face his accuser, so, therefore, a statement made by a person is only evidence against that person who made the statement, not against anybody else." N.T., 11/22/1995, p. 26. As noted above, the jury could not decide on a verdict with regard to the first-degree murder charge, so the court declared a mistrial and scheduled a retrial.

At the second trial, a similar situation arose. Once again, the preliminary hearing testimony was read into the record, including Schneyder's recantation testimony and those portions containing the prior statement Schneyder made to Detective Mangoni. Appellant's name, in the portion of the statement containing Elliott's hearsay statement, was changed to "X." The following day, over defense counsel's objection, Detective Mangoni assumed the stand and read the statement Schneyder gave at the police station.[17] N.T., 7/12/1996, pp. 4-7. He stated, "the day before she was killed, X, they call him Hickey, and me were talking in his car." N.T., 7/12/1996, p. 22. At this point, counsel objected, and the court instructed the jury that Schneyder's statement could only be used to show that she might have said something different on a former occasion. Id. However, the court never gave the jury a general confrontation instruction as it did in the first trial, i.e., that Elliott's statement could only be used as evidence against the person who made the statement. Once more,

[17] At the second trial, Appellant's counsel clearly objected to Mangoni's reading of Schneyder's statement and this time, counsel was not faced with the Hobson's choice of calling Schneyder to the stand or not objecting to the admission of Mangoni's testimony, thus, unlike the first trial, counsel's objection continued at the time that Mangoni actually testified.

when Detective Mangoni read that portion of the statement that incorporated Elliott's hearsay statement, Appellant's name was changed to "A."

In order to discuss Appellant's arguments fully, we must consider the alleged errors at each trial separately. At the first trial, both prior statements were attributed to Schneyder. Schneyder's preliminary hearing testimony provided that she was going to be questioned about the statement she gave to Detective Mangoni on January 24, 1992. Detective Mangoni testified that he was going to read the statement that Schneyder gave him on January 24, 1992. Thus, the jury knew that the statements admitted at both points in the trial were identical. Based upon this, when the jury heard Detective Mangoni read Schneyder's statement for the second time, the "X" clearly referred to Appellant since the statement was identical to the statement attributed to him in Schneyder's previous statement. This error was compounded when, immediately after counsel's objection, Detective Mangoni read the same part of the statement, this time replacing the "X" with Appellant's name. At this point, the jury could surmise that "X" referred to Appellant. Additionally, Elliott's hearsay statement was "powerfully incriminating" as it implicated Appellant directly in the crimes in question. Thus, unlike the situation in Marsh, the jury could reasonably infer from the face of the statements that Elliott was referring to Appellant in violation of Bruton and this was the kind of inference that a jury could make immediately.

Moreover, while it is impossible to divine whether the jurors definitely knew that "X" and "A" referred to the same person or whether the jurors were simply confused by the alteration of the statement, we must conclude that based upon the similarity of the statements a reasonable juror would understand that the letter "X" referred to the same person as the letter "A". Once the statements established that "X" or "A" was Appellant, the Confrontation Clause was violated. The only possible way to correct such a violation was to give Appellant the opportunity to cross-examine Elliott regarding the statement. Bruton.

Appellant did not have such an opportunity and thus, we must conclude that the admission of the statement as redacted violated Appellant's right of confrontation pursuant to Bruton.

A similar analysis applies to the second trial. However, the error at the second trial was even more egregious. First, the jury was apprised that "X" was Hickey when Detective Mangoni read Schneyder's police statement. Appellant was identified as Hickey throughout the trial. N.T., 7/10/1996, pp. 90, 94, 167; N.T., 7/11/1996, pp. 7, 50. Thus, without even referring to the other statements, the jury was informed that "X" was Appellant and the redaction failed to prevent the statement from incriminating Appellant. Miles. This error was aggravated by the fact that the trial court never instructed the jury that Elliott's statement was only admissible against the declarant/Elliott and could not be considered in the case against Appellant. Accordingly, we must find that the admission of the statement during both trials, as redacted, violated Appellant's right of confrontation as defined by Bruton and thus, any limiting instruction was simply insufficient to cure the prejudice to Appellant.[18]

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[18] The United States Supreme Court has not had the opportunity to rule on whether non-custodial statements, such as the ones at issue here, are subject to the rule in Bruton. The Court has repeatedly indicated that custodial statements, such as confessions, are inherently unreliable because of the coercive nature of the statement, i.e., the circumstances surrounding the making of such statements, the motivation to lie, etc. Lee, 476 U.S. at 541; Bruton, 391 U.S. at 141. A corollary to this analysis is that non-custodial statements are reliable, since they are not made under such circumstances. Thus, some federal courts have not employed a Confrontation Clause analysis to bar hearsay statements of accomplices where the hearsay statement was made in a non-custodial setting to a friend or intimate. United States v. Shea, 211 F.3d 658 (1st Cir. 2000); United States v. Robbins, 197 F.3d 829 (7th Cir. 1999); Latine v. Mann, 25 F.3d 1162 (2nd Cir. 1994); but see United States v. Schmick, 904 F.3d 936 (5th Cir. 1990); Monachelli v. Warden, SCI Graterford, 884 F.2d 749 (3rd Cir. 1989).

Nevertheless, the Court has failed to indicate that the Confrontation Clause should not apply to these statements. But see Dutton v. Evans, 400 U.S. 74 (1970)(plurality opinion)(although concluding that hearsay was admissible pursuant to the co-conspirator exception to the hearsay rule, language contained therein implies that the statement was reliable because of the non-custodial nature of the circumstances surrounding the making of the statement). Further, we are reluctant to adopt a general posture declaring such non-
(continued…)

Having concluded that the court erred in the manner in which the statements were redacted, we must necessarily consider whether such error was harmless. Harrington v. California, 395 U.S. 250 (1969); see also Schneble v. Florida, 405 U.S. 427 (1972).

> Harmless error exists where: (1) the error did not prejudice the defendant or the prejudice was de minimis; (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

Commonwealth v. Robinson, 721 A.2d 344, 350 (Pa. 1998)(citations omitted); see also Schneble, 405 U.S. at 430. It is well established that an error is harmless only if the appellate court is convinced beyond a reasonable doubt that there is no reasonable possibility that the error could have contributed to the verdict. Commonwealth v. Story, 383 A.2d 155 (1978); see also Commonwealth v. Ardestani, 736 A.2d 552, 556 (Pa. 1999). This is a burden that the Commonwealth must carry. Commonwealth v. Young, 748 A.2d 166, 193 (Pa. 1999)(citing Commonwealth v. Mayhue, 639 A.2d 421 (Pa. 1994)).

It is clear that the admission of Elliott's hearsay statement, as redacted, prejudiced Appellant. Elliott's statement provided that "X" strangled Gaines and the jury could infer that "X" was Appellant. Thus, the statement clearly implicated Appellant in the crimes charged. Indeed, such evidence provided the only direct evidence of Appellant's participation in the criminal episode. Thus, any prejudice arising from the admission of the statement could not be de minimis.

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custodial statements reliable when they are made to a friend or intimate. Indeed, a declarant may have similar motives for inculpating a co-defendant/accomplice more than himself in situations where he is making such a statement to a friend or intimate.

Further, such evidence was not merely cumulative of other properly admitted evidence. As referenced above, Elliott's statement provided the only direct evidence of Appellant's participation in the crime. While testimony established Appellant's presence outside of the crime scene, at or around the time in question, such evidence was merely circumstantial and did not establish that Appellant committed the crimes in question. Similarly, while testimony established Appellant's intent to rob someone, such testimony might not automatically lead a jury to conclude that Appellant robbed Gaines on the morning in question.

Lastly, the remaining evidence did not overwhelmingly establish Appellant's guilt. The evidence demonstrated Appellant's presence outside the crime scene, his relationship to Gaines, and suggested that there was a disagreement between Appellant and Gaines. However, this evidence was merely circumstantial. While we acknowledge that circumstantial evidence can be sufficient to convict a defendant of a crime, including first degree murder, in this case, Elliott's erroneously redacted statement could have been the evidence that prompted the jury to convict Appellant of the crimes in question. Thus, we cannot conclude that the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error so insignificant that the error could not have contributed to the verdict.

Accordingly, for the reasons stated herein, we reverse the judgment of sentence and remand this matter for a new trial as to all charges.[19]

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[19] After due consideration of the impassioned response by the dissenting opinion, we continue to adhere to our initial position that the issue of trial court error was fairly encompassed in Appellant's brief to this court and that we are not raising the issue *sua sponte*. See *infra* n. 12.

Former Chief Justice Flaherty did not participate in the decision of this case.

Madame Justice Newman files a concurring opinion in which Mr. Chief Justice Zappala joins.

Mr. Justice Castille files a dissenting opinion.