[J-209-98]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	185 Capital Appeal Docket
	:	
Appellee	:	Appeal from the Judgment of Sentence entered on April 17, 1996 in the Court of Common Pleas of Lehigh County, Nos. 1894/1995
v.	:	
	:	
GEORGE IVAN LOPEZ,	:	
	:	
Appellant	:	ARGUED: October 21, 1998

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: October 1, 1999**

I join the majority opinion, except for the conclusion that the form of redaction employed in connection with the testimony of Daniel Lopez would satisfy the dictates of the Confrontation Clause as interpreted in Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968), as well as the suggestion that the United States Supreme Court's decision in Gray v. Maryland, 523 U.S. 185, 118 S. Ct. 1151 (1998), represents a change in existing law.

It is evident that the district attorney perceived a Bruton problem in connection with Daniel Lopez's testimony, and particularly Daniel Lopez's description of the written statement which he claimed was passed from Appellant to his codefendant, Edwin Romero, in a prison cell (the "pizza shop story"). Thus, the prosecutor structured the Commonwealth's presentation of Daniel Lopez's testimony into a portion offered against Appellant and a separate portion offered against Romero. Further, the prosecutor

instructed the witness to omit any references to Romero within the pizza shop story during his testimony against Appellant but instead to use the term "the other guy," and gave a similar instruction to replace references to Appellant during the portion of the testimony offered against Romero.

The problem with this technique of redaction, however, is that it was entirely transparent. The pizza shop story was repeated twice, once in each phase of the bifurcated presentation, with references to "the other guy" in one version often overlapping directly with references to the codefendants' names, thus rendering it patently obvious that the term "the other guy" was frequently employed to refer to Appellant.[1] Indeed, Daniel Lopez was unable to maintain even this slim facade, but rather, contrary to instructions from the district attorney, referred to Appellant by name at several points during his testimony offered against Romero.

In my view, however, the Confrontation Clause was not implicated by the pizza shop story; thus, I see no need for this Court to endorse the flawed redactions, as they were not

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[1] For example, Daniel Lopez opened his description of the pizza shop story during the portion of his testimony offered against Appellant by stating that:

> What I recall is that [Appellant] came to Allentown in January 2 to, um, to have some business with his brother, Angel. And by that time, he couldn't reach his brother and that he went to the pizza shop with the other guys.

During the portion of his testimony offered against Romero, Daniel Lopez began the story as follows:

> It's a statement that they came to Allentown January 2 to see -- [Romero] came with the other guy to see his -- the other guy brother for some business, stash of business. So, after that, they end up in the pizza place . . . .

As another example, during the first rendition of the pizza shop story, Daniel Lopez referred to Miguel Moreno as Appellant's nephew, while during the second telling, he referred to Moreno as "the other guy's" nephew.

necessary in the first instance. First, while I find it a close question, I agree with the majority that the record is sufficient to support the conclusion that the pizza shop story was Appellant's own statement offered against him as an admission rather than the statement of another, such as would implicate the Confrontation Clause. To the extent that the record is ambiguous in this regard,[2] I note that the pizza shop story described a version of events that was inconsistent with the Commonwealth's theory of the case that Appellant was in the apartment where and at the time Mr. Bolasky was killed and physically participated in the murder (the pizza shop version would have placed Appellant in a pizza shop and had him participating only in the disposal of the body). The Commonwealth thus did not proffer the statement to prove the truth of the matter it contained; rather, it offered it as evidence of Appellant's consciousness of guilt by demonstrating his attempt to coach his codefendants into adopting a unified false statement in an effort to avoid criminal liability. In such circumstances, I would apply the principle that, when the government seeks to admit testimony concerning a codefendant's incriminating statement for some nonhearsay purpose, a defendant's right of confrontation is not generally implicated. See generally Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 2081-82 (1985)(finding that a defendant's rights under the Confrontation Clause were not violated by the introduction of an accomplice's confession for the nonhearsay purpose of rebutting the defendant's testimony that his confession was coerced).

There has been some disagreement among courts concerning this point, described at length in Lyle v. Koehler, 720 F.2d 426 (6th Cir. 1983), which involved facts similar to the

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[2] Daniel Lopez testified that he saw Appellant give the written statement to Romero, and that Romero described the statement as one which "the other guy" was trying to coordinate among all codefendants "altogether to not get confused in Court." Daniel Lopez did testify, however, that he did not witness Appellant writing the statement, and there is no testimony concerning a direct admission by Appellant that the written statement was actually his own. It is also significant that the pizza shop story itself contains multiple levels of hearsay.

present case (the government offered into evidence at a murder trial two letters circulated by a codefendant containing a fabricated alibi). The Lyle court noted that the letters were offered for a purpose similar to that for which the pizza shop story testimony was admitted in this case:

> [b]elieving the alibi to be false, the prosecution obviously did not seek to introduce the letters in order to demonstrate the truth of the particular statements they contained. Rather, the government intended to have the jury infer from the statements that [the author] was attempting to obtain fabricated alibi testimony, an act that revealed a "guilty mind" on his part regarding the shootings.

Lyle, 720 F.2d at 431. The court then described two lines of analysis concerning the hearsay nature of such statements. The first would simply treat the statement as nonhearsay, as it is offered not for the truth of the matter asserted but for another relevant purpose. The second would find that the chain of inferences that the jury is invited to make from the statement (i.e., the author needs a false alibi, because he has no explanation for his conduct consistent with his innocence, because he is guilty) is an integral part of the statement itself and thus should be included within the set of assertions made by the statement. Under this view, where the statement is proffered for the purpose of establishing consciousness of guilt, it would constitute hearsay. See generally Lyle, 720 F.2d at 432-33. While the Lyle court adopted the view that implied assertions of this sort fall within the definition of hearsay, I believe that the opposite conclusion is consistent with conventional hearsay analysis, the United States Supreme Court's decision in Street, and the Federal Rules of Evidence, see F.R.E. 801(c) & comment (indicating that, if a statement, although in assertive form, is offered as a basis for inferring something other than the truth of the matter asserted, the statement "is excluded from the definition of hearsay"), as well as our own rules of evidence. See P.R.E. 801(c) & comment. See

generally State v. Esposito, 613 A.2d 242 (Conn. 1992)(declining to adopt the broader view of hearsay taken by the majority in Lyle).

Thus, I would find that Daniel Lopez's testimony concerning the pizza shop story was nonhearsay, and I perceive no violation of Appellant's right of confrontation. In this regard, I note that it is not so important whether the record firmly establishes who physically prepared the written document -- Daniel Lopez's testimony was offered for the purpose of demonstrating that Appellant was circulating a false account among his codefendants, and the record provides an ample foundation upon which his testimony could be admitted for such purpose.[3]

Finally, contrary to the suggestion contained in footnote 18 of the majority opinion, I view the United States Supreme Court's decision in Gray as a rational application of the principles enunciated in Bruton rather than as a change in the law.

Mr. Justice Zappala and Mr. Justice Cappy join this Concurring Opinion.

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[3] I must also respectfully disagree with the majority's alternative conclusion that trial counsel's failure to object to the testimony concerning the pizza shop story constituted a reasonable trial strategy, in that counsel utilized the story in his closing speech by imploring the jury to accept the version of the facts it contained. In my view, the introduction of the pizza shop story provided highly damaging evidence of Appellant's consciousness of guilt. The potential value of the story to the defense would seem to be insignificant in light of the highly suspicious context in which the story was related and absent any corroboration in the evidence whatsoever. Under the circumstances, I do not believe that a reasonable jury would ever accept the substance of such a statement, particularly in view of the extensive evidence of Appellant's guilt. Thus, if the statement had in fact been objectionable, I would find that trial counsel's failure to lodge an objection would have constituted ineffectiveness.