

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge

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S.C. Supreme Court

On Certiorari to the Court of Appeals
Opinion No. 5033 (S.C.Ct. App. filed September 12, 2012)

The State, Respondent,
vs.
Derrick McDonald, Petitioner.

Appellate Case No.: 2012-213686

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit
Post Office Box 192
Columbia, SC 29202-0192
(803) 576-1800

ATTORNEYS FOR RESPONDENT

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PETITIONER'S ISSUE PRESENTED

Whether the Court of Appeals erred by holding the trial court did not commit reversible error by allowing into evidence the statements of petitioner's non-testifying co-defendant without adequately redacting his claim of petitioner's involvement, as this denied petitioner his Sixth Amendment right to confront and cross-examine the witness, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny?

(BOP, p. 3).

RESPONDENT'S COUNTER STATEMENT OF ISSUE PRESENTED

Whether the Court of Appeals erred in affirming the trial judge's ruling that substitution of the neutral phrase "another person" for Petitioner's name in co-defendant Cannon's statement was proper and adequate redaction under *Bruton v. United States*, 391 U.S. 123 (1968) and its progeny when such redaction not only completely removed Petitioner's name but the statement also did not otherwise facially incriminate Petitioner.

RESPONDENT'S STATEMENT OF THE CASE

A Kershaw County Grand Jury indicted Petitioner, Derrick McDonald, in February 2007, for burglary first degree and murder. (R. p. 1553-56). Marcus Whitlark, Esq., and Nathan Sheldon, Esq., represented Petitioner on the charges. A jury trial was held May 5-9, 2006, before the Honorable G. Thomas Cooper, Jr. Petitioner was tried along with co-defendants Robert Cannon and Christopher Whitehead. After a break in the proceedings, the jury continued deliberations on May 13, 2009. The jury returned a verdict of guilty as charged as to all three defendants. (R. p. 1501, line 17 - p. 1502, line 15). The judge sentenced Petitioner to thirty-five (35) years imprisonment. (R. p. 1550, lines 15-21). Petitioner appealed.

In his final brief filed June 17, 2010 in the South Carolina Court of Appeals, Petitioner raised the following two issues:

1.

Whether the court committed reversible error by allowing into evidence the statements of appellant's non-testifying co-defendant without adequately redacting his claim of appellant's involvement, as this denied appellant his Sixth Amendment right to confront and cross-examine the witness, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny?

2.

Whether the court violated appellant's right to confrontation pursuant to Crawford v. Washington, 541 U.S. 36 (2004) by allowing into evidence the statement of appellant's non-testifying co-defendant, where he gave that statement to law enforcement during their investigation of the crime, and appellant never had the opportunity to confront and cross examine his co-defendant?

(FBOA, p. 3).

The South Carolina Court of Appeals heard oral argument on the issues presented on June 19, 2012. On September 12, 2012, the Court of Appeals affirmed Petitioner's

convictions in *State v. McDonald*, Opinion No. 5033 (S.C.Ct.App. filed September 12, 2012).¹ (App. pp. 1-9). Petitioner filed a petition for rehearing on September 27, 2012. (App. pp. 10-12). The State, at the request of the Court of Appeals, made a return to the petition on October 8, 2012. (App. pp. 14-22). The Court of Appeals denied the petition on November 30, 2012. (App. p. 24).

Petitioner filed a petition for writ of certiorari in the Court on March 1, 2013, and sought review of the following two issues:

1.

Whether the Court of Appeals erred by holding the trial court did not commit reversible error by allowing into evidence the statements of petitioner's non-testifying co-defendant without adequately redacting his claim of petitioner's involvement, as this denied petitioner his Sixth Amendment right to confront and cross-examine the witness, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny?

2.

Whether the Court of Appeals erred by holding the Crawford v. Washington, 541 U.S. 36 (2004) issue was not preserved since the issue was raised along with Bruton, it involves the same essential principle of confrontation, the lower court ruled Crawford was not violated, and the lower court had violated petitioner's right to confrontation under Crawford by allowing into evidence the statement of petitioner's non-testifying co-defendant, where he gave that statement to law enforcement during their investigation of the crime, it was testimonial, and petitioner never had the opportunity to confront and cross examine his co-defendant?

(Petition, p. 3).

On May 1, 2013, Petitioner filed a return to the petition. By Order dated February 21, 2014, this Court granted review of Issue I.

On May 13, 2014, Petitioner filed his Brief of Petitioner. This Brief of Respondent follows.

¹ Reported at 400 S.C. 272, 734 S.E.2d 167 (Ct.App. 2012).

RESPONDENT'S STATEMENT OF FACTS

On Tuesday, December 12, 2006, the victim, Joshua Zoch, was brutally murdered in his home. The evidence at trial established that the burglary and murder occurred at approximately 11:30 that night.

Zachary Waltemath, then an employee at the local Sonic along with co-defendant Whitehead, testified that at approximately 7:00 or 8:00 that night, Whitehead called him and asked him to call the victim "and see what he's doing because he wanted to go over there and fight him or something." Waltemath decline. Whitehead called back shortly after and asked if Waltemath had tried to call him. He responded he had not, and Whitehead indicated he wanted Waltemath to call him. Waltemath had "hung out" with Whitehead on several occasions. He was sure that it was Whitehead who called him that night. (R. p. 378, line 12 - p. 380, line 21; p. 384, line 3 - p. 387, line 10).

Allen Brown, a manager at the local Sonic, testified that all three co-defendants had worked at Sonic. Petitioner, Whitehead (who was still employed at the time), and Cannon, were together that evening. At approximately 10:00 p.m., Whitehead, Petitioner, and Cannon were in the kitchen area. Cannon was wearing a ski mask, and was told to take it off. Brown instructed all three to leave. (R. p. 319, line 12 - p. 324, line 14). Christopher Rust, also an employee at Sonic who was working that same evening, confirmed that all three left at the same time. (R. p. 361, lines 1-22). Rust also recalled that Whitehead drove a car with "noticeable" muffler noise. (R. p. 371, line 20 - p. 372, line 5).

At approximately 11:30 p.m., a neighbor to the victim, Cosmo Baccamo, testified that he was outside with his son's dog and heard "a lot of knocking noise, loud, like somebody kicking something or slamming doors" and, "about ten minutes later," he heard "excited" and

loud male voices, a door slam, and a car, with a loud muffler, take off. (R. p. 337, line 25 - p. 339, line 15).

Later that same night, at approximately 1:30, Petitioner went to Rust's home. He was upset and asked to stay the night at Rust's house. He claimed he had an argument with his mother. Rust allowed him to stay, then took him to his mother's home the next morning on his way to school. (R. p. 363, line 7 - p. 365, line 8).

Patricia Heathcoe, part owner of the Sonic, testified that on Wednesday, December 13, 2006, the day after the murder, Whitehead came to work at Sonic with a scratch under one eye, a noticeable limp, and complaining that his ankle hurt. He did not have the injuries the previous day when he had worked an early shift. Whitehead told Heathcoe he had "slipped and fell." (R. p. 443, line 19 - p. 445, line 23). On Thursday, Whitehead demanded that a Worker's Compensation claim be filed. Because business was slow, Heathcoe had intended to let Whitehead go home that day, but "he got real adamant. Whitehead didn't want to leave, you know, until the Workman's Comp form was filled out on him." He wanted to report his injuries as occurring on the 12th. Heathcoe noted that Whitehead never went to a doctor. (R. p. 446, line 15 - p. 448, line 17). On Friday, Whitehead walked out of work, leaving the crew short-handed. Heathcoe called Whitehead on his cell phone and he became belligerent:

... the first thing he said to me was, F Sonic. I said, "Chris, what is wrong with you?" And he started just ranting. I said, "you walked out and left Cecile by herself." I said, "Why would you do that?" And he was just ranting. You know, I don't need that f'g job. I've got problems. I'm about to move to Aiken. And I was just trying to talk to him. I mean, he was just -
- I never heard him sound like that ever. ...

(R. p. 449, line 1 - p. 451, line 14).

“Cecile,” as referenced in the above conversation, was Cecile Trapp. Trapp testified that she worked Tuesday morning with Whitehead and all was well. She went back to Sonic Tuesday night, to eat and check her schedule, and confirmed, like Rust, that Whitehead and Cannon came by the store that night and that Cannon was wearing a ski mask. Whitehead was not limping either that day, or when she saw him later that night. On Wednesday, however, Whitehead came into work “complaining that his ankle was hurting, and he had a scratch on his face.” He told Trapp “that he had got into like a play fight with his cousin and that he hurt his ankle and his cousin accidentally scratched him on his face.” He was also limping. Further, Whitehead advised Trapp that he intended to “pretend that he fell on grease and hurt his ankle so that Ms. Pat could pay for the hospital bills.” (R. p. 476, line 13 - p. 479, line 25; p. 484, lines 20-24). On Friday, Whitehead was with Trapp to open the Sonic, when his mother drove up. After speaking with his mother, Whitehead “kind of freaked out and was just like, ‘I have to go’.” He would not tell Trapp what was happening, but simply left immediately. (R. p. 481, line 19 - p. 483, line 1).

Victim’s longtime, live-in girlfriend, Melissa Davy, was absent from the victim’s home at the time of the burglary and murder, the two having had a disagreement over victim’s drug use. Victim had hosted a party at their home on Friday, December 8, 2006 that lasted into the early morning hours of Saturday, December 9, 2006. At approximately 2:00 a.m. that Saturday, Davy left with friends Zachary Waltermath and his sister Molly, after a fight about victim’s drug use, specifically his smoking crack cocaine (though marijuana may also have “possibly” been used at the party, as well), and after his request that they leave the house. (R. p. 563, line 13 - p. 565, line 17; 593, line 16 - p. 596, line 12; p. 610, line 15 - p. 611, line 2). Davy would later spend time with the victim on Monday, December 11, 2006.

(R. p. 567, line 1 - p. 568, line 19). She last spoke to him when he called her at approximately 6:00 or 7:00 that night. (R. p. 569, lines 14-19). The next day, Tuesday, December 13, 2006, at approximately 5:30, p.m., after completing her work shift at Sonic, Davy went back to the victim's home with Zach and Molly. The lights were off and victim's car was backed into the garage, which was unusual for the victim and alerted Davy that things were not right. She called victim's grandmother, Helen Zoch, who had purchased the home for victim to rent, (R. p. 1271, lines 14-24), and stayed on the phone with the grandmother as she entered the home. She saw victim's lifeless body and called 911. (R. p. 572, line 9 - p. 575, line 23).

Helen Zoch testified that she had spent time with victim the day before the burglary and murder and hoped to help him with his drug problem. In fact, victim had planned to enter Morris Village but wanted to talk to Ms. Davy first. The next day, Ms. Zoch called at 7:30 in the morning, but had not gotten an answer. At approximately 2:00 p.m., she went by the home, noticed the victim's car was backed in the garage, which was unusual, but she did not try to enter the home. (R. p. 1272, line 6 - p. 1274, line 24; p. 1278, line 11 - p. 1280, line 11). She testified that she was aware that her grandson had worked with the police, making drug buys for them. (R. p. 1284, lines 9-24). (See also R. p. 619, lines 19-25).

Investigating officers found the victim's home a "complete mess" with the victim's body "in the middle of it." (R. p. 692, lines 13-17). The back door had been kicked in. (R. p. 675, lines 13-25). The investigation began to focus on Whitehead, Petitioner and Cannon. Whitehead informed the investigating officers he "didn't know a damned thing about" the victim's murder. (R. p. 717, line 18 - p. 718, line 5). Both Petitioner and Cannon similarly denied any direct knowledge or involvement in their initial statements to police. (R. p. 721,

lines 21-25; p. 732, lines 14-25). However, Cannon later gave a detailed confession to officers, implicating Whitehead and Petitioner, which was, of course, redacted for presentation at trial to avoid *Bruton*² issues. The statement included not only the grisly facts of the vicious beating – such as the attack on the victim while he slept, dragging him off his couch, using the victim’s bat to strike the victim on his head – but also that victim was selected because he was thought to be a “snitch” and for his drugs. Cannon’s details included that one person took frozen chicken from the kitchen and place it on the victim’s head wounds in an attempt to stop the bleeding; that they hit the victim with a glass object, that they first went to the local Walmart for supplies and used the purchased purple latex gloves during the attack and wore ski masks; and, that the attack occurred at victim’s home at approximately 11:30. (R. p. 748, line 25 - p. 752, line 15; State’s Exhibits 2 and 103). Cannon later supplemented his statement voluntarily with a list of items he recalled taking from the home, including DVDs, a DVD player, presents, hair clippers, and cellphones, (R. p. 1022, line 16 - p. 1023, line 17), and gave an additional statement in which he admitted kicking the victim, (R. p. 1026, lines 3-16).

Petitioner also confessed to the crime in detail. Like Cannon’s statement, his statement was also redacted before introduction. (State’s Exhibit 104). The statement referenced going to the local Walmart and buying a ski mask and a box of purple gloves; that one of them called “Zach” to see if someone was home; that all of them kicked in a sturdy back door; that one person “picked up a glass bowl with flower petals in it, picked it up over his head and hit Josh in the head with it while Josh was asleep on the couch”; that another person dragged victim off the couch; that he repeatedly hit victim with his fists then hit him

² *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968). See also *State v. Holder*, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009).

in the back of the head using the victim's bat; that they were searching for drugs and money; that another person kicked and stomped the victim, and, eventually, someone pulled a Christmas tree over on him. He also claimed someone else left the house with "plastic bags of stuff" and gave him some "DVD's and stuff." (R. p. 773, line 15 - p. 775, line 21). In particular, as to the beating, Petitioner confessed as follows (again, as reflected in the redacted statement read at trial):

... I first grabbed a bat that was against the wall and I started hitting Josh in the body. Then another person tried to stop me to ask Josh a question about where the money and dope was, and I couldn't stop the bat. I couldn't stop the bat and I hit Josh in the back of the head. I also think I hit him one time in the temple area of his head. Josh then started bleeding more and I got scared. That's when another person and another person started kicking and stomping Josh. ... The last thing I saw another person pushing the tree over on Josh...

(R. p. 775, lines 2-9).

Further, at the time of his arrest, when driving to the sheriff's department and before giving his detailed statement, Petitioner volunteered to officers, "This is the way we came that night." (R. p. 954, line 4 - p. 955, line 3).

Whitehead, though he did not give a confession to officers, was twice overheard by another inmate, Michael Jenkins, at the detention center bragging about the killing, identifying the home where the murder occurred, and calling the victim's name. (R. p. 1221, line 10 - p. 1222, line 8). This caught Jenkins' attention as he had known the victim. (R. p. 1222, lines 9-20). A detention center officer confirmed that Jenkins had been in the cell next to Whitehead at the time the initial conversation was overheard. (R. p. 1257, lines 15-20).

Forensic pathologist Joel Sexton, M.D., testified that at autopsy, he identified "at least six" and possibly eight "injuries or blows were inflicted to the head that were each capable of causing death," with wounds inflicted on the top and back of head and behind the

left ear, along with abrasions and cuts to the face, injuries on legs, abrasions on knees and on the abdomen. (R. p. 1091, line 15 - p. 1096, line 8; p. 1098, line 19 - p. 1099, line 16; p. 1100, line 21 - p. 1105, line 4). From the wounds and autopsy and from looking at scene photos, the pathologist was able to opine that two blows were inflicted on the couch, but that the victim either came off, or was pulled off, the sofa and was hit on the floor with a “cylindrical and linear” object such as the bat (State’s 99), and that he was hit on the head with a glass potpourri bowl, remnants of same still being on the couch. (R. p. 1123, line 17 - p. 1125, line 14). He also confirmed that testing showed a prior use of cocaine and marijuana. (R. p. 1127, lines 11-17).

Investigators obtained a copy of a receipt from the local Walmart confirming a purchase of a ski mask and purple gloves on December 12, 2006 at 10:43 (R. p. 1058, line 7 - p. 1061, line 5). Ms. Davy testified that victim’s grandparents had provided a bat to keep in their residence for protection. (R. p. 590, line 4 - p. 591, line 12). Ms. Zoch testified that she had recently replaced the back door to the home with another sturdier door prior to the burglary and murder. (R. p. 1282, line 17 - p. 1283, line 6). Photos from the scene also confirmed the use of the latex gloves, the bat, the placement of the frozen chicken near victim’s head, the broken glass bowl, and the overturned lamp and Christmas tree. (R. p. 711, line 3 - p. 713, line 19; p. 1106, line 1-7). In sum, the physical evidence supported the detailed confessions of both Cannon and Petitioner, and the details overheard in the third co-defendant’s (Whitehead’s) detention center conversations.

ARGUMENT

The Court of Appeals did not err in upholding the trial judge's ruling that substitution of the neutral phrase "another person" for Petitioner's name in Cannon's statement was proper and adequate redaction under *Bruton v. United States*, 391 U.S. 123 (1968) and its progeny.

Relevant Facts:

All three co-defendants, Petitioner, Whitehead and Cannon, were tried at the same time. Before the statements Petitioner and Cannon made to Investigator Catoe were offered into evidence, the State offered to redact, and did redact, all references to the other co-defendants in both statements.³ (R. p. 629, line 16 - p. 630, line 20). Defense counsel objected and argued the redaction "would violate *Bruton* 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).⁴ Defense counsel relied on *Bruton* and *State v. LaBarge*, 275 S.C. 168, 268 S.E.2d 278 (1980) to argue the offered replacement of Petitioner's name with the phrase "another person" was "no different than" replacing the name with "Mr. X," which was criticized in *LaBarge*. (R. p. 632, line 11- p. 633, line 5).

³ Investigator Catoe first testified to what Cannon told him, (*i.e.* an oral statement), and then the written statement was identified and read to the jury. Petitioner's brief to the Court of Appeals quoted the oral statement as the written statement. (FBOA, pp. 11-12, citing R. p. 739, line 1 - p. 740, line 23). He again referenced that statement in his petition for writ of certiorari to this Court. (Cert. Petition, p. 10). In his brief to this Court, Petitioner apparently quotes the written statement, but again cites to the incorrect section of the record where the statement was read. (See BOP, p. 11, citing R. p. 739, l. 1-740, l 23). The written statement, as read, is actually on R. p. 748, line 25 - p. 751, line 18. Cannon made other statements to Lt. Crawford that were handled separately. (See R. p. 924, line 20 - p. 926, line 8; p. 933, lines 2-8).

⁴ Counsel for Cannon, Mr. Kendrick, argued for all three defendants. (R. p. 627, lines 8-18; p. 643, lines 18-22).

The State argued that *LaBarge* was a 1980 case, and further case law had defined the parameters of permissible redaction, such as *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151 (1988). (R. p. 635, lines 20-24).

Defense counsel recognized that current law supported the redaction of the name and substitution of the phrases “another guy” or “another person,” as offered by the State. (R. p. 635, line 11- p. 636, line 6; p. 638, line 4 -p.639, line 23). Even so, defense counsel offered a redaction to change the facts of the confession to suggestion only single involvement in the burglary and murder, (for example, changing “We pulled up at Josh’s house” to “I pulled up to Josh’s about 11:30”). (R. p. 643, lines 2-11).

After discussion on the current state of the law, the trial judge allowed the redaction as proposed by the State. (R. p. 633, line 25-p. 643, line 17). Counsel objected to the statements when offered at trial. (R. p.738, lines 20-21).

In the Court of Appeals, Petitioner argued that “the admission of his non-testifying co-defendant’s statements clearly implicated Petitioner in the crime and therefore violated his rights under the Confrontation Clause.” (FBOA, p. 14). Thus, he reasoned, the redaction was inadequate. (FBOA, pp. 14-15). The Court of Appeals resolved in the issue finding:

We find the neutral phrase “another person” inserted into Cannon’s statement avoided any *Bruton* violation. The redacted statement only implicates the statement’s maker, and it does not limit the participants to three, which would implicate the three defendants on trial. Further, the court gave the jury a limiting instruction. Therefore, we find the trial court properly allowed Cannon’s redacted statement into evidence.

(App. p. 7).

In the petition for rehearing, Petitioner argued the Court of Appeals erred in finding the substitution of the phrase “another person” was sufficient “*in the context of this case*” where three co-defendants were tried. (App. p. 10) (emphasis in original). He urged the

Court of Appeals to reconsider the ruling “*in the context of all the evidence that was before the jury,*” including the fact that Investigator Catoe had testified that after taking the statement, investigators obtained an arrest warrant for Petitioner. (App. p. 11) (emphasis added).

Discussion:

The gist of the Petitioner’s argument appears twofold. First, he apparently argues that, in general, redaction can be made, but only if no reference to any co-defendant, either in name or action, remains in the statement. In other words, the statement cannot even infer the existence of another individual. Because, he argues, if other evidence puts the three together, the redaction could not be sufficient in the instant case. (See BOP, p. 15, “The men were joined at the hip by their tie to the Sonic. They were the three defendants on trial and Cannon’s statement clearly referred to Petitioner McDonald and co-defendant Whitehead.”). (See also BOP, p. 18, “Petitioner McDonald was jointly tried with Whitehead and Cannon. The jury could look over and see petitioner and Whitehead as the Cannon confession was read.”). Second, Petitioner argues that Investigator’s Catoe’s testimony that they obtain an arrest warrant for Petitioner after taking the statement further identifies Petitioner. (BOP, p. 19). Neither point shows error.

As to his first point, Petitioner conceded at trial that current precedent does not require such radical redaction, and specifically argued for an extension of the present rule. (R. p. 638, line 4 - p. 639, line 21).⁵ The trial judge declined to extend the redaction rules

⁵ This issue is also before the Court by way of the separate petition filed by co-defendant Whitehead. This Court granted certiorari in Mr. Whitehead’s appeal by Order dated February 21, 2014. Mr. Cannon did not raise a *Bruton* issue in his appeal. Mr. Cannon’s convictions were affirmed by the Court of Appeals in an unpublished opinion issued June 8, 2011.

noting his concern that such redaction would “change[] the meaning of the entire statement by creating the impression that these parties acted independently.” (R. p. 639, lines 10-15; p. 643, lines 12-17). The astute trial judge correctly identified the glaring unfairness in the requested extension. Not only does Petitioner’s offered extension of the redaction rules exceed that which Petitioner is entitled to in order to protect his right to confrontation, if allowed, the result would grant permission to tinker with the facts, creating confusion and misleading of the jury. The trial judge appropriately denied the request to extend the redaction rules.

“The constitutional right to confront and cross-examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures [sic] that convictions will not result from testimony of individuals who cannot be challenged at trial.” *State v. Page*, 378 S.C. 476, 481, 663 S.E.2d 357, 359 (Ct.App. 2008), *rehearing denied* June 29, 2009 (*quoting State v. Martin*, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987)). “[A] non-testifying codefendant’s statement that expressly inculpatates the defendant violates the defendant’s rights under the Confrontation Clause” and is inadmissible. *State v. Holder*, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009) (*citing Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968)). “Redaction has come into play as a tool to allow admission of a co-defendant’s confession *against the confessor in a joint trial*. The point of redaction is to permit the confession to be used against the non-testifying confessor, while avoiding implicating his co-defendants.” *State v. Holmes*, 342 S.C. 113, 119, 536 S.E.2d 671, 674 (2000) (emphasis in original) (*citing Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702 (1987); *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151 (1998)).

Thus, if, in a joint trial, a non-testifying co-defendant's statement is admitted, reference to the other named defendant must be redacted for the statement to be admissible. *State v. Martin*, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). See also *State v. Avery*, 374 S.C. 524, 534, 649 S.E.2d 102, 107 (Ct.App. 2007) ("In this case, all statements from Avery's co-defendant that referred to Avery were redacted precisely so Avery's right to confront his witness would not be impinged."). Statements that connect the defendant "only when linked to other evidence introduced at trial," do not offend the *Bruton* rule. *Holder*, 382 S.C. at 284, 676 S.E.2d at 693. However, redaction of the defendant's name alone may not suffice to protect rights.

It is given that at least one other person is implicated in any redaction. That is not error. The danger is not *acknowledging* that at least one other person was involved. The danger is in *identifying* a certain individual – the co-defendant then on trial – when that co-defendant then on trial cannot confront his accuser. As such, "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*." *Holder*, 382 S.C. at 284, 676 S.E.2d at 694.

This Court found in *Holder*, for example, that use of the pronoun "she" when there is only one co-defendant, and she is female, still identifies the co-defendant and offends *Bruton*. *Id.*, 382 S.C. at 285, 676 S.E.2d at 694. This Court has just recently affirmed this very concept in *State v. Henson*, 407 S.C. 154, 754 S.E.2d 508 (2014) (finding redaction error where statement by one of two males involved in crime referenced "I" and also "the guy that did the shooting" thereby identifying the defendant, the only other male). Likewise, physical descriptions that identify the co-defendant are similarly unacceptable. *State v. Singleton*, 303

S.C. 313, 315, 400 S.E.2d 487, 488 (1991) (“Although Sessions’ statement does not expressly implicate appellant by name, we find that the physical descriptions had the same effect; they incriminated appellant by implicating him as an accomplice. Thus, we hold that physical descriptions must be redacted from a nontestifying co-defendant’s statement in order to protect a defendant’s right of confrontation.”).

The use of a phrase which reflects a pointed specific identification being hidden from the juror would also appear to point directly to a co-defendant and would offend *Bruton*. See, for example, *Gray v. Maryland*, 523 U.S. at 196 (referencing pointed identification of “me, deleted, deleted, and a few other guys” insufficient) (emphasis added); *State v. LaBarge*, 275 S.C. 168, 170, 268 S.E.2d 278, 280 (1980) (substitution of “Mr. X” for name likely insufficient). The Court in *Gray* expressed the preference for the use of general terms, such as changing the redaction from specific deletion, *i.e.* “Me, deleted, deleted, and a few other guys,” to “Me and a few other guys.” 523 U.S. at 196. See also *United States v. Richards*, 241 F.3d 335, 341 (3rd Cir. 2001) (redaction insufficient where three people involved in crimes related to armed robbery of an armored car, statement of co-defendant redacted to reference “inside man” and “friend,” when “inside man” could only be driver of armored car thereby identifying defendant as “friend”).

In short, the court must ensure even with redaction, that the statements do not “obviously refer directly to ... the defendant” based upon “inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.” *Gray*, 523 U.S. at 196. Thus, the quality or sufficiency of the redaction in the particular circumstances at trial will be considered. This does not imply that the statement cannot be consistent with other evidence of guilt; rather, the redaction of the statement, by whatever

means, must not still result, from the statement alone, in immediate identification of another co-defendant also on trial. *United States v. Williams*, 936 F.2d 698, 700 -701 (2nd Cir. 1991) (“the appropriate analysis to be used when applying the *Bruton* rule requires that we view the redacted confession in isolation from the other evidence introduced at trial. If the confession, when so viewed, does not incriminate the defendant, then it may be admitted with a proper limiting instruction even though other evidence in the case indicates that the neutral pronoun is in fact a reference to the defendant. This analysis is adopted directly from *Richardson* itself, and the principal extension of *Richardson* by our decisions is that they allow redacted confessions to refer to accomplices with neutral pronouns.”).⁶

The Fourth Circuit has found that a “neutral phrase” such as “another person” or “another individual” does not directly implicate the co-defendant, *United States v. Akinkoye*, 185 F.3d 192, 198 (4th Cir. 1999). Other circuit courts have similarly approved the use of such terms as “we”, “another guy,” and “someone.” *United States v. Edwards*, 159 F.3d 1117, 1125 (1998) (collecting cases). Our case law has similarly upheld redaction using neutral terms. *See State v. Garrett*, 350 S.C. 613, 620-621, 567 S.E.2d 523, 526 (Ct.App. 2002) (use of “another guy” in redaction). Here, the State used the neutral phrase, “another person,” and avoided any *Bruton* violation. This is so for two specific reasons, one, the neutral term itself, and two, the fact that no other information specifically identified the co-defendants, *either* petitioner or Whitehead.

⁶ The Second Circuit has just recently underscored that it is not just the neutral pronoun or phrase at issue, but also its relation to the remainder of the statement and number and identification of the other defendants that should be considered. *See United States v. Taylor*, 745 F.3d 15, 29 (2nd Cir. 2014).

The trial judge carefully reviewed the breadth and context of the statements for any other indication of direct identification. For instance, the judge noted that others were referenced in the statements such as “Leroy” and the generic term “we” could apply to Leroy and the co-defendant. (R. p. 641, line 12 - p. 642, line 5). (See also R. p. 749, lines 2-10). The judge also ordered redaction of the reference to someone’s “blue Honda Accord,” as witnesses had testified that Whitehead drove a blue Honda. (R. p. 645, lines 7-22). (See, for example, R. p. 481, lines 4-9). The remainder of each statement is very generic, and, though it may certainly be one interpretation, the statements do not actually even limit participation to three, such as the three defendants then on trial. (See R. 748, line 25 - p. 752, line 15; p. 773, line 15 - p. 775, line 21). (See also State’s Exhibits 103 and 104). *See Priester v. Vaughn*, 382 F.3d 394, 401 (3rd Cir. 2004) (distinguishing sufficiency of redaction looking at number of people possibly involved: “in this case there were at least fifteen perpetrators involved in the shooting, and the phrases ‘the other guy’ or ‘another guy’ are bereft of any innuendo that ties them unavoidably to Priester” thus, “the replacement was [not] tantamount to an explicit reference to the co-defendant”).

As to Petitioner’s second point – that Investigator Catoe testified that after taking Cannon’s statement, the investigating officer obtained an arrest warrant for Petitioner – his argument is not preserved for appeal as it was not raised at trial. *See, e.g., State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (issue not preserved when one ground is raised to the trial court and another ground is raised on appeal). It is not addressed in the Court of Appeals opinion, and there is no ruling by the Court of Appeals to review here. At any rate, the identification is not as clear as Petitioner submits.

In the Court of Appeals, Petitioner did not argue an inescapable inference; rather, he argued there could be “*serious argument* as to the identity” of the person. (See FBOA, p. 15). (emphasis added). This merely shows the redaction proved its worth. There is no infirmity if *other* evidence at trial indicates identity. *Holder, supra*. At bottom, Petitioner is arguing that other evidence considered in connection with the statement may indicate identification. Precedent is clearly against him. Even so, and critically, reviewing the investigator’s response in context shows the testimony *does not* directly link information in Cannon’s statement to the basis for the subsequent warrant:

Q What happened next in the investigation? What did you do next?

A After obtaining this statement, we then obtained an arrest warrant for Mr. Derrick McDonald.

Q Now, you had previously talked to Derrick McDonald that day?

A I had.

Q Briefly?

A That’s correct.

Q You told us. The oral statement you’ve already given us. Did you leave a card and say call me or anything?

A I left and told him if he could think of anything else when his mother got home to call me.

Q And did you receive a call from the McDonalds’ household?

A I did receive a call from there.

Q When was that?

A This was shortly after I had taken this statement.

Q And as a result of that, what, if anything, did you tell the McDonald residence you would do?

A I told the McDonald residence that I would be there just as soon as I finished up what I was doing.

(R. p. 754, line 5 - p. 755, line 2).

When read in the context, the testimony shows continuing, and separate, lines of investigation at that point. It is far from an inescapable inference that Cannon clearly, by name, implicated Petitioner in the statement to investigating officers or that they used that information alone to obtain a warrant. The testimony is read most naturally as an explanation of the order of investigation, not an inescapable conclusion of implication. *Compare State v. Johnson*, 390 S.C. 600, 703 S.E.2d 217 (2010) (finding *Bruton*- type issue where questions pointedly linked investigation *plus* speaking with co-defendants in explain how appellant's arrest came about).⁷

Again, the redaction was proper and protected Petitioner's right to confrontation by ensuring that no facially incriminating statement was offered. Moreover, as the Court of Appeals noted, the trial judge also instructed the jury that evidence admitted solely for its connection to one co-defendant may only be considered in connection with that co-defendant, and not against the remaining co-defendants which provided further protection of Petitioner's rights. (App. pp 6-7). (See also R. p. 1449, lines 8-12). However, even if the redaction was

⁷ Interestingly, the original unredacted statement in *Johnson* did not implicate Johnson. In that case, it was the actual redaction that could lead to speculation *Johnson* was named which would have allowed a factually incorrect finding. When redaction works properly, the facts of the incident provide identification of the co-defendant or co-defendants – the statement does not. Thus the emphasis on whether the statement is *facially* incriminating. The statement is never used as substantive evidence against the person whose name has been redacted. However, the statement is considered in regard to the statement's maker and the facts of the crime admitted must support the basic facts of the event as gleaned from the properly admitted evidence to avoid creating false exculpatory material – another factual incorrect finding similar to the one that this Court has previous indicated in *Johnson* must be avoided.

not sufficient, and this Court should find error, there is overwhelming evidence of guilt. Any such error could only be harmless on this record.

“Violations of the Confrontation Clause are subject to a harmless error analysis.” *Holder*, 382 S.C. at 285, 676 S.E.2d at 694. Though the considerations vary – including overwhelming evidence of guilt absent the error, whether the evidence was cumulative to other properly admitted evidence, and the overall importance of the testimony – to find a violation harmless, the error must be deemed harmless beyond a reasonable doubt in the context of the entire record. *Id.*, 382 S.C. at 285-286, 676 S.E.2d at 694-695. Here, guilt is not merely premised on inferences from Cannon’s statement. Petitioner confessed. Specifically, he confessed to participating in entry into the victim’s home, and beating the victim about the head with a bat. (R. p. 773, line 15 - p. 775, line 21). Additionally, the details of his confession were corroborated by the physical evidence. First, and foremost, of those details are the injuries to the victim’s head. Forensic pathologist Joel Sexton, M.D., testified that at autopsy, he identified “at least six” and possibly eight “injuries or blows were inflicted to the head that were each capable of causing death,” with wounds inflicted on the top and back of head and behind the left ear, along with abrasions and cuts to the face, injuries on legs, abrasions on knees and on the abdomen. (R. p. 1091, line 15 - p. 1096, line 8; p. 1098, line 19 - p. 1099, line 16; p. 1100, line 21 - p. 1105, line 4). Dr. Sexton also opined that two blows were inflicted on the couch, but that the victim either came off, or was pulled off, the sofa and was hit on the floor with a “cylindrical and linear” object such as the bat (State’s 99), and that he was hit on the head with a glass potpourri bowl, remnants of same still being on the couch. (R. p. 1123, line 17 - p. 1125, line 14). Moreover, investigators obtained a copy of a receipt from the local Walmart confirming a purchase of a ski mask

and purple latex gloves on December 12, 2006 at 10:43 (R. p. 1058, line 7 - p. 1061, line 5). Ms. Davy testified that victim's grandparents had provided a bat to keep in their residence for protection. (R. p. 590, line 4 - p. 591, line 12). Ms. Zoch testified that she had recently replaced the back door to the home with another sturdier door prior to the burglary and murder. (R. p. 1282, line 17 - p. 1283, line 6). Photos from the scene also confirmed the use of the latex gloves, the bat, the broken glass bowl, and the overturned Christmas tree. (R. p. 711, line 3 - p. 713, line 19; p. 1106, line 1-7). These details are all mentioned in Petitioner's own statement. (See R. p. 773, line 15 - p. 775, line 21). Lastly, witness testimony from Allen Brown and Christopher Rust placed Petitioner with the co-defendants immediately before the burglary and murder, (R. p. 319, line 12 - p. 324, line 14; p. 361, lines 1-22), and Rust saw a visibly upset Petitioner immediately after the burglary and murder, (R. p. 363, line 7 - p. 365, line 8). In light of this solid evidence of guilt, any error in the redaction of the co-defendant's statement could only be harmless beyond a reasonable doubt.

However, the statements were properly redacted and the Court of Appeals properly affirmed the trial judge's ruling. The Court of Appeals opinion should be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the opinion of the Court of Appeals should be affirmed.

Respectfully submitted,

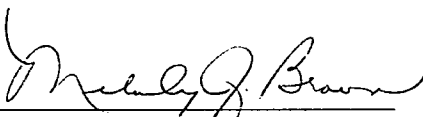
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

BY: 
MELODY J. BROWN
S.C. Bar No. 14244

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

June 12, 2014.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge

On Certiorari to the Court of Appeals
Opinion No. 5033 (S.C.Ct. App. filed September 12, 2012)

The State, Respondent,
vs.
Derrick McDonald, Petitioner.

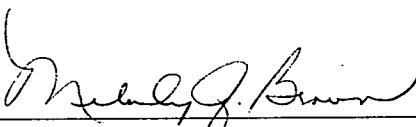
Appellate Case No.: 2012-213686

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Brief of Respondent* on Petitioner depositing a copy of same in the United States mail, postage prepaid, addressed to his attorney of record:

Robert M. Dudek, Chief Appellate Defender
South Carolina Commission on Indigent Defense,
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

This 12th day of June, 2014.



MELODY J. BROWN
S.C. Bar No. 14244

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT