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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER RYAN WHITEHEAD,

PETITIONER

APPELLATE CASE NO. 2012-213683

BRIEF OF PETITIONER

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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ISSUE PRESENTED

Whether the Court of Appeals erred in affirming the trial judge who committed reversible error by allowing into evidence the statements of appellant's two non-testifying codefendants without adequately redacting their claims of appellant's involvement, as this denied his Sixth Amendment right to confront and cross-examine witnesses, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny.

STATEMENT

On May 5 through 13, 2008, Christopher Whitehead and two co-defendants, Robert Cannon and Derrick McDonald, stood trial in Kershaw County before Judge G. Thomas Cooper and a jury, on indictments charging them with murder and first-degree burglary. Whitehead was represented by Neil Riley and David Reuwer. The state was represented by John Meadors, Joanna McDuffie, and Ron Moak. The jury returned a verdict of guilty as indicted. Judge Cooper sentenced Whitehead to life without parole on both the murder and burglary first degree pursuant to S.C. Code section 17-25-45 and a 2005 conviction by guilty plea to attempted armed robbery. Cannon and McDonald each received concurrent sentences of thirty-five years Whitehead's attorney filed a notice of appeal. The Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed Whitehead's convictions and sentences on September 12, 2012. State v. Whitehead, Op. No. 2012-UP-526 (Ct. App. filed September 12, 2012). App. 1 – 3. Appellate counsel filed a petition for rehearing on September 27, 2012. App. 8. The Court of Appeals issued an order on November 30, 2012 denying the petition for rehearing. App. 10. A petition for a writ of certiorari was filed to the Supreme Court. The Supreme Court granted certiorari on Issue One on February 21, 2014. This brief of petitioner follows.

STATEMENT OF FACTS

Each of the three young men and the victim, Joshua Zoch, had worked at the same Sonic restaurant at one point. At the time of his death, Zoch was also a police informant who had committed at least one first-degree burglary of his own. R. p. 619 line 19- R. p. 620 line 15; R. p. 801 lines 20-25; R. p. 1284 line 9- R. p. 1285 line 2.

Both Cannon and McDonald told the police that they and Whitehead had beaten Zoch to death while punishing him for being a snitch. (The introduction of these statements, even as redacted to refer to Whitehead as "another person," is the basis of this appeal.) Petitioner Whitehead, on the other hand, told the police that he did not know "a damn thing" about Zoch's murder. R. p. 717 line 18- R. p. 718 line 5.

A jailhouse snitch testified that he had overheard a conversation in which the participants, one of whom he later identified by his voice as Whitehead, discussed the incident and "just bragging about how they were killers now." R. p. 1221 line 10- R. p. 1222 line 20; R. p. 1226 line 20- R. p. 1227 line 9.

None of the three co-defendants testified.

ARGUMENT

The Court of Appeals erred in affirming the trial judge who committed reversible error by allowing into evidence the statements of appellant's two non-testifying codefendants without adequately redacting their claims of appellant's involvement, as this denied his Sixth Amendment right to confront and cross-examine witnesses, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny.

Co-defendants Cannon and McDonald gave the police statements implicating themselves and Whitehead in Zach's killing. Neither testified at trial. The State argued that replacing Whitehead's name with "another person" in the statements would resolve any confrontation problem. R. p. 629 line 16- R. p. 630 lines 20. The defense responded that this limited redaction would not satisfy Bruton v. United States, 391 U.S. 123 (1968), and State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980), "because the statement clearly implicates someone else and it's obviously prejudicial to the people who are sitting right here." R. p. 631 lines 4-17. "[T]here's an easier way to do it," counsel continued, "which is simply to not put a reference to what someone else did." R. p. 637 lines 20 -22. Ultimately, the judge ruled in favor of the State. R. p. 643 lines 12-17.

Counsel unsuccessfully renewed the objection when the State introduced Cannon and McDonald's statements into evidence. R. p. 734 lines 16-21. Cannon's statement, even as redacted, alleges that "someone else pressured another person to hit Josh with the bat, and the other person hit Josh with the bat."

> He asked if I wanted to ride. I said I had nothing else to do. It was about 11 p.m. or so. Someone else was in the car and he was quiet. So we go to Josh's house and pull up about 11:30. Another person knocked on the front door and Josh didn't answer. Another person said, 'I'm going to pull your move and kick in the door.' He

kicked the side door and runs in. And I go behind him to see the fight. So Josh is asleep on the couch, and another person "- - pardon the wording here; it's what he told me - - "like, 'he, bitch.' And when he looked up, he hit him with a glass" - - what he described as a glass lamp.

After that Josh was in a daze and he drags him off the couch. And he - - someone else pressured another person to hit Josh with the bat. Josh was half way on the couch at the time. And then they took the bat from this other person. So after that, the other person starts talking - - this is his words- - "starts talking shit to Josh. Josh was basically crawling while another person was talking about Josh being a snitch. So Then I wouldn't"--

Q: Did he say: "So then I wouldn't"?

A: Yes. "So then I wouldn't have"- - let's see. That's my scribble. "So then" - -

Q: "So I wouldn't have to beat him"?

A: --"I wouldn't have to beat someone's ass. So I went pulling drawers. And he "- - talking about another person - - "flipped the mattress. We were looking for weed. So the man was unconscious. Another person then said" - -

Q: Just say it, I mean if that's what he said.

A: - - "fuck it, because we didn't find weed. And another person pushed the Christmas tree over and it fell on Josh. I told another person, 'let's go', and another person said, 'fuck, we didn't find anything', and another person got mad because we was not there. Before we left another person did take the house phone. I did put a towel on his head because was bleeding so bad. And anther person went to the freezer and got the chicken for a cold press. We all had on Latex gloves. One person had on purple gloves, and me and another - - me and someone else had on purple gloves, and I had clear and purple gloves on. And after that we leave the same way we went in. Then we drop off another person. Then I was dropped off. Then I guess he went home.

R. p. 738 line 22- R. p. 740 line 23; R. p. 748 line 24- R. p. 752 line 15.

According to McDonald's statement, one of the men called Zack to see if Josh was at home and see who was there. "Then we started planning a whole thing..." Petitioner McDonald said he was to stay outside and "to make sure nobody came up." "So he went to the side door and we all kicked the door on a count of 3. The door opened. Another person when and, another person, then me. I turned around, close the door, and I went to the other room to look out the window, and my name was called. And I went into the living room. They were talking low, and another person went to the light switch at the dining room area and cut the light on. And another person was on the couch asleep... Josh was on the couch asleep. And another person took a glass bowl over his head and smashed it on Josh's head. At that point that's when I looked to the left and saw a bat. And I started hitting him on the body. That's when one another person stopped me to ask Josh question and that's when the bat hit Josh in the face. That's when he really started bleeding and I got scared and dropped the bat." R. 767, l.– 769, l. 17; R. p. 774 lines 22-25;R. p. 775 lines 2-11.

After he beat Josh with the bat, McDonald continued, "[t]hat's when another person and another person started kicking and stomping Josh." R. p. 775 lines 9-11.

The Confrontation Clause of the Sixth Amendment, applicable to the states under the Fourteenth Amendment, guarantees the right of a criminal defendant to confront and cross examine witnesses against him. Richardson v. Marsh, 481 U.S. 200 (1987). In Bruton, 391 U.S. at 136-37, the United States Supreme Court held that, in a joint trial, the admission of a non-testifying co-defendant's statement that expressly incriminates the defendant violates his right under the Confrontation Clause. In Richardson, 481 U.S. at 207-8, the Court held that the rule announced in Bruton does not apply where the statement becomes incriminating only when linked to other evidence introduced at trial, such as the defendant's own testimony. It also noted that "Bruton can be complied with by redaction." Id.

In State v. Bellamy, 293 S.C. 103, 359 S.E.2d 63, 65 (1987), overruled on other grounds in State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), the Supreme Court urged the state to consider all available alternatives before deciding to try co-defendants jointly. The Court wrote that "the decision to pursue this route should be made only after giving due deliberation to the inherent problems, such as redacted statements, which arise in joint trials."

In Gray v. Maryland, 523 U.S. 185, 197 (1998), the Court held that a statement which "substituted blanks and the word 'delete' for the petitioner's proper name falls within the class of statements to which Bruton's protections apply."

> The [Bruton] majority reasoned that one must look at the *kind* of inferences that are necessary to make a connection to the defendant, not the simple *fact* that there are inferences to determine the applicability of Bruton. Richardson involves statements that did not directly refer to the defendant, but which became incriminating only when linked to other evidence developed at trial. However, the Gray Court stated "[t]he inferences at issue here [in Gray] involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, which involve inferences that a jury could ordinarily make immediately, even [if the statement was] the very first item introduced at trial." Thus, the statements are protected under Bruton because in such instances the defendant is implicated almost as if there was a direct reference, and the connection does not depend on other evidence introduced at trial. [Citations omitted.]

In Gray, the court wrote that the confession referred directly to the "existence' of the non-confessing defendant which was distinguished from Richardson. See also, State v. LaBarge (defendant identified as "Mr. X" in co-defendant's statement).

In State v. Holder, 382 S.C. 278, 676 S.E.2d 690, 694 (2009), the South Carolina Supreme court held that even a confession redacted through the use of neutral pronouns violates the Confrontation Clause if it facially incriminates a non confessing co-defendant.

No rational juror who heard Cannon and McDonald's statements to the police could have deduced anything other than that Whitehead was the third "person" who had attacked Josh. Bruton expressly holds that the use of a limiting instruction will not cure the error. Thus, the tepid instruction given in this case is of no avail:

> Now, some of the evidence in this case may have been admitted solely because of its relationship to the case against one of the defendants. This evidence can not be considered in the case of any of the other defendants.

R. p. 1449 lines 8-12.

The Court of Appeals held that there was no violation pursuant to Bruton v. United States, 391 U.S. 123 (1968) because the co-defendant's redacted statement only implicated the statement's maker and did not limit the participants to three which would have implicated the three defendants on trial, so the trial court properly allowed the redacted statement into evidence. App. 2.

The Court of Appeals misapprehended the issue. Bruton holds that the use of a limiting instruction will not cure the error. In the opinion of Whitehead's co-defendant which was cited in Whitehead's opinion, State v. McDonald, Op. No. 5033 (Ct. App. filed September 12, 2012), the Court of Appeals quoted the jury instruction given and relied on this instruction in finding that the redacted statement of Cannon was properly admitted. However, the limiting instruction given was confusing, prejudicial, and a fundamental legal error violating the express language of Bruton. The Court of Appeals held that the neutral phrase "another person" in Cannon's statement avoided any Bruton violation because the redacted statement only implicated the statement's maker.

In State v. Henson, 754 S.E.2d 508, (2014), the Supreme Court reversed the case for a new trial because the admission of the co-defendant's redacted confession during the joint trial violated the defendant's rights under the Confrontation Clause. The co-defendant's confession identified

three individuals by name as committing the crime and acknowledged that another male participated and fired the fatal shots, but left that person unnamed but used a neutral pronoun. The solicitor had stated in his opening that four individuals committed the crime.

The Supreme court in Henson, Id. cited the case of Stanford v. Parker, 266 F.3d 442 (6th Cir. 2001), where the petitioner and a co-conspirator were tried jointly. The co-defendant's confession had been redacted with "the other person" being used to replace petitioner's name. On appeal of his habeas corpus petition, the court held that the confession violated the Confrontation Clause because the "redaction would not have prevented the jury from inferring that the confession referred to the petitioner because he sat as a defendant before the jury. The prosecution offered the confession into evidence, and the jury knew the prosecution was seeking to convict the petitioner.

Though violations of the Confrontation Clause are subject to a harmless error analysis, State v. Holder, *supra,* the error in Whitehead's case could not possibly have been harmless, given the paucity of evidence against Whitehead. There was no forensic evidence linking any of the three co-defendants to the crime scene. R.889, ll. 11- R. 890, ll. 11; R. 894, ll. 14-17. The Supreme Court held in Henson that before an error can be held harmless beyond a reasonable doubt, the court must determine whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. In Arizona v. Fulminante, 499 U.S. 279 (1991) the United States Supreme Court held that constitutional violations were trial errors subject to a harmless error analysis. In Brecht v. Abrahamson, 507 U.S. 619 (1993), The Supreme Court held that the Court, in reviewing claims of constitutional error, consistently applied the standard described in Chapman v. California, 386 U.S. 18 (1967) that the error must be harmless beyond a reasonable doubt.

The confessions of the two co-defendants implicating Whitehead were not harmless. Even with the redactions and the added words of "another person", the jury had to acknowledge the existence of Whitehead.

CONCLUSION

Based on the above, Whitehead's convictions and sentences should be reversed, and the case remanded for a new trial.

Respectfully submitted,

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER.

This 13th day of May, 2014

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CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Melody J. Brown, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Christopher Whitehead, #328345, Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 13th day of May, 2014.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day
of May, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.