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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
Op. No. 5278, filed November 5, 2014, rehearing denied December 17, 2014
From Sumter County
Honorable William Jeffrey Young, Circuit Court Judge
Appellate Case No: 2015-000078

THE STATE,

Petitioner,

V.

DANIEL D'ANGELO JACKSON,

Respondent.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County

William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DANIEL D'ANGELO JACKSON,

APPELLANT

APPELLATE CASE NO: 2011-199366

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in admitting into evidence five statements made by Appellant's non-testifying co-defendant without adequately redacting the portions implicating Appellant in violation of his Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses against him, as interpreted by *Bruton v. United States*, 391 U.S. 123 (1968) and its progeny?
- II. Did the trial court violate Appellant's Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), by allowing five statements by Appellant's non-testifying co-defendant into evidence, which implicated Appellant in the murder and armed robbery?
- III. Did the trial court err in refusing to grant Appellant's motion for severance where Appellant's joint trial compromised his right to confront and cross-examine his accuser by admitting five inculcating statements from his non-testifying co-defendant?
- IV. Did the trial court err in denying Appellant's motion for a mistrial when the non-testifying co-defendant's statements were not adequately redacted and a State's witness committed a *Bruton*-type error?
- V. Did the trial court err in refusing to quash the jury panel pursuant to Appellant's *Batson* motion where the State's explanation for striking two African-American jurors was that the jurors did not want to serve on the jury, and where the State also failed to provide an explanation for striking another African-American juror?

STATEMENT OF THE CASE

On September 11, 2008, the Sumter County Grand Jury indicted Appellant Daniel Jackson for murder and armed robbery. R. 1073.

On August 8, 2011, Appellant and his co-defendant, Reginald Canty, proceeded to trial before the Honorable William Jeffrey Young and a jury. R. 1. Arthur Wilder represented Appellant, and Garryl Deas represented the co-defendant, while Deputy Solicitor John Meadors represented the State.

On August 12, 2011, the jury found Appellant and his co-defendant guilty as charged. R. 1044, l. 18 – 1050, l. 14. The trial court sentenced Appellant to life imprisonment on the murder conviction and thirty years imprisonment on the armed robbery conviction. R. 1066, ll. 6-13. The trial court also sentenced the co-defendant to thirty years imprisonment on both convictions, to run concurrently. R. 1065, ll. 6-16.

This appeal follows.

STATEMENT OF FACTS

Background

On January 12, 2008, William Flexon died from gunshot wounds while delivering three pizzas to a vacant lot in a mobile home park in Sumter County. Based on the five statements given to law enforcement by Appellant's co-defendant, Reginald Canty, and the subsequent investigation by the Sumter County Sheriff's Office, Appellant and his co-defendant were charged with the murder and armed robbery of William Flexon and later tried jointly before a jury.

Jury Selection (*Batson* Motion)

During jury selection, defense counsel informed the trial court, "Your Honor, we'd ask that the record reflect a motion to be heard later." R. 60, ll. 17-18. At the conclusion of jury selection, defense counsel moved to quash the jury panel pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), based on the State striking African-American jurors. R. 71, ll. 9-24; R. 73, ll. 9-22. The State struck eight African-American jurors: (1) juror #64 — Wayne Green; (2) juror #157—Patricia Williams; (3) juror #30—Terry Crowder; (4) juror #167—Marion Thomas; (5) juror #46—Jason Evans; (6) juror #32—Essie Dallas; (7) juror #28—Linda Cooper; and (8) juror #140—Walnetta Spears. R. 57 – 69.

Based on the assertion of racial discrimination, the trial court requested that the State give race-neutral reasons for striking the eight African-American jurors. R. 74, l. 2. Despite the solicitor's statement, that "every [juror] on this list had . . . a serious conviction or charge[.]" the solicitor failed to show a conviction or pending charge for half of the African-American jurors struck: (1) #157—Patricia Williams; (2) #167—Marion Thomas; (3) #32—Essie Dallas; and (4) #140—Walnetta Spears. R. 74, l. 8 – 76, l. 18.

- (1) Juror #157—Patricia Williams: The solicitor claimed, “[I]t was obvious to me she wanted off. And everyone that wanted off, that is my reason that I chose not to present her.” R. 74, l. 22 – 75, l. 5.
- (2) Juror #167—Marion Thomas: The Solicitor noted that this juror was unemployed and that he struck an unemployed white male. R. 75, l. 24 – 76, l. 3.
- (3) Juror #32—Essie Dallas: The solicitor maintained, “[I]n my notes . . . said she did not want to serve.” R. 76, ll. 7-9.
- (4) Juror #140—Walnetta Spears: The solicitor failed to provide an explanation for striking this juror.

Defense counsel then told the trial court, “If you find those reasons satisfactory, I have nothing else to say.” R. 77, ll. 1-2. The trial court ruled, “Well, I looked at the jury . . . you’re not entitled to the perfect jury or to one of all - - but certainly the ones who have pending charges, I find that to be race neutral and deny your motion. . . . And for your record, your motion is denied.” R. 77, ll. 3-12.

Jackson v. Denno Hearing

Pre-trial, a hearing was held pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964), to determine the admissibility of the five statements made to law enforcement by Appellant’s co-defendant, Reginald Canty. R. 79 – 150; State’s Exhibit # 3 (Statement by Canty), R. 1075; State’s Exhibit # 5 (Statement by Canty), R. 1077; State’s Exhibit # 7 (Statement by Canty), R. 1079; State’s Exhibit # 8 (Statement by Canty), R. 1080; State’s Exhibit # 9 (Statement by Canty), R. 1081; Court’s Exhibit # 9 (Collection of Statements), Suppl. R. 1. Officers Dominick West and Robert Burnish of the Sumter County Sheriff’s Office testified at the *Jackson v. Denno* hearing. The trial court ultimately found that the co-defendant’s

statements to law enforcement were admissible because the statements “were made freely and voluntarily.” R. 150, ll. 6-14.

Motion for Severance of Joint Trial

Defense counsel moved for severance of Appellant’s joint trial because co-defendant’s statements to law enforcement and Appellant’s right to cross-examine and confront witnesses against him. R. 148, l. 11 – 150, l. 2. Defense counsel argued that he could not properly attack the co-defendant’s credibility in making those five statements to law enforcement in a joint trial, particularly when the statements contained varying levels of Appellant’s culpability in the murder and armed robbery. R. 148, l. 19 – 149, l. 9. Defense counsel also argued that a joint trial denied Appellant his right to a fair trial because redacting Appellant’s name from his co-defendant’s statements cannot cure the prejudice created by the statements if the co-defendant does not testify in this joint trial. R. 149, l. 10 – 150, l. 2. The trial court denied defense counsel’s motion for severance of Appellant’s joint trial. R. 151, l. 23 – 152, l. 2.

First Motion for a Mistrial

Counsel for the co-defendant elicited the following testimony during cross-examination of Officer Jennifer Thomas of the Sumter County Sheriff’s Office:

Q: And then [the report taken on the night of the murder] also states that you spoke with someone by the name of Linda Canty.

A: Yes, sir.

Q: And also on your report, it indicates that a suspect is Daniel Jackson [Appellant].

R. 329, ll. 3-7. Defense counsel contemporaneously objected, and outside the presence of the jury, moved for a mistrial. R. 330, ll. 1-2. Defense counsel argued that the report is

prejudicial as “rank hearsay” and requested that the trial court strike the question and answer. R. 329, l. 18 – 330, l. 7. The trial court noted, “Well, how is it prejudicial for your client? He’s a defendant in the courtroom. I mean, they [the jury] would have to suspect that at some point in time his [Appellant’s] name would come into play.” R. 330, ll. 8-11. Defense counsel further argued, “[The State is] posturing as though [Appellant] was a suspect . . . on that particular night when the report was issued, and I object to that.” R. 330, ll. 12-15. The trial court refused to grant the mistrial motion, but agreed to strike the witness’ answer. R. 331, ll. 5-8. The trial court also granted defense counsel’s request for a curative instruction. R. 331, l. 15 – 332, l. 8.

Bruton Redactions and Crawford

At trial, the State redacted the co-defendant’s statements by replacing the references to Appellant’s name with inserting “another person” in its place. R. 545, l. 9 – 550, l. 8. The trial court found the redactions satisfied the requirements set forth in *Bruton*, 391 U.S. 123. R. 550, ll. 9-10. Defense counsel objected and argued that the redactions do not satisfy *Bruton* and prevent defense counsel from cross-examining the co-defendant. R. 550, l. 16 – 551, l. 8. The trial court overruled defense counsel’s objection. R. 551, ll. 8-9. The co-defendant’s statements were subsequently entered into evidence over defense counsel’s objection and were read aloud to the jury. R. 563, l. 19 – 564, l. 3; R. 583, ll. 4-9; R. 587, l. 22 – 588, l. 3; R. 761, ll. 8-13; R. 765, ll. 20-25; State’s Exs. # 3, 5, 7, 8, 9; 1075-1081.

The State failed to redact references to Appellant’s race and gender in the co-defendant’s statements. R. 572, l. 24 – 575, l. 22; R. 578, l. 11 – 581, l. 10; R. 586, l. 10 – 587, l. 9; State’s Exhibits # 3, # 5, # 7, # 8, # 9, R. 1075-1081. Specifically, the solicitor failed to redact the pronouns in the co-defendant’s statements (e.g., referring to Appellant as

“Him” and “He”). In State’s Exhibit # 5, the solicitor redacted Appellant’s name, but failed to redact the reference to Appellant’s gender and the co-defendant’s familiarity with Appellant: “The pizza man was met by 3 males with hoodies, *[another person] was one of the males* and I don’t know who the other two were.” (emphasis added). When examining State’s Exhibit # 5 and # 7, these statements reveal Appellant’s race and gender (“black male”). In State’s Exhibit # 9, the solicitor failed to redact Appellant’s nickname: “j-boy.” The solicitor also read and emphasized the importance of the co-defendant’s statements during his closing argument. R. 1003, l. 6 – 1027, l. 16.

Furthermore, the co-defendant’s statements note that Appellant a/k/a “another person” bought a Little Debbie snack cake from a convenience store with the co-defendant prior to the murder. R. 558, l. 15 – 559, l. 5; R. 572, l. 24 – 575, l. 22; R. 578, l. 11 – 581, l. 10; State’s Exhibits # 3; State’s Exhibit # 5. R. 1075 - 1077. Notably, the State established that, *prior* to the introduction of the co-defendant’s statements, Appellant bought a Little Debbie snack cake while in a convenience store prior to the murder. R. 260, l. 18 – 276, l. 8. The trial court sustained defense counsel’s objection after the solicitor sought to enter a little Debbie snack wrapper into evidence. R. 269, ll. 9-20. Counsel for the co-defendant also established that the Little Debbie snack cake was sold to the “fairer skinned gentleman.” R. 275, l. 8 – 276, l. 6. The convenience store clerk testified on cross-examination that he had no idea if the Little Debbie snack wrapper marked as State’s Exhibit # 24 was the snack cake purchased on the night of the murder. R. 287, l. 6 – 288, l. 9.

The solicitor later sought to enter pictures of a Little Debbie snack cake wrapper, and defense counsel objected to the admissibility of these photographs. R. 361, l. 7 – 362, l. 25. The trial court stated, “I’ll rule on that at the appropriate time.” R. 363, ll. 3-4. The

solicitor then established and focused on the fact that a Little Debbie cake wrapper was found in the trailer park after the murder (one-hundred and thirty-seven feet away from the decedent's van). R. 371, l. 17 – 376, l. 6; R. 389, ll. 10-15; R. 395, l. 22 – 453, l. 2; R. 396, l. 1 – 403, l. 19; R. 415, l. 16 – 419, l. 22; R. 853, l. 18 – 859, l. 20. Investigator Raymond Mackessy admitted on cross-examination that no fingerprints were found on the Little Debbie Snack wrapper and that he does not know how the snack wrapper got there. R. 403, ll. 8-19; R. 418, l. 20 – 419, l. 22. The trial court ultimately admitted the Little Debbie snack wrapper and photograph of the snack cake into evidence over defense counsel's objection. R. 858, l. 1 – 859, l. 20; State's Exhibit # 24; State's Exhibit # 85; State's Exhibit # 86. Both the solicitor and counsel for the co-defendant reiterated that Appellant purchased the Little Debbie snack cake wrapper in their closing arguments. R. 969, l. 21 – 970, l. 5; R. 1022, ll. 9-14.

Additionally, the solicitor elicited the following testimony from Officer Burnish:

Q: You were not there when Mr. Canty [co-defendant] gave a statement on the 15th?

A: I was in the building; I was not present for that statement.

Q: Now, what happened and what did you do next in your investigation?

A: *Based on the information that was received on that date is when we issued warrants for the arrest of Mr. Jackson.*

Q: Now, did you go look for Mr. Jackson?

A: Yes, we did.

R. 772, ll. 1-11 (emphasis added).

Second Motion for a Mistrial

At the close of the State's case, defense counsel moved for a directed verdict, and in

the alternative, a mistrial: "Either the statements have been *improperly redacted* in order to get some circumstantial evidence . . . [, o]r there is no evidence in the record pertaining to [Appellant's guilt]." R. 873, l. 19 – 877, l. 12 (emphasis added). Defense counsel noted that the State failed to find any fingerprints or DNA linking Appellant to the crime scene or the items allegedly involved in the offense.¹ R. 874, ll. 15-20. The trial court denied both the motion for a directed verdict and the motion for a mistrial. R. 878, ll. 13-21.

Renewed Motions for a Mistrial and Motion for a New Trial

Defense counsel renewed his prior motions for a mistrial and subsequently moved for a new trial after the jury found Appellant guilty as charged. R. 943, l. 1 – 944, l. 21; R. 1051, l. 24 – 1052, l. 6. Defense counsel argued:

[T]he only logical inference would be that the jury must have decided to use those statements that Mr. Canty [co-defendant] gave against Mr. Jackson [Appellant], which we don't believe should be permitted under the law of Bruton, the confrontation of issues. The right that [Appellant] has under the United States Constitution and [the] constitution of our state, Your Honor.

R. 1052, ll. 19-23. Defense counsel further argued, "[T]hose rights were not afforded [to Appellant] because of the joint trial, the nature of the joint trial, and the denial of our motion for severance." R. 1052, l. 25 – 1053, l. 2. The trial court denied the renewed motion for a mistrial and the motion for a new trial. R. 1054, ll. 17-21. Defense counsel filed a motion for reconsideration on August 16, 2011, arguing the trial court should have granted either the motion for a mistrial or the motion for a new trial. R. 1067. The trial court denied the motion for reconsideration in a written Order on August 24, 2011. R. 1072.

¹ R. 356; R. 396 – 439; R. 698 – 710; R. 721 – 722; R. 730 – 731.

ARGUMENT

- I. The trial court erred in admitting into evidence five statements made by Appellant's non-testifying co-defendant without adequately redacting the portions implicating Appellant in violation of his Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses against him, as interpreted by *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny.

"The Confrontation Clause of the Sixth Amendment, which was extended to the states by the Fourteenth Amendment, guarantees the right of a criminal defendant to confront witnesses against him, and this includes the right to cross-examine witnesses." *State v. Holder*, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009); *See* U.S. Const. amends. VI and XIV. In *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004), the United States Supreme Court held that testimonial out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had prior opportunity to cross-examine the witness. In *Bruton v. United States*, 391 U.S. 123, 126-137 (1968), the Court held that a non-testifying co-defendant's confession that inculcates another defendant is inadmissible at their joint trial, even if the jury is instructed that the confession can only be used as evidence against the confessor, because of the substantial risk that the jury would look to the incriminating extrajudicial statements in determining the other's guilt.

In *Richardson v. Marsh*, 481 U.S. 200, 207-08 (1987), the Court clarified that the rule announced in *Bruton* applies only when the co-defendant's statement implicates the defendant "on its face" and does not apply to statements that only become incriminating when linked to other evidence introduced at trial. The *Richardson* court also held that an adequate redaction cures a *Bruton* violation:

Even more significantly, evidence requiring linkage differs from evidence incriminating on its face in

the practical effects which application of the Bruton exception would produce. If limited to facially incriminating confessions, Bruton can be complied with by redaction – a possibility suggested in that opinion itself. If extended to confessions incriminating by connection, not only is that not possible, but it is not even possible to predict the admissibility of a confession in advance of trial.

Richardson, 481 U.S. at 208-09 (citation omitted); *See State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 359 (Ct. App. 2008) (stating redactions are a tool to allow the admission of a co-defendant's confession against the confessor in a joint trial because it permits the confession to be used against the non-testifying confessor, while not implicating the co-defendant). Notably, the statements in *Richardson* did not directly refer to the defendant; instead, the statements became incriminating only when linked to other evidence developed at trial. *Id.* at 196.

In *Gray v. Maryland*, 523 U.S. 185 (1998), the Court considered *Bruton*'s application when the redaction consists of replacing the defendant's name with an obvious blank space, a symbol, or a word such as "deleted." The *Gray* Court noted that the *Richardson* decision had limited the scope of *Bruton* to instances where the reference to the defendant was on the face of the co-defendant's statement. Yet, the *Gray* 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." *Id.* at 197. The *Gray* Court reasoned that a trial court must look at the *type* of inferences which are necessary to make a connection to the defendant, not the fact that there are inferences, to determine the applicability of *Bruton*. *Id.* at 196. The *Gray* Court stated, "*The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences*

that a jury ordinarily could make immediately, even [if the statement was] the very first item introduced at trial.” *Id.* (emphasis added). Thus, the *Gray* Court held that the statements applied under *Bruton* because the statements implicated the defendant the same as if there was a direct reference, and the connection did not depend on other evidence introduced at trial. *Id.* at 196-97.

Similarly, in *State v. Holder*, 382 S.C. 278, 285-86, 676 S.E.2d 690, 694 (2009), our Supreme Court found the substitution of Holder's name with the pronoun "she" was insufficient to obscure her identity because the jury could readily determine the statement referred to her as she was the only female defendant. The *Holder* court held that the redaction was analogous to the redactions in *Gray* because, despite the redaction, it was apparent the co-defendant was referring to Holder, and the inference was one that was obvious even without relying on the other testimony developed at trial. *Id.* Therefore, the *Holder* court found the admission of the redacted statement violated Holder's rights under the Confrontation Clause because her co-defendant did not testify and was not subject to cross-examination. *Id.* at 286, 676 S.E.2d at 694.

In this case, the trial court violated Appellant's Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses against him, as interpreted by *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny. Specifically, the trial court erred in admitting into evidence five statements made by Appellant's non-testifying co-defendant without adequately redacting the portions implicating Appellant, particularly when the solicitor read the non-testifying co-defendant's statements aloud to the jury. R. 545, l. 9 – 551, l. 9; R. 563, l. 19 – 564, l. 3; R. 583, ll. 4-9; R. 587, l. 22 – 588, l. 3; R. 761, ll. 8-13; R. 765, ll. 20-25; State's Exhibits #3, #5, #7, #8, #9, R. 1075, 1077, 1079, 1080, 1081. See

State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987) (noting “[t]he constitutional right to confront and cross-examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial”).

The redactions were inadequate because the State failed to redact references to Appellant’s race and gender in the co-defendant’s statements. For example, the solicitor failed to redact the pronouns in the co-defendant’s statements (e.g., referring to Appellant as “Him” and “He”). In State’s Exhibit # 5, the State redacted Appellant’s name, but failed to redact the reference to Appellant’s gender and the co-defendant’s familiarity with Appellant: “The pizza man was met by 3 males with hoodies, *[another person] was one of the males* and I don’t know who the other two were.” (emphasis added). When examining State’s Exhibits # 5 and # 7, the statements reveal the Appellant’s race and gender (“black male”). In State’s Exhibit # 9, the solicitor failed to redact Appellant’s nickname: “j-boy.” The solicitor also read and emphasized the importance of the co-defendant’s statements during his closing argument. R. 1003, l. 6 – 1027, l. 16.

Furthermore, the non-testifying co-defendant’s statements implicated Appellant the same as a direct reference because of the irrelevant and prejudicial testimony and evidence presented at trial regarding the Little Debbie snack wrapper. R. 260, l. 18 – 276, l. 8; R. 287, l. 6 – 288, l. 9; R. 361, l. 7 – 363, l. 4; R. 374, l. 17 – 376, l. 6; R. 389, ll. 10-15; R. 395, l. 22 – 396, l. 2; R. 402, l. 1 – 403, l. 19; R. 415, l. 16 – 419, l. 22; R. 853, l. 18 – 859, l. 20; State’s Exhibit # 24; State’s Exhibit # 85; State’s Exhibit # 86. Appellant was further prejudiced by this irrelevant and prejudicial evidence because both the solicitor and counsel for the co-defendant reiterated that Appellant purchased the Little Debbie snack cake

wrapper in their closing arguments. R. 969, l. 21 – 970, l. 5; R. 1022, ll. 9-14.

The solicitor also elicited the following improper testimony from Officer Burnish:

Q: You were not there when Mr. Canty [co-defendant] gave a statement on the 15th?

A: I was in the building; I was not present for that statement.

Q: Now, what happened and what did you do next in your investigation?

A: *Based on the information that was received on that date is when we issued warrants for the arrest of Mr. Jackson.*

Q: Now, did you go look for Mr. Jackson?

A: Yes, we did.

R. 772, ll. 1-11 (emphasis added); *See State v. Johnson*, 390 S.C. 600, 703 S.E.2d 217 (2010) (finding the admission of a non-testifying co-defendant's testimonial confession to an investigator violation the *Bruton* doctrine). Therefore, regardless of the inadequate redactions, it was apparent given the context of the record that the non-testifying co-defendant was referring to Appellant in his five statements to law enforcement, and the inference was one that was obvious even without relying on the other testimony presented at trial. *See Gray*, 523 U.S. 185; *see also Holder*, 382 S.C. at 285-86, 676 S.E.2d at 694.

- II. The trial court violated Appellant's Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), by allowing five statements by Appellant's non-testifying co-defendant into evidence, which implicated Appellant in the murder and armed robbery.

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (quoting U.S. Const. amend. VI). The Confrontation Clause is applicable to the states under the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965). The South Carolina constitution provides the same protection to criminal defendants. S.C. Const. art. I, § 14; *See State v. Green*, 269 S.C. 657, 661, 239 S.E.2d 485, 487 (1977). The right of confrontation is essential to a fair trial in that it promotes reliability in criminal trials and ensures that convictions will not result from testimony of individuals who cannot be challenged at trial. *California v. Green*, 399 U.S. 149 (1970); *State v. Gillian*, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004).

The Confrontation Clause guarantees the accused the right to confront those testifying against him in court and further defines the scope of the admissibility of statements against him made by witnesses out-of-court. *See Coy v. Iowa*, 487 U.S. 1012 (1988). A defendant exercises his right of confrontation through cross-examination, which has been described as the "greatest legal engine ever invented for the discovery of truth." *Green*, 399 U.S. at 158 (internal quotations omitted). Notably, statements given to police during the course of law enforcement's investigation are testimonial. *See Davis v. Washington*, 547 U.S. 813, 22 (2006) (holding the Confrontation Clause of the Sixth Amendment, as interpreted in *Crawford v. Washington*, does not apply to "non-

testimonial” statements not intended to be preserved as evidence at trial).

In addition to the *Bruton* violation presented in this case, the five statements made to law enforcement by Appellant’s non-testifying co-defendant were testimonial and were crucial to the State’s case against Appellant. R. 79 – 150. Due to the co-defendant’s exercise of his Fifth Amendment right not to testify, he was unavailable as a witness and Appellant had no prior opportunity to cross-examine his accuser. Thus, the introduction of the inadequately redacted statements violated Appellant’s Sixth and Fourteenth Amendment rights to cross-examine and confront the witnesses against him. *Crawford*, 541 U.S. at 42.

The error in this case was not harmless for three reasons. First, the State failed to find any fingerprints or DNA linking Appellant to the crime scene or the items allegedly involved in the offense. R. 356; R. 396 – 441; R. 698 – 710; R. 721 – 722; R. 730 – 731. Second, the co-defendant’s statements contained inconsistent information and varying levels of Appellant’s culpability in the murder and armed robbery. Third, the co-defendant’s statements coupled with the irrelevant and improper testimony and evidence presented at trial (e.g., the Little Debbie snack cake and Officer Burnish’s testimony) denied Appellant his right to a fair trial by adversely affecting the jury’s verdict.

- III. The trial court erred in refusing to grant Appellant's motion for severance where Appellant's joint trial compromised his right to confront and cross-examine his accuser by admitting five inculpatory statements from his non-testifying co-defendant.

Criminal defendants who are jointly tried are not entitled to separate trials as a matter of right, and a defendant who alleges he was improperly tried jointly must show prejudice before an appellate court will reverse his conviction. *See State v. Dennis*, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999). The United States Supreme Court has held that severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt. *Zafiro v. United States*, 506 U.S. 534 (1993); *see also Dennis*, 337 S.C. at 282, 523 S.E.2d at 176. This Court has held that an appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial. *Hughes v. State*, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001). This Court has further held that cautionary instructions "may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial." *Dennis*, 337 S.C. at 280, 523 S.E.2d at 176. Motions for severance are addressed to the discretion of the trial court. *State v. Nichols*, 325 S.C. 111, 122, 481 S.E.2d 118, 124 (1997).

In *Bruton*, 391 U.S. 135-137, the United States Supreme Court held that an example of a specific trial right that may be prejudiced due to a joint trial is the constitutional right to cross-examination when a co-defendant's confession expressly implicates another co-defendant, but the confessor fails to testify during the trial. A curative instruction cannot remedy this violation. *Id.* Thus, the trial court erred in refusing to grant Appellant's motion for severance where Appellant's joint trial compromised his right to confront and cross-

examine his accuser by admitting five inculpatory statements from his non-testifying co-defendant. R. 148, l. 11 – 152, l. 2; *See State v. Singleton*, 303 S.C. 313, 315, 400 S.E.2d 487, 488 (1991) (“[W]e admonish trial judges to be cautious in allowing joint trials. While joint trials are permissible, trial judges must carefully consider problems which may arise from a joint trial, *such as redacted statements, and must assure protection of a defendant’s constitutional right to confront witnesses against him.*”) (quoting *State v. Bellamy*, 293 S.C. 103, 359 S.E.2d 63 (1987) (emphasis added)).

IV. The trial court erred in denying Appellant's motion for a mistrial when the non-testifying co-defendant's statements were not adequately redacted and a State's witness committed a *Bruton*-type error.

In determining whether to grant a mistrial, our Supreme Court has noted that "[t]he less than lucid test is . . . whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." *State v. Prince*, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). Specifically, the trial court is to consider the following factors when ruling on a motion for mistrial: (1) the character of the testimony; (2) the circumstances under which it was offered; (3) the nature of the case; (4) other testimony in the case; and (5) "perhaps other matters." *State v. Craig*, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976). Therefore, although the decision to grant or deny a mistrial is within the trial court's discretion, such discretion is not unfettered. *See State v. Edwards*, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007).

In this case, defense counsel moved for a mistrial on three separate occasions. The first mistrial motion occurred when Officer Thomas incorrectly stated that Appellant was a suspect based on her investigative report on the night of the murder. R. 329, l. 3 – 330, l. 15. The trial court refused to grant the mistrial motion, but agreed to strike the witness' answer and granted defense counsel's request for a curative instruction. R. 331, l. 5 – 332, l. 8. Defense counsel again moved for a mistrial after the close of the State's case, arguing that the State failed to adequately redact the non-testifying co-defendant's statements. R. 873, l. 19 – 877, l. 12. The trial court denied the motion for a mistrial. R. 878, ll. 13-21. Defense counsel then renewed his prior motions for a mistrial and subsequently moved for a new trial after the jury found Appellant guilty as charged. R. 943, l. 1 – 944, l. 21; R. 1051, l. 24

– 1052, l. 6. Defense counsel argued:

[T]he only logical inference would be that the jury must have decided to use those statements that Mr. Canty [co-defendant] gave against Mr. Jackson [Appellant], which we don't believe should be permitted under the law of Bruton, the confrontation of issues. The right that [Appellant] has under the United States Constitution and [the] constitution of our state, Your Honor.

R. 1052, ll. 19-23. The trial court ultimately denied both motions. R. 1054, ll. 17-21.

Notably, the solicitor also elicited the following improper testimony from Officer Burnish:

Q: You were not there when Mr. Canty [co-defendant] gave a statement on the 15th?

A: I was in the building; I was not present for that statement.

Q: Now, what happened and what did you do next in your investigation?

A: *Based on the information that was received on that date is when we issued warrants for the arrest of Mr. Jackson.*

Q: Now, did you go look for Mr. Jackson?

A: Yes, we did.

R. 772, ll. 1-11 (emphasis added); *See State v. Johnson*, 390 S.C. 600, 703 S.E.2d 217 (2010) (finding the admission of a non-testifying co-defendant's testimonial confession to an investigator violation the *Bruton* doctrine). Appellant was further prejudiced by the admission of the irrelevant testimony and evidence presented at trial concerning the Little Debbie snack wrapper. R. 260, l. 18 – 276, l. 8; R. 287, l. 6 – 288, l. 9; R. 361, l. 7 – 363, l. 4; R. 374, l. 17 – 376, l. 6; R. 389, ll. 10-15; R. 395, l. 22 – 396, l. 2; R. 402, l. 1 – 403, l. 19; R. 415, l. 16 – 419, l. 22; R. 853, l. 18 – 859, l. 20; State's Exhibit # 24; State's Exhibit # 85; State's Exhibit # 86.

Based on the prejudicial testimony and evidence presented at trial establishing Appellant as the "another person" in his non-testifying co-defendant's statements, "the ends of public justice" require that Appellant receive a new trial. *See* 75A Am. Jur. 2d Trial § 502 (1991) ("Whether an offer of improper evidence requires a reversal depends upon the character and importance of the evidence offered and the good or bad faith of counsel, and each case must be judged on its own circumstances. The vital inquiry usually is whether or not the verdict was substantially influenced by the impropriety.") (footnotes omitted). Accordingly, the trial court erred in denying Appellant's motions for a mistrial. *See Prince*, 279 S.C. 30, 33, 301 S.E.2d 471.

- V. The trial court erred in refusing to quash the jury panel pursuant to Appellant's *Batson* motion where the State's explanation for striking two African-American jurors was that the jurors did not want to serve on the jury, and where the State also failed to provide an explanation for striking another African-American juror.

A criminal defendant has the right to a fair trial by an impartial jury under the federal and state constitutions. See U.S. Const. Amend. VI; see also S.C. Const. art. I, § 14; *State v. Salters*, 273 S.C. 501, 257 S.E.2d 502 (1979). This guarantee includes the right to a selection process that is unbiased and fair to the defendant and the jurors. See *Powers v. Ohio*, 499 U.S. 400, 410-16 (1991). The United States Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment prohibits the prosecution from striking potential jurors on the basis of race. *Batson v. Kentucky*, 476 U.S. 79 (1986). Consequently, a trial court must hold a *Batson* hearing when members of a cognizable racial group are struck and the opposing party requests a *Batson* hearing. See *State v. Haigler*, 334 S.C. 623, 629, 515 S.E.2d 88, 90 (1999).

Batson and its progeny "protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venire person's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process." *State v. Rayfield*, 369 S.C. 106, 112, 631 S.E.2d 244, 247 (2006). Therefore, "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U.S. 472 (2008).

Furthermore, "[w]hether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record." *State v. Edwards*, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009). The trial court's finding of purposeful

discrimination rests on its evaluation of demeanor and credibility. *Id.* at 509, 682 S.E.2d at 823. "Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and an 'evaluation of the [attorney's] mind lies peculiarly within a trial [court's] province.'" *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). This court will give the trial court's finding great deference on appeal and review the trial court's ruling under the "clearly erroneous" standard. *Id.*, 384 S.C. at 509, 682 S.E.2d at 822.

In *Purkett v. Elem*, 514 U.S. 765, 767 (1995), the United States Supreme Court set forth the procedures for a trial court to follow when a party challenges a peremptory strike. The South Carolina Supreme Court adopted that procedure in *State v. Adams*, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996). Specifically, *Batson* challenges follow a three step process: (1) the opponent of the strike requests a hearing and asserts a *prima facie* case of racial or gender discrimination; (2) the proponent of the strike must offer a race or gender neutral explanation; and then (3) the opponent must show the race or gender neutral explanation was mere pretext. See *State v. Cochran*, 369 S.C. 308, 314, 631 S.E.2d 294, 298 (Ct. App. 2006).

The "second step of this process does not demand an explanation that is persuasive, or even plausible." *Purkett*, 514 U.S. at 767-68. The South Carolina Supreme Court recognized that the proponent of the strike does not carry "any burden of presenting reasonably specific, legitimate explanations for the strikes. *Adams*, 322 S.C. at 123, 470 S.E.2d at 371; See *Purkett*, 514 U.S. at 768 (finding unless discriminatory intent is inherent in the explanation, it is deemed race neutral at step two).

During the third step, the moving party “must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination.” *Cochran*, 369 S.C. at 315, 631 S.E.2d at 298 (citing *Adams*, 322 S.C. at 124, 470 S.E.2d at 372). “This burden is generally established by showing similarly situated members of another race were seated on the jury.” *Id.* “Unless the discriminatory intent is inherent in a fundamentally implausible explanation, the opponent of the strike must make a bona fide showing that the proponent of the strike seated a juror who shared nearly every quality with the struck juror other than race to establish pretext.” *Id.*

However, “[u]nder some circumstances, the explanation given by the proponent may be so fundamentally implausible the trial judge may determine the explanation was mere pretext, even without a showing of disparate treatment.” *Edwards*, 384 S.C. at 508-09, 682 S.E.2d at 822. Accordingly, if the trial judge determines the race and gender neutral explanations were mere pretext, then the trial court must quash the jury panel and select a new jury. *Cochran*, 369 S.C. at 315, 631 S.E.2d at 298; *See Riddle v. State*, 314 S.C. 1, 14, 443 S.E.2d 557, 565 (1994) (finding courts will examine the totality of the facts and circumstances in the record to determine if a *Batson* violation has occurred); *see also State v. Johnson*, 302 S.C. 243, 395 S.E.2d 167 (1990) (finding the composition of the jury panel is also a factor that may be considered when determining whether a party engaged in purposeful discrimination).

In this case, the totality of the facts and circumstances surrounding the selection of the jury demonstrates that a *Batson* violation occurred and that the trial court erred by not quashing the jury panel. R. 77, ll. 3-12; *See generally State v. Edwards*, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009) (finding “[w]hether a *Batson* violation has occurred must be

determined by examining the totality of the facts and circumstances in the record"). Specifically, the solicitor struck eight African-American jurors and one white juror during jury selection. R. 57 - 69. Despite the solicitor's statement, that "every [juror] on this list had . . . a serious conviction or charge[.]" the solicitor failed to show a conviction or pending charge for half of the African-American jurors struck: (1) #157—Patricia Williams; (2) #167—Marion Thomas; (3) #32—Essie Dallas; and (4) #140—Walnetta Spears. R. 74, l. 8 - 76, l. 18.

As for juror #157—Patricia Williams, the solicitor claimed: "[I]t was obvious to me she wanted off. And everyone that wanted off, that is my reason that I chose not to present her." R. 74, l. 22 - 75, l. 5. Concerning juror #167—Marion Thomas, the Solicitor noted that this juror was unemployed and that he struck an unemployed white male. R. 75, l. 24 - 76, l. 3. Regarding juror #32—Essie Dallas, the solicitor maintained, "[I]n my notes . . . said she did not want to serve." R. 76, ll. 7-9. Notably, the solicitor failed to provide an explanation for striking juror #140—Walnetta Spears.

Based the solicitor's insufficient explanations for striking the African-American jurors, the trial court ruled, "Well, I looked at the jury . . . you're not entitled to the perfect jury or to one of all - - but certainly the ones who have pending charges, I find that to be race neutral and deny your motion. . . . And for your record, your motion is denied." R. 77, ll. 3-12. Therefore, the trial court erred in refusing to quash the jury panel pursuant to Appellant's *Batson* motion and the final composition of the jury. R. 77, ll. 3-12; *See Batson*, 476 U.S. 79; *see also Edwards*, 384 S.C. at 508-09, 682 S.E.2d at 822.

CONCLUSION

For the foregoing reasons, Appellant Daniel Jackson respectfully requests that this Court reverse his convictions and sentences and remand this case to the Sumter County Court of General Sessions for a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of March, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 11th, 2014



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DANIEL D'ANGELO JACKSON,

APPELLANT

CERTIFICATE OF SERVICE

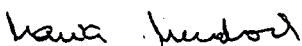
The undersigned attorney hereby certifies that a true copy of the Final Brief in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Columbia, SC 29201, this 11th day of March, 2014.



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SUBSCRIBED AND SWORN TO before me
this 11th day of March, 2014.

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

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
William Jeffrey Young, Circuit Court Judge

Appellate Case No. 2011-199366

THE STATE,

Respondent,

v.

DANIEL D'ANGELO JACKSON,

Appellant

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in admitting into evidence five statements made by Appellant's non-testifying co-defendant without adequately redacting the portions implicating Appellant in violation of his Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses against him, as interpreted by Bruton v. United States, 391 U.S. 123 (1968) and its progeny?
- II. Did the trial court violate Appellant's Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses pursuant to Crawford v. Washington, 541 U.S. 36 (2004), by allowing five statements by Appellant's non-testifying co-defendant into evidence, which implicated Appellant in the murder and armed robbery?
- III. Did the trial court err in refusing to grant Appellant's motion for severance where Appellant's joint trial compromised his right to confront and cross-examine his accuser by admitting five inculpatory statements from his non-testifying co-defendant?
- IV. Did the trial court err in denying Appellant's motion for a mistrial when the non-testifying co-defendant's statements were not adequately redacted and a State's witness committed a Bruton-type error?
- V. Did the trial court err in refusing to quash the jury panel pursuant to Appellant's Batson motion where the State's explanation for striking two African-American jurors was that the jurors did not want to serve on the jury, and where the State also failed to provide an explanation for striking another African-American juror?

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Daniel D'Angelo Jackson, was jointly indicted at the September 11, 2008 term of the Court of General Sessions for murder and armed robbery with his co-defendant Reginald Canty. R. 43. 2008-GS-43-0993 (ROA 1073-74). The case involved the January 12, 2008 murder of William Flexon. Jackson was represented at trial by Arthur H. Wilder. Canty was represented by Garryl L. Deas, Jr. of the Sumter County Bar. They proceeded to trial on August 8, 2011 before the Honorable William Jeffrey Young, Presiding Judge. The case was prosecuted by Assistant Solicitor John P. Meadors of the Third Circuit Solicitor's Office.

On August 11, 2011, the jury found the Appellant and his co-defendant guilty on both counts. R. 1044-45. Judge Young sentenced Canty to thirty (30) years for murder and thirty (30) years for armed robbery, concurrent. R. 1065. Jackson was sentenced to life imprisonment for murder and thirty (30) years for armed robbery. R. 1066.

A motion to reconsideration, judgment NOV, mistrial and motion for a new trial was made on August 16, 2011. ROA 1067. Judge Young denied the motion on August 23, 2011.

The Appellant timely appealed the conviction and sentence on September 7, 2011. This briefing follows.

RESPONDENT'S STATEMENT OF THE FACTS

William Flexon, a pizza delivery man, was gunned down to death by two shots on January 12, 2008 at an abandoned trailer at Lot 7, Cherryvale Road in Sumter County. He was lured there by the Appellant and co-defendant Reginald Canty in a robbery plot.

The incident begins at Sambino's owned by Tanya Knudson. R. 189. Around 8:04 pm that night, Sambino's received a telephone call from a male-like voice ordering three large pizzas

(pepperoni, sausage, double cheese). R. 192-93, 743-44, 746. State Exhibit 82. When asked, Tanya was told the call was being made from a pay phone. R. 193. The delivery was to go to Lot No. 7, O.C. Mobile Home Park in Cherryvale. R. 197. Tanya takes the order.

The next delivery person scheduled was Al. However, the victim, William "Bill" Flexon, takes the order instead.¹ R. 200-01. Before the order is taken, Sumter County Deputy Sheriff Jennifer Griffin, now Thomas, is eating at Sambino's and sees Flexon leave with the pizzas. R. 202.

Deputy Thomas later receives a call about shots being fired at Cherryvale. R. 203. She leaves Sambino's, goes to Lot 7 at the O.C. Mobile Home Park and finds Bill Flexon's body on the ground. R. 308.

Tanya learns that it is her delivery carrier who was shot. R. 203. She leaves and goes to the mobile home park and gets into contact with Sergeant Burnish. R.p. 204, 213, ll. 18-25. [Tanya records the number for the call as 415-656-1073. R.p. 196, l. 4; p. 214, ll. 18-25.] Tanya identifies the closest pay phone to Sambino's as being at the Cherryvale Grocery. R.p. 204, ll. 8-11.

They go to the Cherryvale Grocery and speak with Eugene Mackovitch. R.p. 259-261. A video from the camera reveals that two men came into the grocery. R.p. 260-261. Mackovitch is not able to identify the defendants, although he stated that they look familiar. R. 271.

One of them is subsequently identified as co-defendant Daniel Jackson by Anitta Shannon, a grocery employee after viewing the video as the fairer skinned male on Sunday

¹ Flexon had worked at Sambino's as a delivery driver for 3 years. R. 190-91.

January 13, 2008. R.p. 294-96, 303, 713-756. [Canty is subsequently identified from the video by Investigator Burnish on January 14. R.p. 770-71.] Mackovitch sold one of the two a "Little Debbie" snack. R.p. 261-62, 275. However, the one who purchased the snack leaves with the snack in his right hand. R.p. 267.² After leaving, Mackovitch saw them turn to the right toward where the payphone is located. R. p. 268-69, 276-77. Mackovitch states that he does not use the pay phone. R.p. 271. Another person is also seen in the video in a black hooded jacket. R.p. 837-38 (confirms black hooded individual in store video). See also, R. p. 978-79, 982 (closing Argument of Counsel Wilder concerning other person in black hoodie at the store in the video).

State Exhibit 24 is a Little Debbie snack wrapper and appears to be a product sold in Cherryvale Grocery. R.p. 269-70, 853. See also State Exhibit 86. (photograph of wrapper near vehicle tire). R.p. 858. The sell by date on the wrapper is 1/22. Cherryvale Grocery receives fresh product in the store. R.p. 269-70. This exhibit was discovered on the side of the road near the entrance to lot 7. R.p. 374. It was 137 feet away from the victim's body. R.p. 416-18. There was insufficient ridge detail on the wrapper for positive fingerprint identification. R.p. 428. At the crime scene, evidence is gathered, including two pizza boxes from Sambino's. R.p. 221, 223, 381-82.

Based upon law enforcement leads, they go to co-defendant Jackson's aunt, Andrea Russell. R.p. 486-87. Jackson had been there, but fled when the police arrived. R.p. 485-87.³

² The only incident Mackovitch could remember from that night was when a couple individuals came in and were in the back and Mackovitch had other customers coming in and out and he thought he saw one of the people put something in their pocket. Then they came to the counter and bought a Little Debbie Snack. As they were leaving, Mackovitch went around the counter and approached him and asked if he had anything in his pocket. The person said no and then Mackovitch let him go. R.p. 260-61,

³ See the statement Jackson made when being read his arrest warrants about seeing law enforcement come

However, after the police leave, he returns. R.p. 488. Andrea Russell subsequently calls the Clarendon County Sheriff's Office and advises them that she found a rifle under her futon and asks them to come and get it. R.p. 446. They retrieve the rifle and a box of bullets that she says were not hers. R.p. 446-450, 490, 774. Russell states she discovered the rifle while vacuuming that day. In addition, Russell states that she had some peanut butter on the morning in question and nothing was in her jar but later that same evening when she opened the peanut butter jar there was a shell casing in the jar. R.p. 491-93.

Evidence was presented that Jackson had called Isaac Boyd's wife on January 13 asking him to be picked up from the American Inn in Sumter. R.p. 507. Boyd is Jackson's uncle. He testified that he picked him up and took him to Curtis Wheeler's place to pick something up. While Boyd stayed in the car, he saw Jackson and Wheeler go to an abandoned trailer by the woods. Jackson had told Boyd that he needed to pick up some clothes. Jackson returns with a clothes basket, but Boyd did not realize that there was a rifle in the basket until he got back to Sumter. R.p. 510-11. At that time Boyd takes Jackson to his aunt's house (Andrea Russell). While this occurred on a Sunday night, Boyd claimed that Jackson asked him to lie and say that it was Saturday night. R.p. 511.

Law enforcement searches co-defendant Canty's house and finds a 30-30 shell casing under his bed while searching for a weapon in a consent search. R.p. 630. See State Exhibit 75. R.p. 693.

During the autopsy, law enforcement learns that there were two bullets removed from the

to the apartment complex and that he ran out, away. Further, after the warrants were served on him, were read, he (Jackson) asked the question how can he be charged with armed robbery if he did not take any money from the pizza man. R.p. 778.

victim. R.p. 460-61, 769. SLED forensics firearms examiner Tracy Thrower determined that the bullets came from two different firearms. R.p. 672. He opined that one of the bullets came from the rifle (.30 caliber rifle style bullet) located under the futon at Jackson's aunt's home. R.p. 676-77. He opined that the other bullet did not come from the Winchester rifle. He stated that the bullet was too large in diameter. R.p. 678, 691. He also opined that the cartridge, State Exhibit 69, was fired from the Winchester rifle. R.p. 679. This cartridge was recovered from the peanut butter jar at Andrea Russell's home. R.p. 492. In response to a leading question from Jackson's counsel, Thrower also opined that the cartridge found under Canty's bed was fired by the rifle at some point. R.p. 696, ll. 1-23. State Exhibit 71. Subsequently, Investigator Burnish testifies that he recovered the 30-30 shell casing from underneath Canty's bed, had it sent to SLED, received information that the shell casing was fired from the rifle and then warrants were issued for Canty. R.p. 783-84.

Investigator Burnish went to Canty's front porch and determined that Canty would not have been able to see lot 7 from that position, which is contrary the Canty's January 25, 2008 statement. R.p. 792, ll. 4-9. Investigator West also stated that he could not see Lot 7 from Canty's porch when they were conducting the search. R.p. 654. West stated that someone sitting on the porch of Canty's home who said they were watching the area where the shooting occurred would not be able to see because of the bush. R.p. 629, 654.

On January 13, law enforcement speaks with the co-defendant Reginald Canty. R.p. 760-65. In his initial statement, he denies any knowledge of the crime. In his next statement, Canty states he was there. R.p. 767-68. However, in these initial statements to Deputy Burnish, Canty did not state that someone had asked him if he wants to rob the pizza man, R.p. 768-69. State

Exhibit 8, State Exhibit 9. These statements are set forth in detail within Argument I.

Officer Burnish stated that on January 13 Canty gave a second statement that concluded at 6:00 PM. R.p. 766. In this statement, Canty describes: "I seen the two people fighting, and I hear the gunfire, and I see the man fell on the ground, fell down . . . And the bad guy ran. He looked like he could be James or J-Boy because he had a black hoodie with a dragon on the back with short pants with blue designs on the pockets . . ." R.p. 767, ll. 2-18. (Emphasis added) (James or J-Boy is never identified in the trial record.). State Exhibit 9.

Reginald Canty gave another series of statements to law enforcement. Canty was 16 years old at the time. These statements are set forth in Argument I. The next contact with Canty was on January 15, 2008 by Investigator West at 10:35 am. R.p. 557, l. 16- p. 560, l. 25. State Exhibit 3. On January 17, 2008 at 3:34 PM, Reginald Canty made another statement to Investigator West, with his mother, Dorothy Canty present. R.p. 564-65. R.p. 580. R.p. 580, l. 19- p. 581, l. 10. State Exhibit 5. On January 25, 2008, Investigator West again talked with Canty with his mother present. R.p. 584-87. State Exhibit 7.

Investigator West had an interview with Appellant Jackson on January 16, 2008 at 9:03 PM. R.p. 593. Investigator West stated that at that time he gave Jackson his Miranda rights which Jackson waived. At that point West served Jackson with murder and armed robbery warrants. After being served with the armed robbery warrant, Jackson said "how could I be charged with armed robbery if I didn't steal anything from pizza man." R.p. 595, ll. 1-2. Jackson also told West that he saw the police coming to his aunt's apartment in Summerton and ran away, but watched the police while they were there. R.p. 595, ll. 5-7. See also, R.p. 646-647. Officer Burnish was present during this interview with Jackson. R.p. 778-79.

ARGUMENT I

- I. The trial judge did not err in admitting, in the joint trial, the statements of co-defendant Reginald Canty, which were properly redacted as to Appellant Jackson's name and did not facially incriminate Jackson.**

The Appellant contends that he is entitled to a new trial under Bruton v. United States, 391 U.S. 123 (1968), and its progeny because co-defendant Reginald Canty's statements were inadequately redacted. Within his argument, he claims that the state failed to redact "gender and race" and failed to redact information of familiarity by Canty with the other person. " Initial Brief of Appellant, p. 13. He further contends – apparently for the first time - that the Solicitor failed to redact the term "j-boy" from an earlier statement contending that this was the Appellant's nickname, although that argument was never named below and there was no showing in the trial record that that this was the Appellant's nickname or even a reference to the Appellant. See R. p. 129, l. 9, p. 767, ll. 9-10, p. 807, l. 13. (references to "James or J-boy"). He contends that the admission of evidence that connected the Appellant with the some of the statement of Canty concerning the purchase of a Little Debbie cake removed the effect of the redaction and therefore violating Bruton.

In response, the State submits neither Bruton nor its progeny require gender-neutral redaction nor forbid the use of neutral pronouns. See e.g. Gray v. Maryland, 523 U.S. 185, 196 (1998) (suggesting the substitution of the phrase "some other guys" for "deletion, deletion" did not violate Gray's Confrontation Rights under Bruton). Similarly, the fact that a non-testifying co-defendant's statement limits the amount of potential participants involved does not create a *per se* Bruton violation. In Jackson's case, there was no evident limitation within the redacted statement, which varied from one participant to three additional actors to an ambiguous

unidentified number of other persons. In fact, South Carolina has rejected both of these contentions. See State v. McDonald, 400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012), reh'g denied (Nov. 30, 2012), (finding that the use of the neutral term "another person" was acceptable in a redaction); State v. Garrett, 350 S.C. 613, 620-21, 567 S.E.2d 523, 526 (Ct. App. 2002)(finding the admission of a redacted statement made by Garrett's non-testifying co-defendant, Davis, in Davis and Garrett's joint trial did not violate Garrett's Confrontation Rights despite the fact the redacted statement used the phrase "the other guy" and Garrett was the only other male on trial). Rather, as was the case in Gray, a redacted statement violates Bruton and its progeny only when the inferences flowing from the redactions contained within the statement "obviously refer . . . [to] the defendant" such that "were the confession the very first item introduced at trial" the jury could "immediately" construe the statement against the accused. E.g. Gray, 523 U.S. at 196("The inferences at issue here involve statements that, despite redaction, obviously refer to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial."). Therefore, in a case such as this where there are no obvious redactions in Canty's statements, the redacted statements do not facially incriminate Appellant. Respondent submits that the trial judge did not err in admitting the properly redacted statements of Canty that removed any specific reference to Jackson by the reasonable use of the terms "another person" or "other person."

As set forth below, this case is distinguishable from State v. Henson (Davontay), Op. No. 27354, __ S.C. __, __ S.E.2d __, 2014 Westlaw 229891 (January 22, 2014) since the redaction would

not be seen to obviously refer to Jackson.⁴

Respondent submits that State Exhibits 3, 5, 7, 8, and 9, as redacted were properly admitted against Canty and not against Jackson. There was no Confrontation Clause problem.

HOW THIS ISSUE WAS RAISED AT TRIAL.

Prior to trial, a hearing was held pursuant to Jackson v. Denno, 378 U.S. 368 (1964), to determine the admissibility of the five statements made to law enforcement by Appellant's co-defendant, Reginald Canty. R. 79-150; State's Exhibit # 3 (Statement by Canty); State's Exhibit #

4 In Henson, the Court recently relied upon 3rd Circuit cases in United States v. Richards, 241 F.3d 335 (3rd Cir. 2001) to suggest that any use of a neutral pronoun replacement was error. Subsequent to Richards, the Third Circuit rejected that reading of Richards in Priester v. Vaughn, 382 F.3d 394 (3rd Cir. 2004). In Priester, the Third Circuit found replacing "other guy" in the statements for the other defendants made the roles unclear and the statement difficult to follow, but did not violate Bruton. The Third Circuit relied upon 3rd Circuit cases in Richards, 241 F.3d 335 to suggest that any use of a neutral pronoun replacement was error. The Third Circuit limited its holding in Richards where the use of the word "friend" combined with the testimony unequivocally limited it to the defendant. In Priester, where there were numerous alleged perpetrators involved in the shooting, "the phrases 'the other guy' or 'another guy' are bereft of any innuendo that ties them unavoidably to Priester." The Court found: "In Richards, the replacement was tantamount to an explicit reference to the co-defendant; the same cannot be said for the redaction in the instant case." Priester, 382 F.3d at 400-401. Similar to Priester, the use of the neutral pronouns here do not contain nicknames or descriptions that directly implicate Jackson.

In the Sixth Circuit case relied upon in Henson, Stanford v. Parker, 266 F.3d 442 (6th Cir. 2001), the Sixth Circuit concluded that the redacted phrase "the other person" was insufficient to infer it referred to the defendant. However, the Sixth Circuit found the reference harmless Bruton error where the defendant had made admissions and forensic evidence supported the conviction. The Court felt the other person reference in the statement was unlikely to be seen as other than the Appellant rather than a named third party where the State was pushing for the conviction of the defendant as the shooter. However, the Sixth Circuit in United States v. Vasilakos, 508 F.3d 401 (6th Cir. 2007), limited the holding Stanford and reached an opposite result concluding that "the government may avoid a Bruton violation by replacing the name with a neutral term such as "another person", "another individual", or "the person", relying upon Akinkoye, 185 F.3d 192 in its rejection of Stanford.⁴ As the various Courts have held, the admission of the statement should be viewed in isolation from the other evidence at the trial. Unlike Gray, the redaction of the word "deleted" which pointed directly to the defendant, these neutral references were without an indication that there was a redaction of Jackson's name.

The possible reliance upon Jefferson v. State, 359 Ark. 454, 198 S.W.3d 527 (2004) is also misplaced. In Jefferson, three were involved in a crime and one defendant pled guilty and two were jointly tried. Similar to Holder, the neutral references from the co-defendant's statement made it clear that a third person was involved and it was obviously directed to the appellant. However, the court distinguished United States v. Edwards, 159 F.3d 1117 (8th Cir. 1998) which concluded that referring to joint activity by neutral pronouns or indefinite words such as someone did not draw attention and in most situations no incriminating. In Edwards, there was a large cast of characters and some of the admission inculpated nondefendants weakening any inference that the use of "they" or "someone" referred to the declarant's co-defendant. Here, there are many references within the statements to an indefinite number of other persons weakening the inference. The present situation is more akin to Edwards than Jefferson.

5 (Statement by Canty); State's Exhibit # 7 (Statement by Canty); State's Exhibit # 8 (Statement by Canty); State's Exhibit # 9 (Statement by Canty); Court's Exhibit # 9 (Collection of Statements). Officers Dominick West and Robert Burnish of the Sumter County Sheriff's Office testified at the Jackson v. Denno hearing. The trial court ultimately found that the co-defendant's statements to law enforcement were admissible because the statements "were made freely and voluntarily." R. 150, ll. 6-14.

Prior to the admission of the statements, the Solicitor proposed that every time it states DeAngelo or a form of the Appellant's name that it be replaced with the term "another person." R.p. 546, ll. 5-6. The prosecutor and counsel went through the particular statements and how they would be read using the term "another person" and removed one line completely. R.p. 546-550, l. 8. [Note – "James" or "J-boy" is not redacted in this process.]

The trial judge declared that this satisfied the requirements of Bruton. R.p. 550, ll. 9-10. The defense noted that there were references where Canty stated "something like I heard him say." Counsel Wilder stated that he was objecting based upon the whole process and the problem of being able to confront his witnesses. In camera, the prosecution clarified with the witness the requirements of stating "another person" in any of the five references on the oral statement. R.p. 552-53. The defense did not assert other redactions were specifically necessary concerning either gender, race or familiarity.

WHAT THE JURY HEARD

Canty's statements were subsequently entered into evidence over defense counsel's objection and were read aloud to the jury. R. 563, l. 19 – p. 564, l. 3; R. 583, ll. 4-9; R. 587, l. 22 – p. 588, l. 3; R. 761, ll. 8-13; Tr. 765, ll. 20-25; State's Exhibits # 3, # 5, # 7, # 8, # 9.

Former investigator West testified about the redacted January 15, 2008, 10:35 am statement to the jury by Canty :

On the night of the shooting, **another person** asked my cousin Desmond Canty to take him to Cherryvale Grocery. I went along. I went along because I needed batteries. After arriving at the store, me and **another person** got out of the car and went to use the pay phone. So I stood beside him swinging my phone and I overheard him stating . . . he wanted to order 3 large pizzas: one all pepperoni, one all cheese, and I didn't hear the other one. He told him while on the phone with the order that the address 1128 Cherryvale Drive, lot 7. He got off the phone and we went in the store. I went to look for some batteries, and **the other person** brought a snack cake. While I was in the store, the manager approached me and asked me what I took, and I told him nothing, that I had my phone. **Another person** was standing to the door waiting for me. After we left the store, we was going back home, and **the other person** asked to be dropped off at Oaklawn, but we had already passed it. So, we went back to -we went back home, and the **other person** left walking. I went inside and then came back outside to sit on the porch. As I came out the house, I saw **the other person** walk by. I asked where, where where he going, and he said nothing and walked toward the back of the mobile home park. Tonya Rush, who stayed beside me, she told me to watch her house. I went to the house and got something to drink, sat on the porch, and I saw car lights where lot 7 is. I went-I went to my fence. I saw a white man wrestling with a tall black man over a gun. The black man told him to stop, and then I heard a gunshot. **The other person** was standing next to the van looking at the guys wrestle. **The other guy** had a handgun that looked like a revolver. After the gunfire, everyone ran. I ran in the house. I told my moms what I saw later on that night. I wasn't truthful to law enforcement at the beginning because I was nervous and scared because I never saw anyone get killed before.

R.p. 557, l. 16- p. 560, l. 25. State Exhibit 3. (emphasis added).

Investigator West testified about another statement Canty gave on January 17, 2008 at 3:34 PM. R.p. 573. Investigator West reported this new oral statement, as redacted was as follows:

Reginald Canty was brought to LEC, Law Enforcement Center, accompanied by his aunt, Ms. Glover. Reggie's mother, Dorothy Canty, arrived at the LEC and the interview began. I started by advising Reginald of his Miranda Rights, and he signed the waiver of rights form in front of his mother due to the fact that he was being charged at the present time. After reading him his Miranda

right, I then advised Reginald that his story in the past was inconsistent and that he needed to be truthful from here on out. **Reginald began telling the story of the events that happened on how he was at home and another person approached him and asked him whether he wanted to make any money by robbing a pizza man, and he told him yes.** Reginald then stated he asked his cousin, Desmond Canty, to take him and **another person** to the store, Cherryvale Grocery, where he stated that **another person** made a phone-made a telephone call to Sambinos Pizza Restaurant. Reginald then stated that they went inside the store, and he wanted to buy some batteries, but did not-they did not have the kind he wanted. Reginald stated that **the other person** brought a Debbie snake cake and left the store. I then asked what-I then asked what did they do next. And he stated they went back to his house, and **another person** walked back to the rear or to the mobile home park, O.C. Mobile Home Park, and **watched until the pizza man drove up in the van.** **He began to say he stood in his yard by the gate and saw a black male struggling with the pizza man and another black male holding a revolver. I asked him how he knew it was a revolver, and it being dark with no lighting on, and he said there was a glare coming from the gun. He then said-he then stated it was not supposed to happen like that. And I asked him what did he mean by that, and he said that the pizza man was not supposed to get shot. He stated it was an accident. His mother then asked him how he knew it was an accident, and you said you weren't there. How you knew it was a revolver and it was dark outside. Reginald then began to cry. He stated that he did not shoot and kill anyone. He kept saying it was a accident, and he kept saying he wasn't there. So, I asked him there is no way you can say it was a accident and you weren't there, and he put his head on the table and continued to cry.** Reginald then stated that the suspects ran away and he ran in the house.

R.p. 572, l. 24 – p. 575, l. 25 (emphasis added).⁵ During this meeting, State Exhibit 5, a written statement was prepared. The oral statement that was recorded above was then written out onto a written statement form by Canty and was then read by Investigator West aloud. The written statement (similar as the oral one above with a few minor differences) begins on R.p. 579 and continues thru R.p. 580. Beginning at R.p. 580, l. 19, the statement goes into when the pizza man arrived and the written statement is more detailed than the oral one. The written statement

⁵ During the oral part of the 1/17/08 interview with Canty, Canty told West that he did not shoot or kill anyone. R.p. 597. Canty also claimed that it was the "other person" that made the call that night. R.p. 600.

reads:

Toya left. I then went and sat on my porch until the pizza man came. I saw a silver in color Chrysler van pulled up, and it pulled up to the back where **another person was-the other person** was. The pizza man stayed in his vehicle for approximately 3 minutes, and he then-and then-he then got out and went to the abandoned residence, lot number 7, and saw the door open and turn around and went back to his vehicle real fast. **The pizza man was met by three males with hoodies. Another person** was one of the males, and I didn't-and I don't know who the other two were. **The pizza man was trying to take the gun rifle away from the black male, and the black male told the pizza man to stop, and then the gun fired.** After I saw the man got shot, I ran in the house and told my moms I heard a gunshot.

R.p. 580, l. 19- p. 581, l. 10. State Exhibit 5.

On January 25, 2008, Investigator West again talked with Canty with his mother present.

R.p. 584-87. At this time, Canty wrote out State Exhibit 7 which read as follows:

When we got home, **another person** went to the back of the trailer, **and he wait at the back for the pizza man to come. When the pizza man came, they started to rob the man.** The pizza man was trying to take the gun from **another person**, and **this person** said stop. And after he said stop, he shot the pizza man. It's a-then he stayed there for a second. Then he ran. It looked like it was **another person** running away with **the other person** around the car.

R.p. 586, l. 25- p. 587, l. 9.

In addition to these redacted statements, statements Canty gave on January 13, 2008 before the above were presented after redaction. In State Exhibit 8, as redacted and presented to the jury, Canty stated to Officer Burnish and Horton at the Peach Orchard and put in writing:

I leave Toya's house, and she asked me to watch her house. When she leave. So, I went and sat on my step and I seen lights. So, I went to see what [who] it was, and then that's when I see two people fighting, and I hear somebody say no, stop. I hear the gunfire. So, I went into the house and told my mother. The gun looked like a rifle and the person that was holding the gun had a hoodie, but I couldn't see his face.

R.p. 764, ll. 4-13, 23 - p. 765, l. 8. State Exhibit 8.

Officer Burnish stated that he had a second opportunity to speak with Canty that date around 4:45 and Canty gave a statement that concluded at 6:00 PM. R.p. 766. In this statement, Canty stated:

I leave Toya house and she ask me to watch her house when she leave. So, I went and sit on my step and I seen a light. So, I went to the end of my gate, and I seen the two people fighting, and I hear the gunfire, and I see the man fell on the ground, fell down. . . And the bad guy ran. He looked like **he could be James or J-Boy because he had a black hoodie with a dragon on the back with short pants** with blue designs on the pockets, and the front of the hoodie looked like it zips up with a black bandana on his face. **I think it got to be J-Boy** because he was out there around 3 p.m. that day. He shot the man with a long rifle and then ran around the car. Then I hear more than one footsteps running.

R.p. 767, ll. 2-18. (emphasis added) ("James or J-Boy" is never identified in the trial record.).

State Exhibit 9.

MOTIONS

After the state had rested its case, the defense made a motion for a directed verdict, and in the alternative, a mistrial. The defense argued : "Either the statements have been improperly redacted in order to get some circumstantial evidence . . . [, or there is no evidence in the record pertaining to [Appellant's guilt]." R.p. 873, l. 19 – p. 877, l. 12 (emphasis added). Defense counsel Wilder stated the prosecution failed to find any fingerprints or DNA linking Appellant to the crime scene or the items allegedly involved in the offense. R.p. 874, ll. 15-20. The trial court denied both the motion for a directed verdict and the motion for a mistrial. R.p. 878, ll. 13-21.

After the trial, counsel Wilder renewed his prior motions for a mistrial and subsequently moved for a new trial after the jury found Appellant guilty as charged. R.p. 943, l. 1 – p. 944, l. 21; R.p. 1051, l. 24 – p. 1052, l. 6. Defense counsel stated:

[T]he only logical inference would be that the jury must have decided to use those statements that Mr. Canty [co- defendant] gave against Mr. Jackson [Appellant], which we don't believe should be permitted under the law of Bruton, the confrontation of issues. The right that [Appellant] has under the United States Constitution and [the] constitution of our state, Your Honor.

R.p. 1052, ll. 19-23. Defense counsel further argued, "[T]hose rights were not afforded [to Appellant] because of the joint trial, the nature of the joint trial, and the denial of our motion for severance." R.p. 1052, l. 25 – p. 1053, l. 2. The trial court denied the renewed motion for a mistrial and the and the motion for a new trial. R.p. 1054, ll. 17-21.

Defense counsel filed a motion for reconsideration on August 16, 2011, arguing the trial court should have granted either the motion for a mistrial or the motion for a new trial. ROA 1067-1071. The trial court denied the motion for reconsideration in a written Order on August 24, 2011. ROA 1072.

STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review errors of law and are bound by the factual findings of the trial court unless they are found to be clearly erroneous. State v. Hernandez, 386 S.C. 655, 659, 690 S.E.2d 582, 584 (Ct. App. 2010).

The Confrontation Clause and the Admission of a Statement made by a Non-Testifying Co-Defendant in a Joint Trial.

An accused's constitutional right to confront and cross-examine witnesses against him is essential to a fair trial in that it promotes reliability in criminal trials and ensures convictions will not result from testimony of individuals who cannot be challenged at trial. State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). Specifically, the introduction of a non-testifying co-defendant's statement which implicates a different defendant violates that defendant's right to

confrontation because there is no opportunity to cross-examine the co-defendant on his statement. Bruton, 391 U.S. at 136-37. Indeed, the Bruton Court held the right to confrontation is so fundamental that limiting instructions alone are an inadequate substitute for safeguarding one's confrontation rights. Id. see also Gray, 523 U.S. at 194-95 (stating that because the use of an accomplice's confession "creates a special, and vital, need for cross-examination," a prosecutor desiring to offer such evidence must either comply with Bruton, hold separate trials, use separate juries, or abandon the use of the confession); Id. at 200, (Scalia, J., dissenting) (concluding a codefendant's confessions "may not be considered for the purpose of determining [the defendant's] guilt."); Richardson v. Marsh, 481 U.S. 200, 206 (1987) ("[W]here two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand"); Cruz v. New York, 481 U.S. 186, 189-190, (1987) (same); State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999) (highlighting that in Bruton, the Supreme Court held a defendant's rights under the Confrontation Clause of the Sixth Amendment are violated by the admission of a non-testifying co-defendant's confession that inculcates a defendant, even if a cautionary instruction is given).

In the wake of Bruton, redaction has come into play as a tool to allow for the admission of a co-defendant's statement in a joint trial. State v. Holmes, 342 S.C. 113, 119, 536 S.E.2d 671, 674 (2000). The purpose of redaction is to allow for the introduction of a statement against a non-testifying defendant who previously gave a statement, while avoiding implicating his co-defendant. Id. This is possible because the Confrontation Clause is not violated when a defendant's name is redacted but other evidence links the statement's application to the defendant and a proper limiting instruction is given. See Richardson, 481 U.S. at 211 ("[T]he

Confrontation Clause is not violated by the admission of a non-testifying co-defendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence."); see also Gray, 523 U.S. at 195; State v. Page, 378 S.C. 476, 481-482, 663 S.E.2d 357, 359-60 (Ct. App. 2008).

Nevertheless, redactions which obviously identify the defendant, even without naming him, create a constitutional violation that, like the unredacted statement in Bruton, cannot be cured by a jury instruction. Gray, 523 U.S. at 195-96.⁶ In particular, Gray differentiates statements that incriminate by inference or when linked with later evidence from those that obviously refer to a particular person or involve inferences a jury could make without additional evidence. Id. at 196. Indeed, only in the latter instance does a constitutional violation occur. Id.

⁶ For example, in Gray, a case in which a group of six were involved in the beating death of the victim, of which only Gray and Bell were tried on charges of murder, Bell's redacted confession, which was supposed to be offered only against him, was found to implicate Gray because the statement, when read to the jury, went as follows:

Question: "Who was in the group that beat [the victim]?"

Response: "Me, deleted, deleted, and a few other guys."

Id. In reversing, the Gray Court found the response "Me, deleted, deleted, and a few other guys" obviously incriminated Gray thereby violating his confrontation rights, because the use of "deleted" basically asked the jury to fill in the blank and question who was deleted and why. Id. at 193. Further explaining the Gray problem, the Court opined:

[T]he obvious deletion may well call the jurors' attention specially to the removed name. By encouraging the jury to speculate about the reference, the redaction may overemphasize the importance of the confession's accusation—once the jurors work out the reference. That is why Judge Learned Hand, many years ago, wrote in a similar instance that blacking out the name of a codefendant not only "would have been futile... [T]here could not have been the slightest doubt as to whose names had been blacked out," but "even if there had been, that blacking out itself would have not only laid the doubt, but underscored the answer."

Id. at 193-194. Illustrating the difference between an appropriate and inappropriate redaction, the Gray Court then provided an example taking the inappropriate redaction and asking, "[w]hy could the witness not, instead, have said:

Question: "Who was in the group that beat [the victim]?"

Response: "Me and a few other guys."

Id. at 196. In other words, Gray illustrated that an obviously redacted statement which leaves the jury to "speculate" about the reasons the identity of a person is concealed, is at odds with the Confrontation Clause, but a statement, which on its face, does not appear to conceal a person's identity is constitutionally permissible because the jury is likely to accept the statement at face value rather than questioning it. Id. at 193-96.

Gray differentiates between statements that incriminate by inference or only when linked with later evidence and those that obviously refer to a particular person or involve inferences a jury could make even without additional evidence. Id. at 196, 118 S.Ct. 1151. Only in the latter instance does a constitutional violation occur. Id.⁸ For example, in response to the question,

7 Statements that connect the defendant “only when linked to other evidence introduced at trial,” do not offend the Bruton rule. State v. Holder, 382 S.C. 278, 284, 676 S.E.2d 690, 693 (2009). However, redaction of the defendant’s name alone may not suffice to protect rights. “[O]ne 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. For example, use of the pronoun “she” when there is only one co-defendant, and she is female, still identifies the co-defendant and offends Bruton. Holder, 382 S.C. at 285. Moreover, 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). The use of a phrase which reflects a pointed identification being hidden from the juror would also appear to point directly to a co-defendant and would offend Bruton. See, for example, Gray, 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 (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. The Fourth Circuit has also noted 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). See, e.g., United States v. Lighty, 606 F.3d 321, 376–77 (4th Cir. 2010) (redacted statement of codefendant that he was accompanied by “three other people” did not violate Bruton); United States v. Jass, 569 F.3d 47, 61–63 (2nd Cir. 2009) (substitution of “another person” in place of defendant’s name did not violate Bruton); Kv Minh Pham v. Hickman, 262 F. App’x 35, 37 (9th Cir. 2007) (use of “friends,” “people,” “men,” “they,” “guys,” and “someone” did not violate Bruton).

8 Many circuits, like the Tenth Circuit in United States v. Verduzco-Martinez, 186 F.3d 1208, 1213–14 (10th Cir., 1999) (use of “another person” did not violate confrontation clause); , have permitted admission of a redacted statement using a neutral pronoun, even if other evidence would link the co-defendant to the redacted confession, so long as the redacted statement is not facially incriminatory with respect to the non-testifying co-defendant. See, e.g., United States v. Vega Molina, 407 F.3d 511, 519–21 (1st Cir. 2005) (holding that non-testifying co-defendant’s redacted confession, describing crimes in detail, acknowledging his participation in them, but using terms such as “other individuals” or “another person” when mentioning his co-defendants, was not so powerfully incriminating to bring Bruton proscription to bear); United States v. Logan, 210 F.3d 820, 822 (8th Cir. 2000) (determining there was no Sixth Amendment violation where officer testified that co-defendant said that he and “another individual” had planned and committed robbery); United States v. Akinkoye, 185 F.3d 192, 198 (4th Cir. 1999) (affirming denial of motion to sever because retyped versions of confessions replaced defendants’ respective names with phrases “another person” or “another individual”); United States v. Vejar-Urias, 165 F.3d 337, 339 (5th Cir. 1999) (“[T]his court has found on several occasions that admitting redacted confessions in which a pronoun was substituted for the defendant’s name did not violate Bruton.”); United States v. Hoac, 990 F.2d 1099, 1106–07 (9th Cir. 1993) (holding there was no Bruton error in admitting redacted confession in which “individuals” substituted for defendant’s name where jury was aware that several people were involved in conspiracy, including one who was not tried jointly); United States v. Williams, 936 F.2d 698, 699 (2nd Cir. 1991) (determining that co-defendant’s confession may be

“Who was in the group that beat [the victim]?” the response “Me, deleted, deleted, and a few other guys” obviously incriminates two codefendants of the crime of murdering the victim. *Id.* (internal quotation marks omitted). After *Gray*, however, the Fourth Circuit has continued to allow general references to “another person” or “another individual” in such statements, because “[t]he Supreme Court has strongly implied that such statements do not offend the Sixth Amendment.” *United States v. Akinkoye*, 185 F.3d 192, 198 (4th Cir. 1999). The implication to which *Akinkoye* refers is the Supreme Court’s explicit pondering in *Gray* about “[w]hy could the witness not, instead, have said: ‘Question: Who was in the group that beat [the victim]? Answer: Me and a few other guys,’ ” suggesting that such a neutral response would have been acceptable. *Gray*, 523 U.S. at 196. In *Akinkoye*, the non-testifying co-defendants’ confessions were retyped, with the defendants’ respective names replaced with the neutral phrase “another person” or “another individual,” and the statements were read to the jury. *Akinkoye*, 185 F.3d at 198. So

admitted with limiting instruction where redaction replaces reference to defendant with neutral pronoun); *United States v. Briscoe*, 896 F.2d 1476, 1502 (7th Cir. 1990) (holding that co-defendant’s statement that “we” concealed packages did not violate defendant’s confrontation rights because “we” did not directly implicate defendant in knowing possession of heroin). See also, *State v. Smith*, 162 Wash. App. 833, 851, 262 P.3d 72, 81 (2011) (approving use of neutral pronoun “other” and “another” in redaction did not violate *Bruton*); *Com. v. McGlone*, 716 A.2d 1280 (Pa. Super. Ct. 1998) (The redaction “used non-obvious substitutions that nonetheless acknowledged the defendant’s existence such as ‘other person’ or ‘another man,’ was not *Bruton* error).

Many courts, however, have also recognized that there are circumstances where no redaction or neutral pronoun substitution will suffice to eliminate a Sixth Amendment violation. See *Stanford v. Parker*, 266 F.3d 442, 456-57 (6th Cir. 2001) (concluding that Confrontation Clause was violated because “other person” in confession would not prevent jury from inferring confession referred to defendant); *United States v. Hoover*, 246 F.3d 1054, 1059 (7th Cir. 2001) (holding that “incarcerated leader” clearly referred to defendant in violation of *Bruton* because it was no more than obvious pseudonym and that to “adopt a four-corners rule would be to undo *Bruton* in practical effect”); *Richards*, 241 F.3d, 341 (determining that Confrontation Clause was violated by admission of co-defendant’s confession that referred to “friend” and “inside man”); *United States v. Gonzalez*, 183 F.3d 1315, 1321-22 (11th Cir. 1999) (concluding that there was a Confrontation Clause violation because prosecutor’s presentation of redacted confession implicated precise number (four) of confessor’s co-defendants), overruled on other grounds, *United States v. Diaz*, 248 F.3d 1065 (11th Cir. 2001); *United States v. Payne*, 923 F.2d 595, 597 (8th Cir. 1991) (holding that confession indicating plan to help “someone” escape from prison violated Confrontation Clause because everyone at trial knew that “someone” meant defendant).

redacted, neither confession facially implicated the other defendant. *Id.*⁹

Recently, the South Carolina Supreme Court addressed another Bruton issue in State v. Henson (Davontay), Op. No. 27354, __ S.C. __, __ S.E.2d __, 2014 Westlaw 229891 (January 22, 2014).¹⁰ In Henson, the South Carolina Supreme Court found that the manner of redaction violated the mandates of Bruton. In particular, the Court stated in assessing the particular circumstances that “the jury could infer from the face of Reid’s confession **without relying on any other evidence**, that the confession referred to and incriminated Henson”:

In his opening statement the solicitor asserted that four individuals—Henson, Reid, Ervin, and Newman—committed the crimes and that Henson was the shooter. Reid’s redacted confession was offered into evidence by the solicitor. It identified three individuals by name as committing the crimes and

⁹ In U.S. v. Lighty, 616 F.3d 321, 376 -377 (4th Cir. 2010), the Court found no constitutional violation in Flood’s case. CW’s testimony concerning the statements made by Lighty were found to be like those in Akinkoye and unlike the offending statements in Gray. In Gray, the defendants’ names were redacted in response to the direct question of who beat the victim. It was clear to the jury upon hearing the non-testifying codefendant’s response that the statement had been altered by the deletion of two names. Gray, 523 U.S. at 196, 118 S.Ct. 1151. There, as in Akinkoye, there was no way to facially identify the three other people without more information. Also, unlike in Gray, the 4th Circuit determined that it would have been unclear to the jury that the statements had been altered at all. Indeed, only when Lighty’s out-of-court statement to CW is linked with in-court testimony, which Flood had an opportunity to challenge through cross-examination, might one infer that the out-of-court statement refers to Flood. Following Gray, the Fourth Circuit Court of Appeals applied this reasoning to general references to “another person” or “another individual” in Akinkoye v. United States, 185 F.3d 192, 198 (4th Cir. 1999). Specifically, the Fourth Circuit said that redacted statements taken from Akinkoye, a male, and Afolabi, a female, each of which utilized the redaction mentioned above, and were offered only against themselves in their joint trial, did not violate either of their rights under the Confrontation Clause, despite the fact their statements said that another person aided them in committing the charged offenses. *Id.* In so holding, the Fourth Circuit said, “[t]he Supreme Court has strongly implied that such statements do not offend the Sixth Amendment.” *Id.* Thus, the proposition from Gray, that redactions which are not readily apparent to a juror and do not ask them to speculate whose identity is being concealed, but are instead, accepted at face value, do not violate one’s Confrontation Right’s under Bruton.

The Fourth Circuit has recently relied upon Akinkoye in United States v. Cone, 714 F.3d 197 (4th Cir. 2013). In Cone, the Court held that the substitution of the name “another individual” sufficient to protect the defendant’s rights. *Id.* 714 F.3d at 218. As the Court therein stated: “**only reference to other evidence could the jury arrived at the conclusion that [the defendant] was the subject of Cone’s out of court statement. In such circumstances, we have concluded that the Confrontation Clause is not offended.**”

¹⁰ At the time of the filing of the Initial Brief of Respondent, State v. Henson is awaiting action concerning a petition for rehearing to be made to the South Carolina Supreme Court. State v. McDonald has certiorari pending in the South Carolina Supreme Court.

acknowledged that another male participated and fired the fatal shots, but left that person unnamed. *The jury likely would infer that Henson—a male, seated before them as a defendant, and the only defendant not named in the confession—was the fourth individual and the shooter referenced in Reid's confession. The jury also could presume the solicitor would not both assert that Henson was the fourth conspirator and offer the confession into evidence if the solicitor believed the confession referred to anyone other than Henson.*

Henson, supra. (emphasis added).¹¹

Also, in McDonald, 400 S.C. 272 (cert. pending), the Court of Appeals concluded that Bruton was not violated where the defendant's name, like in this case, was redacted and

¹¹ Previously in State v. Garrett, 350 S.C. 613, 567 S.E.2d 523, 526 (Ct. App. 2002), the Court of Appeals adopted the same reading of Bruton and its progeny when it found that a redacted statement in which Garrett's name was replaced with the redaction, "the other guy" did not violate Garrett's Right to Confrontation, despite the fact that both Garrett and Davis, who were both males, were tried jointly. In Garrett, the victims were beaten, forced into the trunk of their car, and driven around by their assailants until they managed to escape. Garrett was identified as a suspect and tried with co-defendant Davis. Davis did not testify at trial, but the State introduced his redacted statement implicating himself, China, Cunningham, and "another guy" in the crime. Based upon this statement, Garrett moved for severance prior to the statement's admission, arguing the statement was inherently prejudicial because it implicated him as the "other guy." Id., 567 S.E.2d at 524-25. The trial court rejected this argument and on appeal, the Garrett Court upheld the trial court's denial of the severance motion finding that because the redacted statement did not incriminate Garrett, "on its face," and was accompanied by the appropriate limiting instruction, Garrett's Confrontation Rights were not at issue. Id., 567 S.E.2d at 526. Thus, Garrett essentially took the rationale from Gray, that the introduction of a redacted statement from a non-testifying co-defendant which does not appear to conceal a person's identity is constitutionally permissible so long as the statement does not implicate the accused on its face, and applied it to essentially the same factual scenario that are present here.

In the aftermath of Garrett, South Carolina Courts have consistently applied the rule from Gray in determining whether redactions sufficiently protect the accused, and, if so, considering whether the statement made by the non-testifying co-defendant is facially incriminating. Specifically, in State v. Holder, 382 S.C. 278, 285-86, 676 S.E.2d 690, 694 (2009) a homicide by child abuse case, our Supreme Court found the redacted statement from Holder's co-defendant stating that he "felt like she had been inflicting [bruises]" on the victim, Holder's young son, was facially incriminating and therefore, the admission of the statement was error. In other words, while the redaction itself, in this case the use of the word "she" was appropriate, the statement was still facially incriminating based on the allegations Holder faced. Specifically, because Holder was charged with homicide by child abuse and she was the primary caretaker of the victim, who was her young son, the statement made by Holder's co-defendant indicating that he believed "she" was responsible for his injuries to the victim clearly incriminated Holder on its face. Id. Therefore, Holder is clearly a fact-driven holding in that the statement when viewed against the allegations Holder was facing essentially resulted in a perfect storm of facts and circumstances which made the redacted statement at issue facially incriminating.

Holder, is quite different from the situation in State v. Johnson, 390 S.C. 600, 606-07, 703 S.E.2d 217, 220 (2010) insofar as Johnson, like the court in Gray, found the type of redaction utilized, specifically the use of a black magic marker to redact references to Johnson, created a Gray situation. In particular, the Johnson Court observed "the redacted confession clearly has a name eliminated from it, and the jury was charged about this omission" but later explained, "[t]his type of instruction cannot mitigate a Confrontation Clause violation." Id.

replaced by the neutral phrase "another person." The statement therein only implicated the statement's maker and did not limit participation to the three defendant's on trial.

Thus, it seems clear that South Carolina's courts, like the Supreme Court of the United States, ask two questions when reviewing the admission of a redacted statement in Bruton-type situations. First, does the method of redaction utilized in the non-testifying co-defendant's statement require the jury to speculate or fill in any obvious blanks with the non-testifying co-defendant's name? And second, if it does not, does the statement itself facially incriminate the accused?

Appellant's Confrontation Rights were not violated since the method used to redact Canty's various and inconsistent statements did not leave the jury to speculate or fill in any obvious blanks and Canty's statements do not "facially incriminate" Appellant Jackson.

In his brief, for the first time the Appellant contends that the State failed to redact references to Appellant's race and gender in the co-defendant's statements. R.p. 572, l. 24 – p. 575, l. 22; R.p. 578, l. 11 – p. 581, l. 10; p. 586, l. 10 – p. 587, l. 9; State's Exhibit # 3, # 5, # 7, # 8, # 9. Specifically, the solicitor failed to redact the pronouns in the co-defendant's statements (e.g., referring to Appellant as "Him" and "He"). In State's Exhibit # 5, the solicitor redacted Appellant's name, but failed to redact the reference to gender and the co-defendant's familiarity with the person: "The pizza man was met by 3 males with hoodies, another person was one of the males and I don't know who the other two were." The Appellant further claims that when examining State's Exhibit # 5 and # 7, these statements reveal race and gender of the unidentified person ("black male"). He further claims for the first time that in State's Exhibit # 9, the solicitor failed to redact "j-boy," and claims it is Appellant's nickname, but nothing in the

records suggests that “j-boy” is the Appellant’s nickname or street name and no reference is made to that alleged name connection at trial. The Appellant then also complains that read and emphasized the importance of the co-defendant’s statements during his closing argument. R.p. 1003, l. 6 – p. 1027, l. 16.

The various redacted statements did not facially incriminate Jackson. First, there was no reference to Jackson “on the face” of any of the statements. Within his brief, for the first time, the Appellant claims that reference in the second statement that Canty made on January 13, 2008 [State Exhibit 9] to “James or J-boy” was a direct reference to Appellant Jackson. Initial Brief of Appellant, p.13. However, at no time was Appellant Jackson equated with the identity of “James or J-boy” reflected in State Exhibit 9. At no time did Jackson’s counsel specifically object to the particular inclusion of “J-boy” in the redacted version of Exhibit 9. At no time did the State ever assert that “James or J-boy” referred to in Exhibit 9 was Appellant or the person with “a black hoodie with a dragon the back.” Contrary to the assertion, this was not a direct facial reference to the Appellant.

Second, the various and multiple references to “another person” “other person” at the time of the killing could not be always read to facially refer to the Appellant without otherwise being linked with other evidence. Contrary to the claim of Appellant, the evidence would require linkage to the other evidence presented. The jury could not have made any connection without relying upon other evidence presented at trial.

The number of other unidentified participants was unclear and inconsistent from the various statements. Concerning the crime scene, the number of involved participants were either one person [(State Exhibit 9, R.p. 767, ll. 9-10)(“looked like it could be James or J-boy”)], [State

Exhibit 8, R.p. 765, ll. 1-8 ("I see two people fighting and I hear someone said no, stop, then I hear gunfire ... and the person that was holding the gun had a hoodie")), two persons [(State Exhibit 9, R.p. 767, ll. 17-18)("I hear more than one footsteps running)], [State Exhibit 3, R. 40-47, ("I saw a white man wrestling with a tall black man over a gun, the black man told him to stop, and then I heard a gunshot. The other person was standing next to the van looking at the guys wrestle. The other guy had a handgun that looked like a revolver. After the gunfire everyone ran ...")]; (R.p. 574, ll. 9-13)(he stood in his yard by the gate and saw a black male struggling with the pizza man and another black male holding a revolver ..."), three males with hoodies, (State Exhibit 5, R.p. 581, ll. 1-8)("The pizza man was met by three males with hoodies. Another person was one of the males, and I didn't - - and I don't know who the other two were. The pizza man was trying to take the gun rifle away from the black male, and the black male told the pizza man to stop and then the gun fired.") or an unclear amount of perpetrators due to the ambiguity in the Canty's written usage of "another person." See (State Exhibit 7, R.p. 586, l. 25 - p. 587, l. 9)("another person went to the back of the trailer, and he wait for the pizza man to come, they started to rob the man. The pizza man was trying to take the gun away from another person, and this person said stop. And after he said stop, he shot the pizza man ... he stayed there for a second. Then he ran. It looked like another person running away with the other person around the car.")). The use of neutral pronouns in each of the co-defendant's statements removed the jury's speculation that a redaction had occurred. Rather, it enhanced Jackson's own argument that Canty's statements were inconsistent and lacked credibility. A reasonable juror looking only at each of the "confessions" themselves would not be able to reasonably infer that Jackson was the trigger person or another person identified at the crime scene from any of the

statements.

The Appellant complains that the statement referred to the Appellant's gender when it referred to "3 males with hoodies, another person was one of the males." State Exhibit 5. Unlike Holder, the reference to "male" was not a limiting reference that a juror could infer facially referred only to Jackson. Similarly, any reference to "black male" would not be inferred to be solely identifying Jackson on the face of the statement. In fact, reviewing the unredacted State Exhibits 3 and 5, this reference to "black man" was to an unnamed individual other than Jackson. Compare R.p. 85, ll. 11-23 (unredacted Exhibit 3) with R.p. 560, ll. 14-25. Compare R.p. 94, ll. 19-25 (unredacted Exhibit 5); R.p. 574, ll. 9-14. Both were ambiguous references in the redactions.

The reference to the purchase of a Little Debbie snack cake in the redacted statement by the "other person" (R.p. 574, ll. 1-3), "another person" (R.p. 579, ll. 19-24) or "the other person bought a snack cake" (R.p. 558, l. 25 – p. 559, l. 2) did not create Bruton error. These are not facially incriminating statements against Jackson. Unlike Gray, this reference would not be read to refer obviously to Jackson even if the statements were the first piece of evidence at the trial. Any significance to the purchase of a Little Debbie cake had to be developed through the trial evidence. The clerk testified "they" came in and bought a Little Debbie cake, but he could not identify who bought it. R. 260-61, 275. Another employee was able to identify Jackson from the video. R. 296. Subsequently, a Little Debbie wrapper was found near the crime scene. R. 374, 416-18. However, there was nothing that could identify the particular wrapper to a purchase that evening. R. 428, 858. This reference did not refer "on its face" to Jackson, although it was plainly inferable through the other evidence that was properly admitted against

him. However, the statement did not plainly indicate that this person was the only person involved in the crime.

Further, the degree of inference is slight due to the multiple possibilities of “another” or “other” persons within the individual statements. The inferential connection to the trigger person or the person with the revolver is tenuous and is not “facially incriminating” to Jackson than it is to the hooded unidentified person in the video at the grocery store. R. 281 (State Exhibit 18, State Exhibit 20, 21:01:09). Simply put, these statements do not incriminate Jackson on their face. A juror would not know what or anything that Jackson did from the statements. It may have been Marcus Branch, Desmond Canty, Junior’s nephew, or the unidentified man in the black hoodie in the store or any “other person” or other persons. This extensive redaction of Canty’s statements were consistent with Bruton-Richardson-Gray.

The attenuated reference to “another person” or “other person” is distinguishable from cases recently addressed by the court. Unlike Henson, the Canty statements would not be read to facially refer specifically to Jackson. To the contrary, the jury here would have to refer to other evidence to determine what role Appellant had in the crime. Unlike Henson, no other co-defendants were named though there were multiple other unnamed persons suggested in the statements. The jury could not assume from the face of any statement what Jackson did. Similarly, unlike Holder, the various statements had other individuals who were unidentified and did not uniquely point to Jackson as it did in Holder who was the only female on trial, where the jury would likely infer the reference to Holder. Similarly, the specific reference to “James or J-boy” was not a reference to the appellant and did not implicate any Bruton issue. In fact, it is not clear from the statement how many were involved.

Further, there was no singular “another person” identified in the various statements who had a particular role that the jury would have only inferred was Jackson. From the collateral evidence presented to the jury, it was clear that Jackson was identified by the store employee on the video. R. 296. His presence at the store was conceded by his counsel in his opening and closing statement. R. 173, 977, 982-83, 998. Similarly, it was shown that someone bought a Little Debbie snack on the video, but one of the employees was unable to identify who or what was brought. R. 260-64, 287. But see Tr. 275 (on video fairer skinned person purchases Little Debbie).¹²

Contrary to Henson, Holder, and State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980)(replacement of “LaBarge” to “Mister X” pointed directly to Defendant), it cannot be said that “another person” or “other person” at any or all times pointed to Jackson. Similar to McDonald, 400 S.C., 274-276(S.C.App. 2012), the “another person” phrase only implicated Canty and did not limit the participants or their discrete roles in the killing.

In the Final Portion of his initial argument, the Appellant complains that the following testimony from Officer Burnish was Bruton error. In particular,

Q: You were not there when Mr. Canty [co-defendant] gave a statement on the 15th?
 A: I was in the building; I was not present for that statement.
 Q: Now, what happened and what did you do next in your investigation?
 A: Based on the information that was received on that date is when we issued warrants for the arrest of Mr. Jackson.
 Q: Now, did you go look for Mr. Jackson?

¹² There were references to the other person seen on the video in the store wearing a black hooded sweatshirt. R. 280-81. Counsel Wilder presented this unidentified individual as leaving the store prior to Jackson in support of his theory. R. 183. He similarly referenced this unknown person in the hooded jacket in his closing. R. 977, 982. He also notes that this person left before an employee named Junior’s nephew, who both left before Jackson and Canty, during the critical time period. R. 981-82. See also, R. 258, 274-76, 284. The nephew was seen dancing in the store and walked to the right when he left. R. 282. However, the employee could not tell on the video what way the hooded sweatshirt man left. R. 281.

A: Yes, we did.

R.p. 772, ll. 1-11 (emphasis added). No objection was made to the inquiry by any counsel.

Respondent submits that claim the Petitioner about R. 772 is making is not preserved for the appeal due to the lack of a contemporaneous objection. "For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented ... and with sufficient specificity to inform the circuit court judge of the point being urged by the objector." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). "Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review." State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010). Here, no objection was made concerning the reference. It is not preserved.

Assuming arguendo that matter may be considered, the Appellant claims regardless of the inadequate redactions addressed above, it was apparent given the context of the record that the non-testifying co-defendant was referring to Appellant in his five statements to law enforcement and particular the January 15 statement. State Exhibit 3, R.p. 556-563. Respondent submits that this claimed inference concerning the statements does not create a Bruton error. First, other information had been developed prior to that point concerning Jackson. This included the identification of Appellant Jackson in the video by January 13, 2008. R.p. 294-96,770. He was immediately a suspect at that point on January 13, 2008. R. 376. Canty was recognized on January 14 as being the person with Jackson and that they had spoken to Canty previously. R.p. 771. The statements that Canty gave on January 13, State Exhibit 8 and State Exhibit 9 did not say anything about either Jackson or about another person asking him to rob a pizza man. R.p. 764-68. In the January 15 unredacted statement, it indicated only that "Deangelo was standing by

the van looking at the guys wrestling. R.p. 83-85. A reference to an unnamed "tall black man" was in the unredacted statement and references to Desmond Canty and DeAngelo Jackson were later redacted from the statement to another person or other person throughout. R.p. 83-85, 557-561. Furthermore, the questioning on R.p. 772 did not reference any specific information that was gained from the statement against Jackson or other information that may have been received.

However, the Appellant tries to read too much into the inferences he suggests about the testimony at R.p. 772. Simply put the officer testified that based upon the unstated information he had received, a warrant was issued for Appellant. For several reasons we find no error in the admission of the above testimony. First, Officer Burnish never repeated the January 15 statements made by Canty. Rather, he testified only to the conclusions he made based on what his investigation had thus far revealed. See State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 893 (1994) State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003) finding officers' statements explaining why they began their surveillance of defendant's apartment were not hearsay); State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct.App.2003) (" '[A]n out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken.' " (quoting Brown, 317 S.C. at 63, 451 S.E.2d at 894)). Furthermore, Burnish did not testify to any specific statements that identified Jackson. Because this testimony did not constitute hearsay, the trial court did not abuse its discretion in admitting it. See State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995)(stating the admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion). For all the foregoing reasons, his first argument is without merit.

HARMLESS ERROR

Any error in the admission of the statements was harmless error. Harrington v. California, 395 U.S. 250, 254, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969); Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); State v. Holder. Thus, even if Jackson's Confrontation Clause rights were violated, a harmless-error analysis must be applied. "Whether the error is harmless depends upon a host of factors, including: (1) the importance of the witness's testimony in the prosecution's case, (2) whether the testimony was cumulative, (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, (4) the extent of cross-examination otherwise permitted, and (5) the overall strength of the prosecution's case." Van Arsdall, 475 U.S. at 684.

The Appellant conceded being in the store contemporaneous to when the telephone call setting up the pizza man was made. R. 173, 977, 998. Jackson was identified with Canty at the store on the video. R. 296. Upon arrest, Jackson made an inculpatory statement when served with the armed robbery warrant that "how could I be charges with armed robbery if I didn't steal anything from the pizza man." R.p. 595, ll. 1-2. His guilty knowledge was reflected in his hiding when the police came to his aunt's apartment in Summerton and watched them leave before returning. R.p. 595, ll. 5-7. Also, R. 486-88. The day after the shooting, an empty-handed Jackson was picked up by his uncle Isaac Boyd at a motel in Sumter and he asked him to take him to Curtis Wheeler's house to pick up clothes and Jackson and Wheeler went to an abandoned trailer. R. 507-510. After Jackson brought a clothes basket back, Boyd saw a rifle which Jackson took into his aunt's house. R. 510-11. Jackson asked Boyd to lie for him and tried to get Boyd to hold the rifle. R. 511, 516, 518. Jackson asked Toya Rush on the evening of

January 12, 2008 for socks and gloves, but she claimed she did not give him any. R. 914-15. The rifle that was recovered from the apartment of Jackson's aunt was identified as one of the fired two murder weapons through ballistic testing of the rifle and the fired bullet. [State Exh. 58-A]. R. 486, 490, 496, 502, 510-11, 673-77.

Further, a pizza box with pizza in it and a warmer from Sambino's were recovered on January 22, 2008 at St. Mark's Court. R. 386, 408, 803. Also R. 204-05. This was the location where Jackson's uncle took him where the Winchester model 94 rifle was picked up. R. 386, 408, 508, 803. On the night of the crime, 3 large pizzas were ordered. R. 198. At the crime scene on January 13, two pizza boxes had been recovered. R. 381-82, 384.

The Appellant claims that to satisfy the harmless error standard, there needed to be additional forensic evidence such as fingerprints or DNA specifically linking him to the crime scene. This is not necessary. There are specific links to the crime scene from the rifle in his identified in his possession, the pizza and a pizza warmer from the crime located where Appellant recovered the rifle the day after the shooting. His assessment would be more evidence would have been helpful, but it does not preclude the reasonable conclusion that the available evidence satisfied harmless error.

Under these discrete circumstances, any error was harmless.

ARGUMENT 2 – Crawford and Bruton

II. The trial court did not violate the Appellant's Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses pursuant to Crawford v. Washington, 541 U.S. 36 (2004), by allowing five statements by Appellant's non-testifying co-defendant into evidence, which did not directly implicate Appellant in the murder and armed robbery due to the redaction of Appellant's name with neutral pronouns and it use only against Canty.

Respondent incorporates by reference its argument from Argument One that the redacted

statements did not implicate Appellant where his name was removed from the multifarious statements made by him. The Appellant claims the five statements made to law enforcement by Appellant's non-testifying co-defendant were testimonial and were crucial to the State's case against Appellant. R. 79-150. Due to the co-defendant's exercise of his Fifth Amendment right not to testify, he was unavailable as a witness and Appellant had no prior opportunity to cross-examine his accuser. Thus, the introduction of the inadequately redacted statements violated Appellant's Sixth and Fourteenth Amendment rights to cross-examine and confront the witnesses against him. Crawford, 541 U.S. at 42. However, Respondent submits that the statements were not introduced against the Appellant, but against his co-defendant – the maker of the statements. Thus his confrontation right was not violated because it was not a witness against him.

In Crawford, 541 U.S. 68, the Supreme Court held that testimonial statements of unavailable witnesses are admissible against a defendant only where there had previously been an opportunity for confrontation. Otherwise, the admission of such statements offends a defendant's rights under the Confrontation Clause. *Id.* However, the statement at issue here was redacted as to Petitioner and admitted only against Canty - the defendant who made the statement. Crawford could not apply. In short, the statement was not admitted against Petitioner, but against Canty. Petitioner's confrontation rights were protected by redaction under Bruton, 391 U.S. 123

In Bruton, the Supreme Court held that "admission of [the co-defendant's] confession in [a] joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." 391 U.S. at 126. Thus, to avoid a confrontation right violation, and for the statement to be admissible, any such statement must be redacted to avoid directly implicating

(by name or direct, or inescapable inference) a defendant's co-defendant. *Id.*, Gray, *supra*, Holder, *supra*. Here the statement was properly redacted which prevented any Confrontation Clause issue.

Crawford's main concern was for a defendant's right "to be confronted with the witnesses against him." Crawford, 541 U.S. at 42. Crawford did not abrogate the Supreme Court's prior holdings in Bruton or Marsh, which found no Sixth Amendment violation when the admitted statement is not facially incriminating. See Crawford, 541 U.S. at 57 (finding its decision consistent with other Confrontation Clause cases, including Bruton; Richardson, 481 U.S. at 206 ("Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant")). Thus, while co-defendant Canty's statements are testimonial, the admission did not violate the petitioner's confrontation rights because it did not implicate Appellant. Appellant had no need for cross-examination because the testimonial evidence did not reference him or implicate him in any crime. Crawford is therefore inapplicable. See, e.g., U.S. v. Akefe, 2010 WL 2899805, at 25-26 (S.D.N.Y. July 21, 2010).¹³

Assuming Caldwell error, harmless error analysis applies. The Appellant claims any

¹³ In regard to a similar situation, the Fifth Circuit found that "while Crawford certainly prohibits the introduction of a codefendant's out-of-court testimonial statement against the other defendants in a multiple-defendant trial, it does not signal a departure from the rules governing the admittance of such a statement against the speaker-defendant himself, which continue to be provided by Bruton, Richardson, and Gray." United States v. Ramos-Cardenas, 524 F.3d 600, 609-610 (5th Cir. 2008). By the same logic, the Second Circuit, also in reviewing a Bruton redaction, found "there is no separate Crawford problem, and we see no indication that Crawford overrules Richardson or expands the holding of Bruton." United States v. Lung Fong Chen, 393 F.3d 139, 150 (2nd Cir. 2004). See also United States v. Williams, 429 F.3d 767, 773 n.2 (8th Cir. 2005) ("We note that Crawford did not overrule Bruton and its progeny"). Applying the same logic here, because Canty's statements were properly redacted of any specific reference to Jackson by the use of neutral pronouns. At any rate, as shown in the prior argument in the instant brief, that statement was properly redacted; thus, there could be no error under the Confrontation Clause. Ramos-Cardenas.

error in the use of the statements could not be harmless error. He asserts that the failure to specifically have either fingerprints or DNA linking him to the crime scene removes the possible error. As set forth in the conclusion of argument one, the admission of the statements were harmless.

SEVERENCE ISSUE

III. The trial court did not abuse its discretion in denying Appellant's motion for severance.

Appellant contends the trial court erred in denying the motion for severance made by his counsel. He claims that the joint trial compromised his right to confront and cross-examine his accuser where five statements were introduced at the trial. Initial Brief of Appellant, p. 17-18. However, he fails to articulate the basis as to why the introduction of the statements of co-defendant Canty, after redaction, required that severance be granted in the trial court's discretion. The trial judge did not err in denying severance.

STANDARD OF REVIEW

In South Carolina, criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right. State v. Cope, 405 S.C. 317, 748 S.E.2d 194 (2013); State v. Kelsey, 331 S.C. 50, 73, 502 S.E.2d 63, 75 (1998). Motions for a severance are addressed to the discretion of the trial court. Kelsey, 502 S.E.2d at 75. A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a codefendant's guilt. State v. Dennis, 337 S.C. 275, 282, 523 S.E.2d 173, 176 (1999) (citing Zafiro v. United States, 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993)). Furthermore, "[a]n appellate court should not reverse a

conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial.” State v. Stuckey, 347 S.C. 484, 497, 556 S.E.2d 403, 409 (Ct.App.2001).

Where a solicitor determines that a joint trial or, alternatively, separate trials of criminal co-defendants would best facilitate the efficient administration of her prosecutorial duties, a trial court may still, in its sound discretion, grant severance or order joinder, respectively, to protect a defendant's right to a fair trial. See State v. Halcomb, 382 S.C. 432, 439, 676 S.E.2d 149, 152 (Ct. App. 2009)(stating a decision on whether to grant or deny a motion for severance is subject to a trial court's sound discretion). Thus, a trial court's decision to grant or deny a motion opposing the solicitor's election of either joint or separate trials will not be disturbed on appeal absent an abuse of the trial court's discretion. Cf. Halcomb, 676 S.E.2d at 153(stating a trial court's decision to deny a motion for severance will not be disturbed absent an abuse of discretion). Further, when the trial judge bases this determination “upon a just and proper consideration of the particular circumstances which are presented to the court in each case,” an abuse of discretion does not result. Halcomb, 676 S.E.2d at 153. An example of a specific trial right that may be prejudiced from a joint trial is the constitutional right to cross-examination when one codefendant's confession expressly implicates another codefendant but the confessor does not take the witness stand. Bruton, 391 U.S., 135.

HOW THE ISSUE WAS RAISED AT TRIAL

Defense counsel renewed his motion for severance after the Jackson v. Denno hearing was completed. Counsel stated that the trial court had the various statements from Canty which go from (in unredacted form) from Jackson being was not involved in it, that he didn't do it and

then Canty started adding Jackson in it a little bit that he was present, but did not shoot the weapon. R.p. 148, ll. 11-18. Counsel Wilder asserted that the co-defendant's statement is in his own handwriting. Counsel asserted that if there was a separate trial, "if we were to go into any of those statements, that the defense would have a right to go into all of them to show that he changed them over time, and that Canty made different statements. He asserted that this would go to the credibility of the anything that Canty said. R.p. 148-49.¹⁴ Counsel stated that it would be difficult to redact the statements of Canty, because he felt it would still cast an inference because there are two defendants at trial. R.p. 149, ll. 10-14. Counsel stated that saying "Mr. Blank did so an so" would occur and counsel moved that the statements be thoroughly redacted if they were admitted. R. 149. Counsel stated that it all goes to the question of whether it is fair to try these two together and that he believed it was not. R.p. 149, ll. 18-20.

The solicitor urged that the statements could be successfully redacted. R. 150-51. The trial court denied defense counsel's motion for severance of Appellant's joint trial after he ruled the statements were admissible. R.p. 151, l. 23 – p. 152, l. 2.

In the post-verdict motion of the Appellant, counsel re-asserted the failure to grant the severance issue. ROA 1068. Motion for Reconsideration, p. 2, Section 3. In the motion, Jackson contended that failure to grant the motion deprived him of a fair trial because Canty did not testify and that he was deprived of his right to cross-examine him. He claimed that if Canty's statements were to be believed, the only member of the traveling party who could have placed

¹⁴ Respondent notes that after the redacted statements were introduced, Jackson's counsel attacked the credibility of the statements through the law enforcement officers by revealing and emphasizing the inconsistencies in the statement. R.p. 629, ll. 16-23. The defense counsel further question Deputy Burnish about seeing an individual in a black hoodie (not Jackson) in the video at the store. R. 837-38. Defense counsel uses this in his closing argument to suggest that person made the telephone call. R.p. 978-79, 982.

the telephone call to order pizza would have been Desmond Canty while Jackson and Canty were in the store. He asserts he was denied his opportunity to show Canty's motive in naming Jackson rather than Desmond Canty was to protect Desmond from being identified as the person who made the call. He further urged that the redaction of the statements failed to remove identifying information. Further, Jackson argued that in the in camera hearing Canty admitted writing another statement that would show that Canty was not a credible person. *Id.* He further claims that it caused him to forfeit his right to last argument because his counsel did not offer any exhibits during the state's case. *Id.* Judge Young denied the motions. ROA 1072 Order dated August 23, 2011.

ANALYSIS

In his argument before this Court, the Appellant fails to show or argue prejudice from the trial court's failure to sever the case from Canty. In his brief, he only asserts that the defense presented five (5) inculpatory statements of the co-defendant into evidence. However, as noted in the earlier arguments, the statements of Canty were redacted to remove any identification of Appellant Jackson and left it to the jury to determine from the other evidence whether Jackson was a participant in the crime. Contrary to the claims of Appellant the use of "another person" was not conclusive term necessarily relating to the same person. Further, evidence was presented about another individual at the scene who wore a black hoodie who had not been identified. Here, Appellants maintain that severance was required under Bruton, 391 U.S. 123, regarding their co-defendants' out-of-court admissions.

Even assuming that non-testimonial statements of co-defendants can create a Bruton problem after Crawford, the admission of the statements by the codefendant did not violate

Bruton because the statements made no mention of the names of anyone else involved nor provided a means of identifying them. See United States v. Najjar, 300 F.3d 466, 475 (4th Cir. 2002)(“A Bruton problem exists only where a co-defendant's statement on its face implicates the defendant.”). Accord, United States v. Lighty, 616 F.3d 321, 350 (4th Cir. 2010)(“to protect Flood's Confrontation Clause rights in this case, the district court refused to allow CW to refer to Flood, Wilson, and Mathis by name, but permitted CW to make reference to “three other people.” “Such redactions are permissible so long as the redaction does not distort the statements' meaning, exclude substantially exculpatory information, or change the tenor of the utterance as a whole” citing United States v. Yousef, 327 F.3d 56, 150 (2nd Cir. 2003).

Respondent respectfully submit that the trial judge did not abuse his discretion in denying the motion to sever where no prejudice is shown.

ARGUMENT IV MISTRIAL

IV. The trial court did not abuse its discretion in denying motions for mistrial based upon the redactions of Canty's statements and the admission of evidence.

In his fourth argument, the Appellant contends that the trial court erred in rejecting various motions for a mistrial on three occasions..

I. Reference to Jackson as a Suspect – Evidence Struck and Curative Instruction Given.

Appellant claims that the first error in refusing a mistrial occurred when Officer Thomas “incorrectly” stated that Appellant was a suspect based on her investigative report on the night of the murder. R. 329-30. The record reveals that Canty's counsel elicited the following testimony during cross- examination of Officer Jennifer Thomas of the Sumter County Sheriff's

Office:

Q: And then [the report taken on the night of the murder) also states that you spoke with someone by the name of Linda Canty.

A: Yes, sir.

Q: And also on your report, it indicates that a suspect is Daniel Jackson [Appellant] R.p. 329, ll. 3-7. Defense counsel contemporaneously objected, and outside the presence of the jury, moved for a mistrial. R.p. 330, ll. 1-2. Defense counsel argued that the report is prejudicial as "rank hearsay" and requested that the trial court strike the question and answer. R.p. 329, l. 18 – p. 330, l. 7. The trial court noted, "Well, how is it prejudicial for your client? He's a defendant in the courtroom. I mean, they [the jury] would have to suspect that at some point in time his [Appellant's] name would come into play." R.p. 330, ll. 8-11. Defense counsel further argued, "[The State is] posturing as though [Appellant] was a suspect . . . on that particular night when the report was issued, and I object to that." R.p. 330, ll. 12-15. The trial court refused to grant the mistrial motion, but agreed to strike the witness' answer. R.p. 331, ll. 5-8. The trial court also granted defense counsel's request for a curative instruction. R.p. 331, l. 15 – p. 332, l. 8. It instructed the jury that it "sustained the objection" and "ask that the jury disregard the last statement of the witness." R.p. 332, ll. 5-8.

"The decision to grant or deny a mistrial is within the sound discretion of the trial court." State v. Wiley, 387 S.C. 490, 692 S.E.2d 560 (Ct. App. 2010). "The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *Id.* "The power of the trial court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the trial court." *Id.*

“A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial.” Id. “The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way.” Id. at 495–96, 692 S.E.2d at 563.

Here, the trial judge sustained the objection and struck the reference to Appellant as a suspect. A curative instruction was immediately given to disregard. A curative instruction is generally deemed to have cured any alleged error. State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005). “If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured.” State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996); State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976); State v. McCord, 349 S.C. 477, 562 S.E.2d 689 (Ct. App. 2002). Relief is not warranted on this initial assertion.

II. Mistrials Motion Related to Inadequate Redaction.

In his second assertion, he claims that mistrial motion related to the redactions were improperly denied. In particular, counsel Wilder moved for a mistrial after the close of the State's case, arguing that the State failed to adequately redact the non-testifying co-defendant's statements. R.p. 873, l. 19 – p. 877, l. 12. The trial court denied the motion for a mistrial. R.p. 878, ll. 13-21. Counsel Wilder renewed his prior motions for a mistrial and subsequently moved for a new trial after the jury found Appellant guilty. R.p. 943, l. 1 – p. 944, l. 21; p. 1051, l. 24 – p. 1052, l. 6. Defense counsel argued:

[T]he only logical inference would be that the jury must have decided to use those statements that Mr. Canty [co- defendant] gave against Mr. Jackson [Appellant], which we don't believe should be permitted under the law of Bruton.

the confrontation of issues. The right that [Appellant] has under the United States Constitution and [the] constitution of our state, Your Honor.

R.p. 1052, ll. 19-23. The trial court denied both motions. R.p. 1054, ll. 17-21.

Respondent submits that related to this mistrial motion, it is grounded on the claims addressed in argument one. For the reasons set forth within argument one, Respondent submits that there was no error shown concerning the redactions. His claims otherwise are without merit. The judge did not abuse his discretion in denying the motions.

III. Little Debbie Purchase and Wrapper.

In his brief, Jackson asserts in passing that the trial court admitted prejudicial and improper evidence in admitting the evidence of the purchase of the Little Debbie at the grocery and the later admission of a "Little Debbie" snack wrapper found near the crime scene. He does not address why this admission was improper. A conclusory argument must be rejected in an appeal. See In re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001)(holding an issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory); see also Solomon v. City Realty Co., 262 S.C. 198, 201, 203 S.E.2d 435, 436 (1974)(deeming a conclusory argument abandoned).

Further, the evidence concerning the purchase of a Little Debbie snack was relevant and admissible. The significance to the purchase if a Little Debbie cake had to be developed through the trial evidence. The clerk testified "they" came in and bought a Little Debbie cake, but he could not identify who bought it. R. 260-61, 264, 275. He identified him on the video as the fairer skinned of the two who entered the store. R. 275. In trying to limit the weight of the evidence, counsel Wilder pointed out that the store sold 15-20 different kinds of "Little Debbie"

snack cakes and did not recall which one he sold on that date. R. 277. Another employee was able to identify Jackson from the video. R. 296. A Little Debbie wrapper was found near at the entrance to the lot the crime scene at the side of the road and photographed the incident day after 9 PM, although another officer did not recall seeing it that night. R. 337, 374-75, 416-18. It was estimated that the wrapper [State Exhibit 86] was found 137 feet from where the victim's body was discovered and near a vehicle. However, there was insufficient ridge detail to get a fingerprint from the wrapper. R. 428. A photograph of the wrapper was introduced. The objection to the admission of the photograph was that it was "outside of the crime scene." R.p. 856-58, ll. 12-14.

Plainly the evidence concerning the presence of the Appellant purchasing a Little Debbie snack cake at a location in close proximity to where the set-up telephone call was made for pizza and the presence of a Little Debbie snack wrapper near the crime scene location the night of the killing is relevant evidence. Contrary to the claims underlying the Appellant's conclusory argument or the "outside the crime scene" objection, the connection of the wrapper and the purchase was relevant. The jury was aware that the vehicle that it was located near that night was outside of the crime scene tape, but that location does not define relevant evidence's admissibility. R. 856-57. There is no legal requirement that evidence must be supported by either fingerprint or DNA to be admissible under these circumstance. The defense had the opportunity to challenge the weight of the presence of the particular wrapper. However, that did not make its admission improper or unduly prejudicial. His suggestions otherwise do not require a new trial.

BATSON ISSUE

- V. The trial judge did not err in finding the prosecution did not violate the mandates of Batson v. Kentucky in its strikes of two African American jurors (#157, #32) for the reason that they had indicated that they did not want to serve on the jury based upon their responses. Further, any error in the failure to indicate that basis for not stating the basis for striking juror #140, a potential second alternate, was not reversible error where the juror would not have been seated and the Appellant failed to assert this ground before the trial judge. (Initial Brief of Appellant, Argument V, pp. 3-4, pp. 22-26).

Appellant contends the trial court erred in concluding that there was no violation of the mandates of Batson v. Kentucky, 476 U.S. 79 (1986) in the prosecutors use of the peremptory challenges against African American venirepersons. In particular, the Appellant questions the prosecutions use of the peremptory challenges against two female venirepersons (#32 and #157) claiming that they had indicated during the voir dire a desire to not serve as a juror. A review of the preliminary jury voir dire record, in addition to the record of the striking of the jury in the case supports the race neutral reasons given by the prosecution and the validity of the trial court's rejection of the issue under Batson.

A. The Alternate Issue Is Not Preserved For Appeal.

The Appellant also claims that the failure by the State to indicate its reason for striking juror #140 – Walnetta Spears – a potential second alternate juror was fatal. Two reasons demand that this claim be rejected. The Appellant did not raise this particular assertion about the failure to specify the reasons for the strike of juror #140 to the trial judge and it is not preserved for this appeal. Accord State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991) (“[A]s to the striking of Juror Leaks, the potential alternate for whom no explanation was given, appellant waived any error in the Solicitor's lack of explanation by failing to raise it below). See State v. Martinez, 294

S.C. 72, 362 S.E.2d 641 (1987)).¹⁵ Any potential error does not warrant a new trial under these circumstances.

STANDARD OF REVIEW

“Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record.” State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). “Appellate courts give the trial judge’s finding great deference on appeal, and review the trial judge’s ruling with a clearly erroneous standard.” Id. “A finding is clearly erroneous if it is not supported by the record.” Id. at 620, 545 S.E.2d at 813.

“In Purkett v. Elem, 514 U.S. 765, 767, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995), the Supreme Court of the United States explained the proper procedure for a Batson hearing as follows:

Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Recently, the South Carolina Supreme Court addressed step two of the Batson analysis in State v. Giles, 407 S.C. 14, 754 S.E.2d 261, (January 15, 2014). In Giles, the Court initially summarized Batson, stating:

If a sufficient showing is made, the trial court will move to the second step in the process, which requires the proponent of the challenge to provide a race neutral explanation for the challenge. Id. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the opponent of the challenge has proved purposeful

¹⁵ Respondent notes that alternate juror 145 Lakeisha Stubbs replaced juror 159 Jaron Wilson and participated in deliberations. R.p. 153-58.

discrimination. 476 U.S. at 98. The ultimate burden always rests with the opponent of the challenge to prove purposeful discrimination.

In addressing the second step of the process, the United States Supreme Court held that general assertions, such as a mere denial of discriminatory motive or assurance the challenges were exercised in good faith, are not sufficient to rebut a prima facie showing of a race based challenge. 476 U.S. at 97-98. The Court noted that if such general assertions were sufficient, "the Equal Protection Clause 'would be but a vain and illusory requirement.'" 476 U.S. at 98 (quoting Norris v. State of Alabama, 294 U.S. 587, 598, 55 S. Ct. 579, 79 L. Ed. 1074 (1935)). Accordingly, the Court, while not requiring the explanation to rise to the level of justifying the exercise of a challenge for cause, held the proponent of the strike must give a clear and reasonably specific explanation of legitimate reasons for exercising the challenge. 476 U.S. at 98 n. 20.

Giles, supra. (emphasis added).

In Giles, the Court overruled a portion of State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) overruled by State v. Giles, supra concerning its position that a proponent of a peremptory challenge has no burden of presenting a reasonably specific and legitimate explanation for the challenge at the second step of the Batson process. In Purkett, 514 U.S. 765, the Court had clarified that the issue at that step is the facial validity of the explanation provided by the proponent of the strike, and the explanation need not be persuasive or even plausible. Purkett, 514 U.S. at 768. The Giles Court found that Court in Purkett went so far as to state the reason does not have to make sense, and even a silly or superstitious reason may suffice because it is not until the third step of the Batson process that the persuasiveness of the explanation becomes relevant. Id. The Purkett Court noted that it is at that stage that the trial court determines whether the opponent of the strike has met the burden of proving purposeful discrimination and will probably find implausible or fantastic justifications to be pretexts for discriminatory intent. Id.

The South Carolina Supreme Court in Giles then analyzed the decision in Miller-El v. Dretke, 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). There, the Court concluded that the Court did not, in Purkett, abandon the requirement set forth in Batson that at the second stage of the Batson process a proponent of a strike “give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenge.” Miller-El, 545 U.S. 231. The Court concluded its assessment of step two in Batson must be re-evaluated and Adams revised:

We likewise find, based on a harmonization of Batson, Purkett and Miller-El, that in order for the explanation provided by the proponent of a peremptory challenge at the second stage of the Batson process to be legally sufficient and not deny the opponent of the challenge, as well as the trial court, the ability to safeguard the right to equal protection, it need not be persuasive, or even plausible, but it must be clear and reasonably specific such that the opponent of the challenge has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty to assess the plausibility of the reason in light of all the evidence with a bearing on it. Reasonable specificity is necessary because comparison to other members of the venire for purposes of a disparate treatment analysis, which is often used at the third step of the Batson process to determine if purposeful discrimination has occurred, is impossible if the proponent of the challenge provides only a vague or very general explanation. **The explanation given may in fact be implausible or fantastic, as noted in Purkett, but it may not be so general or vague that it deprives the opponent of the challenge of the ability to meet the burden to show, or the trial court of the ability to determine whether, the reason given is pretextual. The proponent of the challenge must provide an objectively discernible basis for the challenge that permits the opponent of the challenge and the trial court to evaluate it. The trial judge need not proceed to step three of the Batson process when no constitutionally permissible reason has been proffered at step two.**

Giles, *supra*.¹⁶

¹⁶ In Giles, the Supreme Court concluded that an explanation given by the proponent of a strike that “he did not feel the jurors were right for the jury” was “no reason at all.” The Court equated it to reasons that had been rejected on grounds that the explanations given were not sufficiently clear and specific to provide a factual basis that courts can review for legitimacy, including “gut feeling” explanations. Alex v. Rayne Concrete Svc., 951 So. 2d 138, 153 (La. 2007). See e.g., Robinson v. United States, 878 A.2d 1273 (D.C. 2005)(finding prosecutor’s statement that he “just didn’t like” the stricken venireperson did not furnish the clear and reasonably specific explanation of his legitimate reasons for striking that juror that was required); People v. Carillo, 9 A.D.3d 333, 780 N.Y.S.2d 143 (2004)(finding prosecutor’s explanation that his peremptory challenge of a prospective juror was not based on

“At step three, the opponent of the strike must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination.” State v. Cochran, 369 S.C. 308, 315, 631 S.E.2d 294, 298 (Ct. App. 2006)(citing Adams, 322 S.C. at 124, 470 S.E.2d at 372). “The burden of persuading the court that a Batson violation has occurred remains at all times on the opponent of the strike.” State v. Haigler, 334 S.C. 623, 629, 515 S.E.2d 88, 91 (1999). “This burden is generally established by showing similarly situated members of another race were seated on the jury.” Cochran, 369 S.C. at 315.¹⁷

South Carolina has rejected the “dual-motivation” doctrine in Batson cases, and instead, “South Carolina follows the ‘tainted’ approach whereby a discriminatory explanation for the exercise of a peremptory challenge will vitiate other nondiscriminatory explanations for the strike.” State v. Rayfield, 357 S.C. 497, 503, 593 S.E.2d 486, 489 (Ct. App. 2004) aff’d, 369 S.C. 106, 631 S.E.2d 244 (2006)(citing Payton v. Kearsse, 329 S.C. 51, 59, 495 S.E.2d 205, 210

anything in particular, he “just did not get a good feel from her,” “amounted to, in essence, no explanation at all”); Zakour v. UT Med. Grp., Inc., 215 S.W.3d 763 (Tenn. 2007)(finding explanation that six prospective female jurors were stricken because of their body language, without providing more detail, was not clear, reasonably specific, legitimate and reasonably related to the particular case being tried).

¹⁷ For the purpose of demonstrating potential jurors are similarly situated under Batson, potential jurors are not required to be “identical in all respects.” Miller-El v. Dretke, 545 U.S. 231, 247 n. 6, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005)(“A per se rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave Batson inoperable; potential jurors are not products of a set of cookie cutters.”). Rather, the potential jurors need only be alike “in all relevant aspects.” Startzell v. City of Philadelphia, Pennsylvania, 533 F.3d 183, 203 (3rd Cir. 2008)(quoting Nordlinger v. Hahn, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992)). In determining whether potential jurors are similarly situated, our courts have focused their inquiry on whether there are meaningful distinctions between the individuals compared. See State v. McCray, 332 S.C. 536, 540, 506 S.E.2d 301, 302 (1998)—03 (1998) (finding three white jurors who were seated on the jury were not similarly situated to four black jurors who were struck from the jury because “[t]he white jurors did not have the same relationship to law enforcement as the black jurors” when the black jurors had relatives or friends who, at the time of the trial, were employed in law enforcement, and the relatives or friends of the white jurors were no longer employed in law enforcement); State v. Williams, 379 S.C. 399, 401, 665 S.E.2d 228, 230 (Ct. App. 2008)(holding the trial court erred in finding an unemployed juror was similarly situated to an employed juror whose spouse was unemployed); State v. Scott, 406 S.C. 108, 749 S.E.2d 160 (Ct. App. 2013)(sufficient distinctions between a teacher and a warehouse manager]. Cf. United States v. Davis, 154 F.3d 772, 781 (8th Cir. 1998)(finding there was a sufficient distinction between the challenged juror who worked as a drug counselor and several seated jurors who worked as drug prevention volunteers to defeat a Batson challenge).

(1998)).

The South Carolina Supreme Court explained:

Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record. The opponent of the strike carries the ultimate burden of persuading the trial court that the challenged party exercised strikes in a discriminatory manner. Appellate courts give the trial judge's finding great deference on appeal and review the trial judge's ruling with a clearly erroneous standard.

State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009)(internal citations omitted).

The trial court's finding of purposeful discrimination rests on its evaluation of demeanor and credibility. Edwards, 682 S.E.2d at 823. "Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and an 'evaluation of the [attorney's] mind lies peculiarly within a trial [court's] province.'" Id. (quoting Hernandez v. New York, 500 U.S. 352, 365, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)).

HOW THE ISSUE WAS RAISED BELOW

At the beginning of the court term, there was general *voir dire* of the potential jurors by Judge Young. During the initial questioning concerning whether any member of the jury panel was incapable by reason of mental or physical infirmity to render efficient jury service [R.p. 13, l. 5-6], venireperson #32 **Essie Dallas** responded. She declared that she was disabled with two artificial knees, had deteriorating bone osteoarthritis and had fibromyalgia. R.p. 14, ll. 19-23. Upon request by the court, she stated that she did not bring a doctor's excuse. However, she reported to the Court that she had an appointment Friday and kept her two grandchildren. R.p. 14, ll. 1-2. Judge Young stated that it did not keep her out of jury service, concluding that "if you can keep your kids, you can serve as a juror." R.p. 15, ll. 3-4.

Judge Young asked if there was any member of the panel "who is a school employee whose service this week would conflict with his or her activities as a school employee" which he defined as "employed as a teacher, certified personnel at the building level, or a school bus driver, or a school system or school district ..." and wished to be exempt. R.p. 20, l. 21- p. 22, l. 5. In response to the question, venireperson #157 **Patricia Williams** stated that she was employed at the school district as an attendance supervisor and was scheduled to work tomorrow (August 9, 2012). R.p. 21, l. 24- p. 22, l. 4. She stated that school starts for her tomorrow, but that the students would not return until after August 16th. She acknowledged to the judge that she would not have to worry about attendance until after August 16th, but that they were in the process of getting ready for the student's return. R.p. 22, ll. 4-12. Judge Young stated that he was getting low on jurors and was "going to keep you on this week because there's no other time to transfer you to until next summer." R.p. 22, ll. 13-15.

The following chart represents the use of the peremptory challenges by the parties.

Juror #	Name	Race/Sex	State	Canty	Jackson	Seated
64	Wayne Green	AA/M	1			
47	Deneen Fioritto	W/F		1		
157*	Patricia Williams	AA/F	2			
75	Perry Hendrix	WM		2		
60	<i>Sherry Glasscho</i>	AA/F				1
30	Terry Crowder	AA/F	3			
100	<i>Michael Knight</i>	WM				2
167	Marion Thomas	AA/M	4			

46	Jason Evans (Tr.p. 35, I.1-4)	AA/M	5			
32*	Essie Davis	AA/F	6			
28	Linda Cooper	AA/F	7			
13	Sherrie Benenhaley	W/F		3		
115	Kelly McMillian	WF				3
109	Sean McCombs	WM			1	
120	Charles Mullins	Asian/M				4
143	Martin Stegner	WM		4		
124	Thomas Nissan	Asian M				5
6	Erin Andrews	WF				6
123	Lisa Ottenschot- Newman	WF			2	
34	Connie Davis	AAF				7
159	Jaron Wilson	Asian M				8 (Removed Tr.p. 194-199 – replaced by Juror 145).
155	Marcus White	AA/M				9
82	Johnnie Holland	AA/M				10
132	Robert Rogers	WM				11
43	Angela Edwards	WF		5		
164	Beckham Harris, Jr.	WM			3	
166	Shawn McLaughlin	WM	8			

165	Terry Hearst	WF		6		
144	Wendy Stickle	WF				12
ALTERNATES						
17	Iesha Bradley	AA/F				1
140*	Walnetta Spears	AA/F	1			
145	Lakeisha Stubbs	AA/F				2 Served (Tr.p. 194-199) in lieu of juror 159

R.p. 57-69.

During jury selection, after the State's strike of Marion Thomas #167, defense counsel Wilder informed the trial court, "Your Honor, we'd ask that the record reflect a motion to be heard later." R.p. 60, ll. 17-18. At the conclusion of jury selection, defense counsel moved to quash the jury panel pursuant to Batson, 476 U.S. 79, based on the State striking African-American jurors. R.p. 71, ll. 9-24; p. 73, ll. 9-22. The State had struck eight African-American jurors: (1) juror #64 - Wayne Green; (2) juror #157-Patricia Williams; (3) juror #30-Terry Crowder; (4) juror #167-Marion Thomas; (5) juror #46-Jason Evans; (6) juror #32-Essie Dallas; (7) juror #28-Linda Cooper; and (8) juror #140-Walnetta Spears. R. 57-69.

The State's Response to the Batson Inquiry

Because he had struck African-American jurors, consistent with state practice, Deputy Solicitor Meadors was required to respond to the trial court with his reasons to determine if they were race neutral.

MR. MEADORS: Judge, as to juror number 64, Mr. Griffin was assisting me in this, and he has **pending burglary charges**. Everyone on this list had had a pending or a serious conviction or charge -- I don't care if they're black, white, or

purple -- I struck them. Anything beside a traffic offense, which I never use, but if there's a serious offense out there that's either still pending or convicted or we're not sure, I struck them. I have a burglary charge for this individual. That's why I struck him.

THE COURT: Mr. Green, there was burglary charge pending?

MR. MEADORS: Yes, sir. That's juror number 64.

THE COURT: Right.

MR. MEADORS: Judge, juror, juror number 157 [Patricia Williams]. Judge, as we approached -- I've done this my whole career. People that want off, I don't put on. There were several people that wanted off Your Honor transferred. This next juror, 157, wanted off. I believe she was the attendance coordinator. It was obvious to me -- not, not disagreeing with you keeping her on, Judge, but it was obvious to me she wanted off. And everyone that wanted off, that is my reason that I chose not to present her. Your Honor, number 30 [Terry Crowder] has charges, and I don't know. They're from Baltimore, but they're charges of possession of heroin, intent to distribute, possession of Valium with intent to distribute, possession of paraphernalia with intent to inject something, nuisance, conspiracy to violate the drug laws, possession of narcotics. That's why I struck her, Judge.

THE COURT: All right.

MR. WILDER: Your Honor, did he say she has a conviction for that?

THE COURT: She has pending charges showing up on her sheet. . . .

MR. MEADORS: As I said, everybody ---

MR. WILDER: She had pending charges?

THE COURT: She has pending charges.

MR. WILDER: All right.

MR. MEADORS: I forgot where I was now, Judge.

THE COURT: Mr. Thomas.

MR. MEADORS: 167. I struck everyone that came up unemployed, that stated they were unemployed. And while we're at there, he is a black male, juror 166 [Shawn McLaughlin]. Number right next to him, Judge, is a white male. He's unemployed. I struck him, too. Juror number 46, [Jason Evans] Your Honor, has a -- came up, I believe came up when we were all present, said he had a gun charge that's pending. That's why I struck him. Juror number 32 [Essie Davis] also in my notes had said she did not want to serve. I had written that down. That was consistent with that. And finally, juror number 28 [Linda Cooper], Judge, fraudulent check convictions, false statement to obtain benefits convictions, other fraudulent check convictions, just convictions of fraud and deceit, and that's why I respectfully struck that juror. Again for the record, all of their strikes were exercised against white individuals. Your Honor, I think I provided a race-neutral reason for each one of them. We would respectfully ask you keep this jury. Thank you.

R.p. 74, l. 8 - p. 76, l. 19.

Defense counsel Wilder for Appellant Jackson stated that he would leave it in the Court's discretion. He stated that if the Court find those reasons satisfactory, I have nothing to say. R. 76-77.

The Trial Court's Rejection.

Judge Young then concluded that he had looked at the jury and noted that they are not entitled to a perfect jury, but certainly the ones who have pending charges, I find that to be race neutral and deny your motion. R.p. 77, ll. 3-7.

ANALYSIS

In his brief before this Court, Appellant merely states that the assistant solicitor's reasons for striking the African American jurors were insufficient. *Initial Brief of Appellant*, p. 25, para. 2. In the heading of his argument he states that the explanation for striking two of the jurors was because they did not want to serve on the jury and the potential alternate for who a reason was not given nor asked for by the judge. *Initial Brief of Respondent*, p. 22. However, in the

argument, Appellant refers to four individual jurors that the Solicitor did not assert had either a prior conviction or criminal charges pending - #147 (Patricia Williams), #167 (Marion Thomas), # 32 (Essie Davis) and potential alternate #140 (Walnetta Spears). *Id.*, p. 24-25. Respondent submits that prosecution complied with the mandates of Batson and provided race neutral reasons for the use of the peremptory challenges on each of the potential jurors who could have been qualified to serve.

The Argument is Not Preserved and Conclusory.

First, however, a review of the record reveals his present argument before this Court concerning venirepersons #157, #167, and #32 is likely not preserved. As noted above, after the prosecution gave his reasons for the use of the strikes on these particular jurors, the defense counsel abandoned any specific challenge. Particularly, when asked by the Court whether he had any response to the Solicitor's statement of reasons, defense counsel Wilder stated that he had no response other than: "just leave it to your Honor's discretion. If you find those reasons satisfactory, I have nothing else to say." R.p. 76, l. 25- p. 77, l. 2.

In this appeal, Appellant claims that the reasons given for these three jurors was insufficient. *Initial Brief of Appellant*, p. 25 (Based [upon] the solicitor's insufficient explanations for striking the African American jurors. . ."). At no time did defense counsel assert or the trial judge find that the Solicitor's reasons for striking the particular jurors insufficient. This conclusory argument – raised within this appeal for the first time – must be inadequate to preserve the issue for an appeal. At no time was it suggested below to the trial that the grounds were insufficient and particularly the trial court did not find that the reasons were insufficient. See also *On. L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716,

724 (2000)(stating the “losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments”). For this threshold reason, this issue must be dismissed. See State v. Flynn, 368 S.C. 83, 84, 627 S.E.2d 763, 764 (Ct. App. 2006)(the Court concluded the appellant had offered no evidence other than a conclusory assertion of racial motivation, we find the trial court did not err in failing to find a Batson violation.”). See In re McCracken, 346 S.C., 92(holding an issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory); see also Solomon, 262 S.C., 201(deeming a conclusory argument abandoned).

The Solicitor’s Reasons for Striking Each Juror Were Race-Neutral.

Viewing the totality of the circumstances that the trial judge was presented, Respondent submits that the specific reasons given by the state were race neutral and the trial judge properly denied the motion. Each of the reasons for the particular jurors was not “general or vague” and provided the trial court and opponent the ability to determine whether, the reason given is pretextual and gave an objectively discernible basis for the challenge that permits the opponent of the challenge and the trial court to evaluate it. See Giles, *supra*.

Respondent submits that the prosecution used a “race-neutral” reason in removing the potential jurors who had expressed a desire in the voir dire to not serve as a juror. Other than the potential alternate, the Appellant appears to only be challenging the two potential jurors who were removed basis upon the expressed attempt to be excused and removed from the jury pool. Solicitor Meadors indicated that “Judge, juror, juror number 157. Judge, as we approached I’ve done this my whole career. People that want off, I don’t put on. There were several people that wanted off Your Honor transferred . . .” and “Juror number 32 also in my notes had said she did

not want to serve. I had written that down. That was consistent with that" R.p. 74, ll. 22-24, p. 76, ll. 7-9.

This was not based upon a "gut feeling" about either of the jurors but upon discernible evidence presented during the general voir dire of the jurors in the question of the jurors. **Venireperson #32 Essie Dallas** declared that she was disabled in response to the general inquiry about whether the juror was incapable of rendering by reason of mental or physical infirmity from rendering efficient jury service. R.p. 14, ll. 19-23. Upon request by the court, she stated that she did not bring a doctor's excuse. However, she reported to the Court that she had an appointment Friday and kept her two grandchildren. R.p. 14, ll. 1-2. Judge Young stated that did not keep her out of jury service, concluding that "if you can keep your kids, you can serve as a juror." R.p. 15, ll. 3-4. The record evidence support the basis for the use of the Solicitor's strike. See e.g., United States v. Garrison, 849 F.2d 103, 106 (4th Cir. 1988)("A prosecutor is justified in striking jurors that he or she perceives to be inattentive or uninterested").

Similarly, venireperson **#157 Patricia Williams**, in response to a general inquiry about whether the potential juror "is a school employee whose service this week would conflict with his or her activities as a school employee" [R.p. 20, l. 21- p. 22, l. 5] responded that she was employed at the school district as an attendance supervisor and was scheduled to work tomorrow (August 9, 2012). R.p. 21, l. 24- p. 22, l. 4. She stated that school starts for her tomorrow, but that the students would not return until after August 16th. Although school attendance was not at issue until after August 16th, she declared they were in the process of getting ready for the student's return. R.p. 22, ll. 4-12. Judge Young stated that he was getting low on jurors and was "going to keep you on this week because there's no other time to transfer you to until next

summer.” R.p. 22, ll. 13-5. Again, the record supports the solicitor’s basis for the strike.¹⁸

Respondent submits that the expressed attempt by potential jurors to avoid jury service is a race-neutral reason. The Petitioner has not suggested nor shown otherwise.

In addition, the Appellant appears to accept the solicitor’s basis for using the remaining strikes against potential jurors with criminal convictions or potential charges as race neutral:

- (1) Juror #64 - Wayne Green – burglary charge pending.
- (2) Juror #30-Terry Crowder – “charges, and I don’t know. They’re from Baltimore, but they’re charges of possession of heroin, intent to distribute, possession of Valium with intent to distribute, possession of paraphernalia with intent to inject something, nuisance, conspiracy to violate the drug laws, possession of narcotics”.
- (3) Juror #46-Jason Evans – “a gun charge that’s pending.” [See also R.p. 12, ll. 8-23.
- (4) Juror #28-Linda Cooper – “fraudulent check convictions, false statement to obtain benefits convictions, other fraudulent check convictions, just convictions of fraud and deceit.”

Respondent submit that the presence of criminal convictions and/or pending criminal charges is a race neutral reason. See Martinez, 294 S.C. 72 (possible criminal records may be race-neutral reasons for a strike).

The remaining excluded juror, #167 - Marion Thomas was excused because he was unemployed. Solicitor Meadors noted that he had excluded Caucasian juror #166 Shawn McLaughlin also because he was unemployed, defeating any claim of pretext of similarly situated persons. The use of a strike against unemployed has been upheld by the court to be race neutral. See State v. Ford, 334 S.C. 59, 512 S.E.2d 500 (1999)(lack of employment or place or type of employment may be race-neutral reason for strike); State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990)(potential juror’s knowledge of and association with defendant may be race-

¹⁸ Respondent further note that a review of the record of the pretrial inquiries reveals that none of the potential jurors that he seated and had an opportunity to strike expressed any desire on the record to avoid jury duty that term. Thus, had step three been involved there could not have been any showing of pretext because no similarly situated person was seated.

neutral reason for strike); State v. Green, 306 S.C. 94, 409 S.E.2d 785 (1991)(unemployment may be race-neutral reason for a strike).

For each of the reasons set forth previously, Respondent submit that this argument of Appellant is without merit. A new trial should be denied.

CONCLUSION

For the aforementioned reasons, the State respectfully asks this Court to affirm the judgment and conviction and sentences.

Respectfully Submitted,

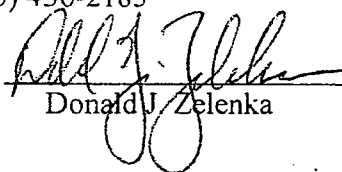
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March 25, 2014

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
William Jeffrey Young, Circuit Court Judge

Appellate Case No. 2011-199366

THE STATE,

Respondent,

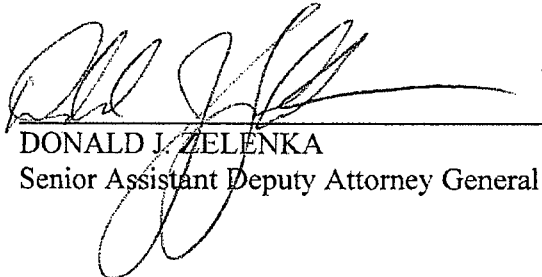
v.

DANIEL D'ANGELO JACKSON,

Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled A Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.



DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

March 25, 2014

CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that I have served the *Final Brief of Respondent* in the foregoing action by depositing copies in the InterAgency Mail to Carmen V. Ganjehsani, Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 25th day of March, 2014.



DONALD J. ZELENA
Senior Assistant Deputy Attorney General

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Daniel D'Angelo Jackson, Appellant.

Appellate Case No. 2011-199366

Appeal From Sumter County
W. Jeffrey Young, Circuit Court Judge

Opinion No. 5278
Heard June 10, 2014 – Filed November 5, 2014

REVERSED

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Attorney General John W. McIntosh, and Senior
Assistant Deputy Attorney General Donald J. Zelenka, all
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of Sumter, for Respondent.

FEW, C.J.: Daniel D'Angelo Jackson appeals his convictions for murder and armed robbery. He argues he was denied his Sixth Amendment right of confrontation when the trial court admitted the redacted statements of his nontestifying codefendant Reginald Canty. We reverse.

I. Facts and Procedural History

On the night of January 12, 2008, William Flexon was shot twice and killed while delivering pizzas to lot seven in O.C. Mobile Home Park in the Cherryvale area of Sumter. Law enforcement officers found Canty walking nearby shortly after the shooting. Canty agreed to speak with the officers, and between January 13 and 25, he gave six statements.

In his statements, Canty described his and Jackson's role in the events leading up to Flexon's death.¹ Canty stated he was at home in O.C. Mobile Home Park when Jackson asked him if he wanted to make some money by robbing a pizza delivery man. Canty wrote, "I said yes cause I didn't want the other guys to laugh and pick at me."² At Jackson's request, Canty's cousin Desmond took Jackson and Canty to Cherryvale Grocery. Canty saw Jackson use the pay phone outside the grocery store, and heard him call Sambino's Pizza Restaurant and order three large pizzas, requesting delivery to lot seven in O.C. Mobile Home Park. Canty stated he and Jackson then went inside the store, where Jackson purchased "a Debbie snack cake (donut sticks)." Canty and Jackson returned to the mobile home park and waited for the pizza delivery man to arrive. Canty reported he stayed at his house where he could see lot seven while Jackson hid behind some trailers. Canty watched the pizza delivery man arrive at lot seven, and saw him exit his vehicle. Canty stated the delivery man "went to the abandoned residence (Lt. 7) and saw the door open and then turn[ed] around [and] went back to his vehicle real fast." Canty then saw Jackson and at least one other person rob the delivery man. Canty reported Jackson shot the delivery man and ran away.

The State charged Jackson and Canty with murder and armed robbery and called them to trial together. Jackson filed a pretrial motion to sever the trials, arguing that if the State introduced Canty's statements at trial and Canty did not testify, the admission of the statements would violate Jackson's constitutional right to confront and cross-examine Canty. *See Bruton v. United States*, 391 U.S. 123, 126, 88 S. Ct. 1620, 1622, 20 L. Ed. 2d 476, 479 (1968) (holding the Confrontation Clause of the Sixth Amendment bars the admission of a nontestifying codefendant's confession that incriminates another defendant). The trial court denied the motion.

¹ We have included an appendix that contains Canty's fifth statement as read to the jury. However, several details in this paragraph are from Canty's other statements.

² Canty was sixteen years old at the time of the crimes, and Jackson was nineteen.

Jackson renewed his severance motion on the first day of trial. As an alternative to severance, Jackson requested the court "thoroughly redact[]" the statements, but argued, "I don't think that's going to protect us." The court denied Jackson's renewed severance motion and stated, "[W]e'll see where we are on redaction if any statements are proposed by the State."

The State presented testimony and evidence establishing that Jackson and Canty acted together to lure a pizza delivery man to a vacant trailer at O.C. Mobile Home Park and rob him there. The owner of Sambino's Pizza Restaurant testified that on the night of January 12, a man called and ordered three large pizzas. The unnamed man told her he was calling from a pay phone, and he requested the pizzas be delivered to lot number seven in O.C. Mobile Home Park. A custodian of telephone records subsequently testified the call to Sambino's was made from the pay phone at Cherryvale Grocery.

Eugene Mackovitch testified he was working at Cherryvale Grocery the night of January 12. He recalled two African-American men—one darker-skinned and the other fairer-skinned—entered the store together, and he sold one of them a Little Debbie snack cake. During his testimony, the State played surveillance video showing Mackovitch and the two men inside the grocery store.³ Mackovitch explained the video showed him selling the Little Debbie snack cake to one of the men.

The State presented two witnesses who identified by name the two men shown in the video. Anitta Shannon, another employee of the grocery store, testified she personally knew Jackson and identified him as the individual buying the Little Debbie snack cake. Sergeant Robert Burnish of the Sumter County Sheriff's Office—the chief investigating officer on the case—identified both Jackson and Canty as the men in the video.

Later, the State sought to introduce Canty's statements. Jackson requested the trial court review the third, fourth, fifth, and sixth statements, and the court held a hearing outside the jury's presence. The State proposed to redact the four statements by replacing Jackson's name with "another person," and the court found this redaction satisfied the requirements of *Bruton*. Jackson objected on the basis that admitting the statements violated his right to confront and cross-examine Canty. He argued that even with the State's proposed redaction, the statements

³ Cherryvale Grocery had no surveillance cameras outside, where the pay phone was located.

were "still going to lead to inferences . . . that it might be my client that he's referring to." The court overruled Jackson's objection.

Investigator Dominick West of the Sumter County Sheriff's Office then read the redacted versions of the four statements to the jury. He did not say Jackson's name, but instead said "another person" or "the other person" wherever Jackson's name appeared in the statements. Canty's redacted statements described how "another person" (1) asked Canty if he wanted to participate in robbing a pizza man; (2) told Canty to get Desmond to take them to Cherryvale Grocery; (3) used the pay phone to call Sambino's and order three large pizzas, requesting delivery to lot seven in O.C. Mobile Home Park; (4) bought a "Debbie snack cake donut sticks"; (5) returned to the mobile home park with Canty; (6) went behind the trailer on lot seven and waited for the pizza man to arrive; and (7) robbed and shot the pizza man, while Canty watched from his house.

Sergeant Burnish testified about his investigation of the crimes and read the original, unredacted versions of Canty's first and second statements to the jury.⁴ In the first statement, Canty reported, "The gun looked like a rifle and the person that was holding the gun had a hoodie, but I couldn't see his face." He next read the second statement, in which Canty named "the bad guy . . . James or J-Boy" as the person who shot the pizza man with a rifle and ran. Sergeant Burnish also read the same redacted version of the sixth statement that Investigator West read.

After Sergeant Burnish testified that Canty made his third statement on January 15, Sergeant Burnish explained:

Q: You were not there when Mr. Canty gave a statement on the 15th?

A: I was in the building; I was not present for that statement.

Q: Now, what happened and what did you do next in your investigation?

A: Based on the information that was received on that date is when we issued warrants for the arrest of Mr. Jackson.

⁴ Canty's first and second statements did not name Jackson.

At the close of the State's case, Jackson moved for a mistrial on the basis that admitting Canty's statements violated his right to confront and cross-examine Canty. The trial court denied Jackson's motion. Neither Canty nor Jackson testified. After Canty and Jackson presented their defenses, Jackson renewed his mistrial motion, which the court again denied.

The State presented no direct evidence of the events that occurred after Canty and Jackson left the grocery store, except Canty's statements. In particular, no eyewitnesses to the shooting testified. However, circumstantial evidence linked Jackson to the crimes. Both Investigator West and Sergeant Burnish testified they interviewed Jackson after his arrest, and Jackson "said how could I be charged with armed robbery if I didn't steal anything from the pizza man." Jackson also admitted he fled his aunt's house when he saw law enforcement officers coming. The State presented an officer who testified he recovered a Little Debbie donut sticks wrapper from "the side of the road near the entrance to . . . the mobile home park," 137 feet from Flexon's body. Canty called Latoya Rush, who testified she was Canty's neighbor when the crimes occurred. She recalled asking Canty that evening "to keep an eye on [her] house because [she] didn't want to lock [the] door" while she went to McDonald's. Rush stated that "a little while" before she left to go to McDonald's, Jackson was at her house and asked her if she had "any socks or gloves." Rush testified she went to McDonald's and was gone for "no more than ten minutes," and when she came back, she saw officers had arrived in her neighborhood because a "man was dead."

The State also presented Jackson's aunt, Andrea Russell, who testified Jackson "spent a few days" at her apartment in January 2008, although she could not recall exactly when. She later found underneath her couch a rifle that she remembered Jackson brought with him when he arrived. At trial, she identified it as the rifle the State introduced in evidence. The State's firearms expert, referring to the rifle Russell found in her apartment and a bullet fragment removed from Flexon's body, testified "this gun fired that bullet into William Flexon." The firearms expert also testified a shell casing Russell found in her apartment was fired by the same rifle.

The jury found Jackson and Canty guilty of murder and armed robbery. The trial court sentenced Jackson to life in prison for murder and thirty years in prison for armed robbery.⁵

II. Admission of Canty's Statements Violated the Confrontation Clause

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to confront and cross-examine the witnesses against him, and the Fourteenth Amendment applies this right to the States. U.S. Const. amends. VI and XIV; *State v. Henson*, 407 S.C. 154, 161, 754 S.E.2d 508, 512 (2014). In a joint trial, the admission of a nontestifying codefendant's confession that incriminates another defendant violates the other defendant's right of confrontation. *Bruton*, 391 U.S. at 126, 88 S. Ct. at 1622, 20 L. Ed. 2d at 479; *Henson*, 407 S.C. at 161-62, 754 S.E.2d at 512. Such a confession may be admitted in evidence, with an appropriate limiting instruction, only if it is redacted so that it does not incriminate the other defendant on its face, either explicitly or by obvious and immediate implication. *Gray v. Maryland*; 523 U.S. 185, 192, 118 S. Ct. 1151, 1155, 140 L. Ed. 2d 294, 301 (1998); *Henson*, 407 S.C. at 161-64, 754 S.E.2d at 512-13; *see also Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 1709, 95 L. Ed. 2d 176, 188 (1987) (holding a nontestifying codefendant's confession can be admitted only if it "is redacted to eliminate not only the defendant's name, but any reference to his or her existence").

Jackson argues the admission of Canty's statements violated his right of confrontation. He contends that even as redacted, the statements allowed the jury to infer that Canty was referring to Jackson. The law requires a court to carefully analyze "the exact words used for redaction . . . in context to determine whether the reference to the defendant was adequately obscured" to avoid a *Bruton* violation. *State v. Holder*, 382 S.C. 278, 285 n.3, 676 S.E.2d 690, 694 n.3 (2009); *see id.* (explaining "the use of 'the other guy' ha[s] been upheld as a proper substitution in previous cases," but "there could be some instances where this identical phrase would not be [a] sufficient" redaction (citing *State v. Vincent*, 120 P.3d 120, 123-24 (Wash. Ct. App. 2005))). As the First Circuit stated,

⁵ The trial court sentenced Canty to thirty years in prison for his convictions. This court affirmed Canty's convictions in an unpublished opinion. *State v. Canty*, 2014-UP-208 (S.C. Ct. App. filed June 4, 2014).

The application of *Bruton*, *Richardson*, and *Gray* to redacted statements that employ phraseology such as "other individuals" or "another person" requires careful attention to . . . the text of the statement itself and to the context in which it is proffered. The mere fact that the other defendants were on trial for the same crimes to which the declarant confessed is insufficient, in and of itself, to render the use of neutral pronouns an impermissible means of redaction. A particular case may involve numerous events and actors, such that no direct inference plausibly can be made that a neutral phrase like "another person" refers to a specific codefendant. A different case may involve so few defendants that the statement leaves little doubt in the listener's mind about the identity of "another person." In short, each case must be subjected to individualized scrutiny.

United States v. Vega Molina, 407 F.3d 511, 520-21 (1st Cir. 2005) (internal citations omitted); *see also Richardson*, 481 U.S. at 214, 107 S. Ct. at 1711, 95 L. Ed. 2d at 190 (Stevens, J., dissenting) ("*Bruton* has always required trial judges to answer the question whether a particular confession is or is not 'powerfully incriminating' on a case-by-case basis."); *Foxworth v. St. Amand*, 570 F.3d 414, 433 (1st Cir. 2009) (stating "an inquiring court must judge the efficacy of redaction on a case-by-case basis, paying careful attention to both a statement's text and the context in which it is offered").

Evaluating the content of Canty's redacted statements in context, we find the admission of the statements violated Jackson's right to confront and cross-examine Canty.

1. The Little Debbie Snack Cake

Canty's redacted statements contain one specific detail about the person he referred to as "another person" and "the other person," and because of that detail "the reference to [Jackson] was [not] adequately obscured," *Holder*, 382 S.C. at 285 n.3, 676 S.E.2d at 694 n.3, and "the statement [left] little doubt in the listener's mind about the identity of 'another person.'" *Vega Molina*, 407 F.3d at 520. In his fifth statement, Canty stated that while he was inside Cherryvale Grocery,

"Another person brought⁶ a Debbie snack cake donut sticks." In his third and fourth statements, Canty likewise told officers "the other person brought a snack cake" and "the other person brought a Debbie snack cake." This detail specifically identified Jackson to the jury as "another person" and "the other person." The State had already shown the store's surveillance video in which jurors could see a man purchase what appeared to be a snack. Mackovitch—the clerk working in the store that night—testified he sold one of the men "a Little Debbie snack cake." Shannon, who was not working that night but who knew Jackson, watched the video and identified Jackson as the person Mackovitch testified purchased the Little Debbie snack cake. This testimony regarding the purchase of the snack cake was a vivid description of a unique act that only one person completed. Thus, when the State presented Canty's fifth statement to the jury in which he stated "another person" bought a Little Debbie snack cake, the conclusion that Canty was referring to Jackson was inescapable on the face of the statement, despite the removal of Jackson's name. When the jury then heard "another person" was one of the men who attacked the pizza man at the mobile home park, the statement obviously and immediately incriminated Jackson.

Moreover, the witnesses testified the video shows one of the men in the store to be a darker-skinned African-American and the other man to be a fairer-skinned African-American. Mackovitch testified "it was the fairer-skin African-American male that purchased the snack cake." While the jury was listening to Canty's statements that "another person brought a Debbie snack cake donut sticks" and "the other person brought a Debbie snack cake," it could see at the defense counsel table Canty and Jackson, the same two people the witnesses had distinguished by the difference in their complexions. In this context, Canty's statements informed the jury that the fairer-skinned man in the video was the same person who (1) asked Canty if he wanted to participate in robbing a pizza man; (2) told Canty to get Desmond to take them to Cherryvale Grocery; (3) used the pay phone at the store to call Sambino's and order three large pizzas, requesting delivery to lot seven in O.C. Mobile Home Park; (4) bought a "Debbie snack cake donut sticks"; (5) returned to the mobile home park with Canty; (6) went behind the trailer on lot

⁶ Canty wrote the word "brought" in his statements. As the other evidence we discuss in this opinion clearly indicates, however, he meant "bought," as in purchased. In reaching this conclusion, we rely on Investigator West's testimony during a pretrial hearing concerning the voluntariness of Canty's statements: "[Canty] stated that [Jackson] bought Debbie cake, Debbie snack cake and left the store." Investigator West gave similar testimony before the jury.

seven and waited for the pizza man to arrive; and (7) robbed and shot the pizza man, while Canty watched from his house.

The State argues, however, the statements do not incriminate Jackson on their face. It contends a juror hearing only the statements would not be able to identify Jackson as the person Canty describes, and instead would have to link other evidence—such as the surveillance video and Shannon's testimony—to the statements, and from that linkage draw an inference that "another person" was Jackson. The State maintains this necessity removes Jackson's case from the scope of *Bruton* and subsequent cases. The State's argument is based on passages from the decisions of the Supreme Court of the United States and our supreme court, such as "the rule announced in *Bruton* is a 'narrow' one that applies only when the statement implicates the defendant 'on its face.'" *Holder*, 382 S.C. at 284, 676 S.E.2d at 693 (quoting *Richardson*, 481 U.S. at 207-08, 107 S. Ct. at 1707, 95 L. Ed. 2d at 185-86); *see also id.* (stating "[i]n *Richardson*, the Supreme Court remarked 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"); *Richardson*, 481 U.S. at 208-09, 107 S. Ct. at 1707-08, 95 L. Ed. 2d at 186-87 (distinguishing "evidence requiring linkage" from "evidence incriminating on its face" and declining to extend *Bruton* to confessions that incriminate only by inference from other evidence). We find the admission of Canty's statements violated *Bruton* even under the reasoning of *Richardson* and *Holder*.

We agree that because the State redacted Canty's statements to remove Jackson's name, a juror hearing the statements would have to consider evidence outside the four corners of the statements, and draw an inference from the statements in combination with the other evidence that Canty was referring to Jackson. As our supreme court explained in *Henson*, however, "*Richardson* did not turn on whether the confession admitted required an inference in order to incriminate the defendant, but on *the kind of inference required*." 407 S.C. at 164, 754 S.E.2d at 513 (emphasis added). In *Gray*, the Supreme Court defined the kind of inference required for a *Bruton* violation, holding the admission of a codefendant's statement violates *Bruton* when the "statements . . . , despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately." 523 U.S. at 196, 118 S. Ct. at 1157, 140 L. Ed. 2d at 303.

Other courts have applied this standard to determine whether a statement incriminates a codefendant on its face despite the necessity of the jury drawing an

inference. *See, e.g., United States v. Green*, 648 F.3d 569, 575 (7th Cir. 2011) (citing this passage from *Gray* as the standard courts apply "when the defendant's identity can be established through other evidence" and finding no *Bruton* violation); *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 134 (2d Cir. 2008) (noting "whether . . . redaction sufficiently protects a criminal defendant's rights 'depend[s] in significant part upon the kind of . . . inference' that the jury may draw," and citing the passage from *Gray* as the standard for determining whether statements "have the effect of 'facially incriminat[ing] the . . . co-defendant,' thereby rendering them unsuitable for admission under *Bruton*" (alteration in original) (quoting *Gray*, 523 U.S. at 196, 118 S. Ct. at 1157, 140 L. Ed. 2d at 303)). Our own supreme court quoted the passage from *Gray* in *Henson* before concluding, "In other words, the [*Gray*] Court brought within *Bruton*'s prohibition those confessions which facially incriminate through inference." 407 S.C. at 164, 754 S.E.2d at 513.

The evidence in this case meets the *Gray* standard for a *Bruton* violation because the statement "obviously refer[red] directly to someone," and the Little Debbie cake reference would cause the jury to immediately infer it was Jackson. *Gray*, 523 U.S. at 196, 118 S. Ct. at 1157, 140 L. Ed. 2d at 303. As we previously explained, the State had already conclusively proven—before the jury heard the statements—that Jackson was the person who purchased the Little Debbie snack cake. With this knowledge, the jury could not help but immediately infer from the face of the statements that Jackson was "another person."

The State also argues, however, "The reference to the purchase of a Little Debbie snack cake . . . would not be read to refer obviously to Jackson *even if the statements were the first piece of evidence at the trial.*" (emphasis added). The State bases this argument on the remainder of the sentence from *Gray* that we quoted in the previous paragraph. In its entirety, the sentence reads:

The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.

Id. Based on this sentence, the State argues, "Any significance to the purchase of a Little Debbie cake had to be developed through the trial evidence."

In *Henson*, our supreme court found a *Bruton* violation because "the jury could infer from the face of Reid's confession *without relying on any other evidence*, that the confession referred to and incriminated Henson." 407 S.C. at 166, 754 S.E.2d at 514 (emphasis added). The *Henson* court explained that in *Holder*, similarly, "it was apparent the statement was referring to the appellant *even without considering any other evidence*." 407 S.C. at 165, 754 S.E.2d at 514 (emphasis added). However, we do not read *Gray*, *Henson*, or *Holder* as the State asks us to do here—to forbid us from relying on other evidence to conclude a jury would infer Canty's statements incriminated Jackson on their face. In *Gray* itself, the Supreme Court relied in part on other evidence—the testimony of a police detective—introduced after the codefendant's confession. 523 U.S. at 188-89, 193, 118 S. Ct. at 1153, 1155, 140 L. Ed. 2d at 298, 301. In *State v. Johnson*, 390 S.C. 600, 703 S.E.2d 217 (2010), our supreme court relied on an investigator's testimony that the defendant's arrest was based in part on the codefendant's statement in finding a *Bruton* violation. 390 S.C. at 605, 703 S.E.2d at 219.

Other courts have relied on evidence outside the four corners of the codefendant's statement to find a *Bruton* violation. In *United States v. Hoover*, 246 F.3d 1054 (7th Cir. 2001), the Seventh Circuit found the phrases "incarcerated leader" and "unincarcerated leader" in a codefendant's redacted statement were "obvious stand-ins" for Hoover and Shell, two gang members. 246 F.3d at 1059. In doing so, the court relied on other evidence introduced at trial showing Hoover ran the gang from within prison, while Shell "was Hoover's ambassador on the outside." *Id.* Based on this evidence, the court concluded, "Only a person unfit to be a juror could have failed to appreciate that the 'incarcerated leader' and 'unincarcerated leader' were Hoover and Shell." *Id.* The court explained its reliance on other evidence, stating, "Very little evidence is incriminating when viewed in isolation; even most confessions depend for their punch on other evidence. To adopt a four-corners rule would be to undo *Bruton* in practical effect." *Id.*

We discuss *Hoover* not because it is directly on point,⁷ but because it illustrates that a court may consider evidence other than the codefendant's statement in determining whether a *Bruton* violation occurred. *See also United States v.*

⁷ *Hoover* is different from Jackson's case in at least two respects. First, the redaction in *Hoover* functioned as a pseudonym—indeed, much like a nickname—while the identifying detail of Canty's statements is a description of a unique action Jackson took. Second, the inference identifying the defendant in the codefendant's statement was stronger in *Hoover* than it is here—so strong "[o]nly a person unfit to be a juror" could have missed it. *Id.*

Schwartz, 541 F.3d 1331, 1351-52 (11th Cir. 2008) (finding a *Bruton* violation "[e]ven though [the codefendant]'s statement 'was not incriminating on its face, and became so only when linked' with other evidence" because the statement named the defendant's "corporations after the jury had heard lengthy testimony regarding the extent of [the defendant]'s ownership and control of them" (quoting *Richardson*, 481 U.S. at 208, 107 S. Ct. at 1707, 95 L. Ed. 2d at 186)); *United States v. Mayfield*, 189 F.3d 895, 902 (9th Cir. 1999) (finding a *Bruton* violation because "the impermissible inference that [the codefendant] named Mayfield as the drug ringleader was unavoidable, if not on its face, then certainly in the context of the previously admitted evidence at trial"); *State v. Weaver*, 97 A.3d 663, 679 (N.J. 2014) (stating a codefendant's statement admitted in violation of *Bruton* "cannot be considered in a vacuum" but must be "[c]onsidered in the context of the complete trial record").

Thus, we do not agree with the State's argument that this court may not consider other evidence in determining whether Canty's statements incriminated Jackson. Rather, the question before us is whether "the exact words used for redaction," in context with other evidence, "adequately obscured" "the reference to the defendant," *Holder*, 382 S.C. at 285 n.3, 676 S.E.2d at 694 n.3, such that the jury would not "obviously" and "immediately" infer that Canty was referring to Jackson. *Gray*, 523 U.S. at 196, 118 S. Ct. at 1157, 140 L. Ed. 2d at 303. We find they did not.

2. The Redaction of the Statements

The manner in which Canty's statements were redacted and the number of instances where Jackson's name was removed exacerbate the *Bruton* problem. Canty describes how "another person I know by another name came up to me and asked whether I wanted to be a part of robbing a pizza man." He also states he knew "[a]nother person was one of the males, and I didn't -- and I don't know who the other two were." These clumsy substitutions invite the jury to speculate about the identity of the unnamed person Canty implicates in his statements. The Supreme Court discussed this effect in *Gray*, explaining "the obvious deletion may well call the jurors' attention specially to the removed name. By encouraging the jury to speculate about the reference, the redaction may overemphasize the importance of the confession's accusation—once the jurors work out the reference." 523 U.S. at 193, 118 S. Ct. at 1155-56, 140 L. Ed. 2d at 301; *see also United States v. Jass*, 569 F.3d 47, 60 (2d Cir. 2009) (stating "the Supreme Court's Confrontation Clause concern has been with juries learning that a declarant defendant specifically identified a co-defendant as an accomplice in the charged

crime," which becomes too great a risk to the codefendant's right of confrontation "[o]nce a jury learns of a defendant's specific identification—whether through introduction of an unredacted confession, *or through a clumsy redaction that effectively reveals the fact*" (emphasis added) (internal citation omitted)).

The phrase "[a]nother person was one of the males," followed by "I don't know who the other two were," makes it clear Canty *did* know who "another person" was, and indicates that person's identity was intentionally removed from his statement. *See Gray*, 523 U.S. at 192, 118 S. Ct. at 1155, 140 L. Ed. 2d at 301 ("Redactions that simply replace a name with an obvious blank space or . . . other similarly obvious indications of alteration . . . leave statements that, considered as a class, so closely resemble *Bruton*'s unredacted statements that, in our view, the law must require the same result."); 523 U.S. at 194, 118 S. Ct. at 1156, 140 L. Ed. 2d at 302 ("*Bruton*'s protected statements and statements redacted to leave a blank or some other similarly obvious alteration function the same way grammatically."); *United States v. Taylor*, 745 F.3d 15, 29-30 (2d Cir. 2014) (finding a redacted statement violated *Bruton* and *Gray* in part because "the wording of the statement suffers from stilted circumlocutions" that make it "obvious that names have been pruned from the text"); *United States v. Akinkoye*, 185 F.3d 192, 197 (4th Cir. 1999) (stating "if a redacted confession of a non-testifying codefendant . . . shows signs of alteration such that it is clear that a particular defendant is implicated, the Sixth Amendment has been violated").

We also find the frequent repetition of "another person" and "the other person" causes those phrases to lose their effectiveness in obscuring Canty's references to Jackson, and makes it more likely a jury would realize the original statements incriminated Jackson. Altogether, these phrases appear more than thirty times throughout Canty's six statements. The substituted phrases are not intertwined into the narrative structure, and they disrupt the syntax of the sentences. This excessive repetition creates an unnatural prose that draws the listener's attention to the redaction. Thus, a juror hearing the phrases would likely believe Canty's statements originally contained an actual name. *See United States v. Williams*, 429 F.3d 767, 773-74 (8th Cir. 2005) (finding "the redaction of [the confessing codefendant]'s statement made it obvious that a name had been redacted" because: (1) there were "more than forty instances where [the nonconfessing codefendant]'s name was replaced with the word 'someone,'" (2) "[t]he replacements were not seamlessly woven into the narrative," and (3) "the neutral pronoun 'someone' may have lost its anonymity by sheer repetition"; and thus concluding "[i]t may well have been clear to the jury that the statement had obviously been redacted and that

the 'someone' of the statement was [the nonconfessing codefendant]"); *United States v. Sandstrom*, 594 F.3d 634, 649 (8th Cir. 2010) (applying *Williams* in a similar scenario).

3. The State's Reliance on the Statements

The State relied heavily on Canty's statements in arguing Canty committed the crimes. In so doing, the State asked the jury to accept the statements as reliable. The State also asked the jury to accept its argument that Jackson committed the crimes with Canty. The only way the statements could be reliable, therefore, was if "the other person" referred to in the statements was Jackson. In other words, by asking the jury to convict Canty based in part on the reliability of his statements, and by asking the jury to convict Jackson too, the State was necessarily asking the jury to believe Canty was referring to—incriminating—Jackson. *See Gray*, 523 U.S. at 193, 118 S. Ct. at 1155, 140 L. Ed. 2d at 301 ("A more sophisticated juror, wondering if the blank refers to someone else, might also wonder how, if it did, the prosecutor could argue the confession is reliable, for the prosecutor, after all, has been arguing that [the nonconfessing codefendant], not someone else, helped [the confessing codefendant] commit the crime."); *Henson*, 407 S.C. at 166, 754 S.E.2d at 514 ("The jury also could presume the solicitor would not both assert that Henson was the fourth conspirator and offer the confession into evidence if the solicitor believed the confession referred to anyone other than Henson.").

This is particularly true given that the State prosecuted Canty for murder under the accomplice liability doctrine of the hand of one is the hand of all. Under the hand of one doctrine, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *State v. Reid*, 408 S.C. 461, 472, 758 S.E.2d 904, 910 (2014).⁸ To prove Canty guilty of murder under this doctrine, the State had to prove he "joined with another" to rob the pizza delivery man. The State presented circumstantial evidence—such as the surveillance video—that Canty and Jackson planned to do this. However, the strongest evidence the State presented to prove Canty "joined with another" in a "common design and purpose" was the evidence in Canty's statements. Moreover, to prove Canty guilty of murder under this doctrine, the State had to prove a participant in the agreed plan shot Flexon in

⁸ Donta Reid, the defendant in the cited case, was the nontestifying codefendant whose statements to police were found to violate Davontay Henson's right of confrontation when admitted at their joint trial. *Henson*, 407 S.C. at 157, 754 S.E.2d at 509.

executing their "common design and purpose." The only person this could have been was Jackson. Thus, for the State to successfully prove Canty guilty of murder under the doctrine of the hand of one is the hand of all, the person whose name was redacted from Canty's statements and replaced with the phrase "another person" had to be Jackson.

4. Unpreserved Issues

There are two additional issues, either of which possibly warrants reversal under *Bruton*, but neither of which is preserved for our review.

The first unpreserved issue involves Sergeant Burnish's testimony about his investigation of the crimes and Jackson's arrest. Sergeant Burnish described how he and Investigator West picked up Canty on January 15 and took him to the law enforcement center for questioning. There, Canty gave a statement to Investigator West. Sergeant Burnish explained he was not present when Canty gave this statement, but "was in the building." The solicitor then asked, "what happened and what did you do next in your investigation?" Sergeant Burnish answered, "Based on the information that was received on that date is when we issued warrants for the arrest of Mr. Jackson."

Jackson argues Sergeant's Burnish's testimony created a *Bruton* violation because it effectively told the jury that Canty named Jackson in his original, unredacted statements. *See Gray*, 523 U.S. at 188-89, 193, 118 S. Ct. at 1153, 1155, 140 L. Ed. 2d at 298, 301 (finding a detective's testimony that he was able to arrest the defendant after his codefendant gave a confession "blatantly link[ed] the defendant to the deleted name" in the redacted confession introduced at trial); *Johnson*, 390 S.C. at 605-07, 703 S.E.2d at 219-20 (holding an investigator's testimony that he arrested the defendant based in part on a conversation in which a codefendant gave a confession "effectively told the jury" the unredacted confession named the defendant, and thereby created a *Bruton* violation).

However, Jackson never made any argument to the trial court as to the effect Sergeant Burnish's testimony had on the *Bruton* problem. In fact, the only times Jackson addressed the merits of the alleged *Bruton* violation were in his pretrial motion to sever and when he renewed the motion on the first day of trial. At those points, the trial court could not have known Sergeant Burnish would connect Canty's statement to Jackson's arrest. When Jackson renewed his motion at the close of the State's case and the close of all evidence, he offered no new arguments in support of the alleged *Bruton* violation, and did not mention how Sergeant

Burnish's testimony affected the issue. Therefore, we find unpreserved Jackson's argument that Sergeant Burnish effectively told the jury Canty's unredacted statements named Jackson.

The second unpreserved issue relates to the trial court's failure to instruct the jury not to consider Canty's statements in determining Jackson's guilt. A trial court's instruction to the jury that it may not consider a nontestifying defendant's confession against a codefendant is central to the right of the State to conduct a joint trial. *See Richardson*, 481 U.S. at 206-07, 107 S. Ct. at 1707, 95 L. Ed. 2d at 185-86 (stating the Court's decision in *Bruton* created "a narrow exception" to "the almost invariable assumption of the law that jurors follow their instructions"); *Henson*, 407 S.C. at 162, 754 S.E.2d at 512 ("Historically, instructing the jury to consider a confession as only evidence against the confessing codefendant was considered sufficient under the Confrontation Clause, but in *Bruton* the United States Supreme Court dispensed with that fiction.").

The Eighth Circuit explained the necessity of a limiting instruction to protect the confrontation rights of defendants such as Jackson:

The Confrontation Clause dictates that "where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand." There is a general assumption in the law, however, that juries follow their instructions. As such, the general rule is that "a witness whose testimony is introduced at a joint trial is not considered to be a witness against a defendant if the jury is instructed to consider that testimony only against a codefendant."

United States v. Gayekpar, 678 F.3d 629, 636 (8th Cir. 2012) (internal citation omitted) (quoting *Richardson*, 481 U.S. at 206, 107 S. Ct. at 1707, 95 L. Ed. 2d at 185). In *Gayekpar*, the Eighth Circuit found that although the redaction was sufficient, a *Bruton* violation occurred because the district court failed to give a limiting instruction. 678 F.3d at 637.

The Eighth Circuit was able to consider the trial court's failure to give a limiting instruction under the plain error rule. 678 F.3d at 637-38. We are constrained to find the issue unpreserved. *See State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) (stating "the plain error rule does not apply in South Carolina state

courts"); *State v. Evans*, 316 S.C. 303, 307 n.1, 450 S.E.2d 47, 50 n.1 (1994) (finding that when a defendant claiming a *Bruton* violation "did not request [a limiting instruction] nor make the argument [on appeal] that the failure to give a limiting instruction was error . . . , [the argument] has been waived").

III. Distinguishing Jackson's Case from Other Cases

The State cites numerous cases in which courts found no *Bruton* violation where the defendant's name or nickname was redacted from the nontestifying codefendant's statement and replaced with a neutral phrase like the ones used in this case—"another person" and "the other person." We find the cases cited by the State are distinguishable on their facts because the statements in those cases did not incriminate the codefendant on their face.

In *United States v. Vasilakos*, 508 F.3d 401 (6th Cir. 2007), the government jointly tried five codefendants who participated in a mail fraud conspiracy. 508 F.3d at 405. Two of these codefendants, Vasilakos and Lent, appealed their convictions, arguing the district court erred by admitting into evidence deposition statements of their codefendants from civil proceedings. 508 F.3d at 406. Before introducing the statements, "the government replaced each reference to Vasilakos and Lent with a neutral word, such as 'the person' or 'another person.'" 508 F.3d at 408. The two appellants argued the admission of the statements violated their right of confrontation. 508 F.3d at 406. The Sixth Circuit disagreed. 508 F.3d at 408. The court explained the statements did not "ineluctably implicate Vasilakos or Lent" because "the government was prosecuting multiple defendants" and "alleged a multifaceted conspiracy in which several individuals engaged in activities" described in the depositions. *Id.*

In *Priester v. Vaughn*, 382 F.3d 394 (3d Cir. 2004), the appellant sought habeas corpus relief for an alleged *Bruton* violation in his 1991 trial for murder. 382 F.3d at 395-96, 397.⁹ The Third Circuit found no *Bruton* violation because the

⁹ *Priester* is distinguishable from this case initially because it is an appeal from the denial of habeas corpus relief. As the Third Circuit explained, the cases upon which the appellant relied—*Gray* and *United States v. Richards*, 241 F.3d 335 (3d Cir. 2001)—"were announced after [the] merits appeal was heard in the Pennsylvania Superior Court and it did not act unreasonably in failing to predict the Supreme Court's decision in *Gray*." 382 F.3d at 400. Under the deferential standard of review the Third Circuit was required to apply, the appellant was not entitled to relief unless the state court's "adjudication of the claim . . . resulted in a

statements contained "no . . . 'nicknames,' descriptions or phrases that directly implicate[d]" the appellant, and the phrases used for redaction were "bereft of any innuendo that ties them unavoidably to" him. 382 F.3d at 400-01.

The outcomes of *Vasilakos* and *Priester* are different from the result we reach today not because the Sixth Circuit and Third Circuit applied a different rule of law, but because the facts of those cases are distinguishable from the facts before us. This difference becomes clear by comparing *Vasilakos* and *Priester* to two other cases decided by those courts, both of which our supreme court found "persuasive" in *Henson: Richards* and *Stanford v. Parker*, 266 F.3d 442 (6th Cir. 2001). See *Henson*, 407 S.C. at 165-66, 754 S.E.2d at 514. The State argues the outcomes of *Vasilakos* and *Priester* are different because the Sixth Circuit "limited" *Stanford* in *Vasilakos* and the Third Circuit "rejected" *Richards* in *Priester*. We disagree. Rather, we believe the courts reached different outcomes because each court's evaluation of the specific facts of that case required it. The different results of these cases are reconciled by a careful evaluation of their distinguishable facts.

A similar evaluation of specific facts also reconciles our decision today with our decision in *State v. McDonald*, 400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012), *cert. granted in part*, (Feb. 21, 2014). In that case, the State tried McDonald together with his two codefendants—Whitehead and Cannon—for murder and burglary. 400 S.C. at 274, 734 S.E.2d at 168. Cannon gave a statement admitting his, Whitehead's, and McDonald's involvement in the crimes. 400 S.C. at 274, 734 S.E.2d at 167. After the State redacted Cannon's references to Whitehead and McDonald by replacing their names with the phrase "another person," the trial court allowed the statement into evidence. 400 S.C. at 276-77, 734 S.E.2d at 169. We carefully evaluated the statement, the redaction, and the context in which the State presented the statement at trial—as *Holder* required—and concluded the redacted statement incriminated only Cannon, not McDonald. 400 S.C. at 278-79, 734 S.E.2d at 170.

decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 382 F.3d at 397 (emphasis removed) (quoting 28 U.S.C. § 2254(d)).

McDonald, like other cases cited by the State,¹⁰ is based on its unique facts. We can reconcile *McDonald* with this case despite the use of the same neutral phrase for redaction—"another person." First, the trial court in *McDonald* gave the jury a limiting instruction. 400 S.C. at 278, 734 S.E.2d at 170. Second, Cannon's statement in *McDonald* did not contain a vivid description of a unique act by his

¹⁰ In each case cited by the State to support its position that neutral phrases such as those used in this case do not offend the Sixth Amendment, the court ruled on the facts of that case the co-defendant's statements did not incriminate the defendant. Each case, therefore, is distinguishable on its facts from the case before us. See, e.g., *United States v. Lighty*, 616 F.3d 321, 377 (4th Cir. 2010) (finding the redacted statement was like that in *Akinkoye*, *infra*, and unlike that in *Gray* because "it would have been unclear to the jury that the statements had been altered at all"); *Jass*, 569 F.3d at 58, 61-64 (holding a redacted confession did not violate the defendant's right to confrontation "[b]ecause the redacted statements neither manifested obvious indications of alteration, nor otherwise signaled to the jury that the statements had originally contained actual names," and finding the "confession was not obviously altered to omit the specific identity of" the nonconfessing codefendant (internal quotation marks and citations omitted)); *United States v. Logan*, 210 F.3d 820, 821-23 (8th Cir. 2000) (examining the redaction "another individual," concluding "there was no indication whatever that there had been a redaction," and pointing out "the allegedly offending phrase occurred only once"); *United States v. Verduzco-Martinez*, 186 F.3d 1208, 1214-15 (10th Cir. 1999) ("[c]onsidering [the nontestifying codefendant]'s redacted statements as a whole" and finding "the use of the neutral pronoun/phrase 'another person' did not identify [the nonconfessing codefendant] or direct the jury's attention to him, nor did it obviously indicate to the jury that the statements had been altered"); *Akinkoye*, 185 F.3d at 198 (finding no *Bruton* violation because "the jury neither saw nor heard anything in the confessions that directly pointed to the other defendant"); *United States v. Edwards*, 159 F.3d 1117, 1125-26 (8th Cir. 1998) (finding "the district court's decision to admit nontestifying defendant admissions, redacted as to codefendants by the use of pronouns and other neutral words" was not a *Bruton* violation because it was consistent with *Gray* and other cases allowing redacted confessions into evidence "so long as the redacted confession or admission does not facially incriminate or lead the jury directly to a nontestifying declarant's codefendant"); *State v. Garrett*, 350 S.C. 613, 620-21, 567 S.E.2d 523, 526-27 (Ct. App. 2002) (determining no Confrontation Clause violation occurred because the redacted statement removed specific mention of the nonconfessing codefendant and "was limited in scope to events occurring the night of the crime in question," and thus based on the specific facts of that case).

codefendant, as Canty's statement did with his description of Jackson purchasing a Little Debbie cake. Had the State removed Canty's reference to the purchase of the Little Debbie cake, which was virtually unnecessary to convict Canty, this case may very well have turned out like *McDonald*. In addition, although Cannon's redacted statement used the phrase "another person" twenty-one times, 400 S.C. at 277-78, 734 S.E.2d at 169-70, no single use of the phrase created an awkward sentence construction as did the redaction of Canty's statement. Thus, the fact of redaction was far less obvious in *McDonald* than here.

Under the facts of this case, primarily the description of "another person" purchasing the Little Debbie cake, Canty's redacted statements incriminated Jackson by obvious and immediate implication. Under the facts of *McDonald*, however, Cannon's redacted statement did not incriminate his codefendant.

IV. Admission of Canty's Statements Was Not Harmless

The State argues that even if the trial court erroneously admitted the statements in violation of the Confrontation Clause, their admission did not constitute reversible error. We disagree.

Confrontation Clause violations are subject to a harmless error analysis. *Holder*, 382 S.C. at 285, 676 S.E.2d at 694. "In the context of Confrontation Clause violations through the admission of a codefendant's confession, the harmless error standard has been formulated as: 'In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.'" *Henson*, 407 S.C. at 167, 754 S.E.2d at 515 (quoting *Schneble v. Florida*, 405 U.S. 427, 430, 92 S. Ct. 1056, 1059, 31 L. Ed. 2d 340, 344 (1972)).

We find the admission of the statements prejudiced Jackson and contributed to his guilty verdict, and the remaining evidence against Jackson was not overwhelming. First, the statements were the only direct evidence Jackson planned the robbery, called Sambino's, and shot Flexon. No other witness or evidence identified Jackson as the person who asked Canty to rob a pizza man, and the statements were the only eyewitness account of the shooting. Second, the State emphasized the statements throughout trial, especially during its closing argument. Finally, the trial court did not give the jury a limiting instruction that it may consider the statements only against Canty. As the Eighth Circuit noted in *Gayekpar*, "[w]ith

no cautionary instruction, the jury was free to consider [Canty]'s statements when it decided the sufficiency of the [State]'s case against [Jackson]." 678 F.3d at 637.

We acknowledge the remaining evidence tending to establish Jackson's guilt is strong. However, the evidence is purely circumstantial, and we do not believe this "properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." *Henson*, 407 S.C. at 167, 754 S.E.2d at 515 (internal quotation marks and citation omitted). *See also* 407 S.C. at 158, 167, 754 S.E.2d at 510, 515 (finding a *Bruton* violation and concluding the error was not harmless, even where two coconspirators testified Henson was the shooter and gave other testimony corroborating the State's evidence against him); *State v. Singleton*, 303 S.C. 313, 314-15, 400 S.E.2d 487, 487-88 (1991) (finding a *Bruton* violation and concluding the error was not harmless, even where "[t]he victim testified that appellant walked up to his car, pointed a pistol in the car and demanded he turn over his money"); *Edmond v. State*, 341 S.C. 340, 349, 534 S.E.2d 682, 687 (2000) (concluding "evidence of petitioner's guilt was not overwhelming as the State's entire case was built on circumstantial evidence").

We conclude the admission of Canty's statements was not harmless error.

V. Conclusion

We find the admission of Canty's redacted statements violated Jackson's right of confrontation under the Sixth Amendment and was not harmless error. We **REVERSE** and **REMAND** for a new trial.¹¹

SHORT, J., concurs.

GEATHERS, J., concurring in a separate opinion: I concur in the majority's conclusions that the admission of Canty's redacted statements was a *Bruton* violation and the violation was not harmless beyond a reasonable doubt. However,

¹¹ Jackson also appeals the trial court's refusal to quash the jury panel pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Because we find a reversible Confrontation Clause violation occurred, we need not address this issue. *See Henson*, 407 S.C. at 168 n.4, 754 S.E.2d at 515 n.4 (declining to address a remaining issue because the court's determination of the Confrontation Clause issue was dispositive).

I do not agree that a juror hearing the statements would have to consider evidence outside the four corners of the statements in order to infer that Canty was referring to Jackson. Further, I do not agree that had the State removed Canty's reference to the purchase of the Little Debbie cake, this case may have turned out like *State v. McDonald*, 400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012), *cert. granted in part* (Feb. 21, 2014). The blunt and repetitive substitutions of "another person" or "the other person" for Jackson's name, especially "Another person was one of the males, . . . and I don't know who the other two were," were obvious redactions that "performed the same accusatory function as using the defendant's name." *State v. Henson*, 407 S.C. 154, 163, 754 S.E.2d 508, 513 (2014) (discussing the State's substitution of obvious blanks for the defendant's name in *Gray v. Maryland*, 523 U.S. 185, 193-94 (1998)). These substitutions, by themselves, impermissibly refer to Jackson's existence because they "obviously refer directly to someone," *Gray*, 523 U.S. at 196, and Jackson was Canty's sole co-defendant.

APPENDIX: Text of Canty's Fifth Statement

This appendix contains the text of Canty's fifth statement as Investigator West read it to the jury. We have omitted objections and other interruptions so that what appears below is simply the text of the statement:

I was standing by the mailbox of the O.C. Mobile Home Park when another person I know by another name came up to me and asked whether I wanted to be a part of robbing a pizza man, and I said yes because I didn't want the other guys to laugh and pick at me. Another person told me to ask my cousin to take us to the store. I was going to get the -- I was going to get batteries. My cousin name is Desmond Canty. He told me he was going to call Sambino's and order some pizzas. We went to Cherryvale Grocery. Another person used the pay phone right next to the trash can, green, and called Sambino's. Another person ordered three large pizzas. Pepperoni and cheese is all heard he asked for. We went -- we then went into the store. I looked for the batteries, but they didn't have any. Another person brought a Debbie snack cake donut sticks. We went back to the house and we went into the back where the trash cans were, and I sat on a blue Caprice next to Toya's house. Toya stays next door to us. Toya left. I then went and

sat on my porch until the pizza man came. I saw a silver in color Chrysler van pulled up, and it pulled up to the back where another person was -- the other person was. The pizza man stayed in his vehicle for approximately three minutes, and he then -- and then -- he then got out and went to the abandoned residence, lot number 7, and saw the door open and turn around and went back to his vehicle real fast. The pizza man was met by three males with hoodies. Another person was one of the males, and I didn't -- and I don't know who the other two were. The pizza man was trying to take the gun rifle away from the black male, and the black male told the pizza man to stop, and then the gun fired. After I saw the man got shot, I ran in the house and told my moms I heard a gunshot.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
Honorable William Jeffrey Young, Circuit Court Judge
Appellate Case No: 2011-199366
Opinion dated November 5, 2014

THE STATE,

Respondent,

v.

DANIEL D'ANGELO JACKSON,

Appellant.

PETITION FOR REHEARING

Comes now Respondent, above named, by and through the Attorney General of South Carolina, and pursuant to Rule 221(a), SCACR, hereby respectfully petitions this Court for rehearing. The Court of Appeals opinion was issued on November 5, 2014 and concluded the admission of co-defendant Reginald Canty's redacted statements during joint murder trial violated Daniel Jackson's 6th Amendment right of confrontation and that the error was not harmless error. State v. Daniel D'Angelo Jackson, __ S.C. __, __ S.E.2d __, 2014 Westlaw 5654283 (S.C. App. November 5, 2014). Respondent submits that the issues raised in Jackson concerning the admission of a non-testifying co-defendant's confessions against the co-defendant and the complete redaction of Jackson's name by the use of the neutral pronoun "another person" involve a legal principle of major importance concerning the manner that joint trials are handled in South Carolina and it is therefore proper for rehearing under SCACR Rule 221 and certiorari

under SCACR Rule 242 should rehearing be denied. Respondent submits that the Court of Appeals misapprehended certain points, both legal and factual, as set forth below, in support of the petition for rehearing.

1. The admission of Canty's Statements against Canty did not violate the Confrontation Clause where specific reference to Jackson was removed through the use of neutral pronouns that referred to either "another person" or "other person" which did not incriminate Jackson "on the face" of each of the admitted statements.

In the Court's opinion, it concluded that "[E]valuating the content of Canty's redacted statements in context, we find the admission of the statements violated Jackson's right to confront and cross-examine Canty." Respondent submits that the references made directly to Jackson in the series of statements was "adequately obscured." The Court focused on the reference in the fifth statement about "another person" purchasing a "Little Debbie" snack cake to resolve that the reference in the statement was to Jackson rather than "another person." The opinion states: "the conclusion that Canty was referring to Jackson was inescapable on the face of the statement, despite the removal of Jackson's name. When the jury then heard "another person" was one of the men who attacked the pizza man at the mobile home park, the statement obviously and immediately incriminated Jackson."

The problem with the Court's reading of the statements reflects a misapprehension of the manner that a jury would hear the statement. Under the court's conclusion "another person" would always refer to the same person, i.e., "another person #1." However, a fairer reading of the statements does not require the jury to assume that "another person" is always the same person. To the contrary, "another person" would as reasonably suggest that its use is a different person than the earlier reference.

Neither Bruton nor its progeny require gender-neutral redaction nor forbid the use of neutral pronouns. See e.g. Gray v. Maryland, 523 U.S. 185, 196 (1998) (suggesting the

substitution of the phrase “some other guys” for “deletion, deletion” did not violate Gray’s Confrontation Rights under Bruton). Similarly, the fact that a non-testifying co-defendant’s statement limits the amount of potential participants involved does not create a per se Bruton violation. In Jackson’s case, there was no evident limitation within the redacted statement, which varied from one participant to three additional actors to an ambiguous unidentified number of other persons. In fact, South Carolina has rejected both of these contentions. See State v. McDonald, 400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012), (cert. granted.), (finding that the use of the neutral term “another person” was acceptable in a redaction); State v. Garrett, 350 S.C. 613, 620-21, 567 S.E.2d 523, 526 (Ct. App. 2002)(finding the admission of a redacted statement made by Garrett’s non-testifying co-defendant, Davis, in Davis and Garrett’s joint trial did not violate Garrett’s Confrontation Rights despite the fact the redacted statement used the phrase “the other guy” and Garrett was the only other male on trial). Rather, as was the case in Gray, a redacted statement violates Bruton and its progeny only when the inferences flowing from the redactions contained within the statement “obviously refer . . . [to] the defendant” such that “were the confession the very first item introduced at trial” the jury could “immediately” construe the statement against the accused. See e.g. Gray, 523 U.S. at 196(“The inferences at issue here involve statements that, despite redaction, obviously refer to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.”). Therefore, in a case such as this where there are no obvious redactions in Canty’s statements, the redacted statements do not facially incriminate Appellant. Respondent submits that the trial judge did not err in admitting the properly redacted statements of Canty that removed any specific reference to Jackson by the reasonable use of the terms “another person” or “other person.”¹

¹ Statements that connect the defendant “only when linked to other evidence introduced at trial,” do not

Gray differentiates between statements that incriminate by inference or only when linked with later evidence and those that obviously refer to a particular person or involve inferences a jury could make even without additional evidence. Id. at 196, 118 S.Ct. 1151. Only in the latter instance does a constitutional violation occur. Id.² For example, in response to the question, “Who was in the group that beat [the victim]?,” the response “Me, deleted, deleted, and a few other guys” obviously incriminates two codefendants of the crime of murdering the victim. Id.

offend the Bruton rule. State v. Holder, 382 S.C. 278, 284, 676 S.E.2d 690, 693 (2009). However, redaction of the defendant’s name alone may not suffice to protect rights. “[O]ne 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. For example, use of the pronoun “she” when there is only one co-defendant, and she is female, still identifies the co-defendant and offends Bruton. Holder, 382 S.C. at 285. Moreover, 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). The use of a phrase which reflects a pointed identification being hidden from the juror would also appear to point directly to a co-defendant and would offend Bruton. See, for example, Gray, 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 (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. The Fourth Circuit has also noted 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). See, e.g., United States v. Lighty, 606 F.3d 321, 376–77 (4th Cir.2010) (redacted statement of codefendant that he was accompanied by “three other people” did not violate Bruton); United States v. Jass, 569 F.3d 47, 61–63 (2nd Cir.2009) (substitution of “another person” in place of defendant’s name did not violate Bruton); Ky Minh Pham v. Hickman, 262 F. App’x 35, 37 (9th Cir. 2007) (use of “friends,” “people,” “men,” “they,” “guys,” and “someone” did not violate Bruton).

2 Many circuits, like the Tenth Circuit in United States v. Verduzco-Martinez, 186 F.3d 1208, 1213–14 (10th Cir., 1999) (use of “another person” did not violate confrontation clause); , have permitted admission of a redacted statement using a neutral pronoun, even if other evidence would link the co-defendant to the redacted confession, so long as the redacted statement is not facially incriminatory with respect to the non-testifying co-defendant. See, e.g., United States v. Vega Molina, 407 F.3d 511, 519–21 (1st Cir.2005) (holding that non-testifying co-defendant’s redacted confession, describing crimes in detail, acknowledging his participation in them, but using terms such as “other individuals” or “another person” when mentioning his co-defendants, was not so powerfully incriminating to bring Bruton proscription to bear)

Many courts, however, have also recognized that there are circumstances where no redaction or neutral pronoun substitution will suffice to eliminate a Sixth Amendment violation. See Stanford v. Parker, 266 F.3d 442, 456–57 (6th Cir. 2001) (concluding that Confrontation Clause was violated because “other person” in confession would not prevent jury from inferring confession referred to defendant); United States v. Hoover, 246 F.3d 1054, 1059 (7th Cir. 2001) (holding that “incarcerated leader” clearly referred to defendant in violation of Bruton because it was no more than obvious pseudonym and that to “adopt a four-corners rule would be to undo Bruton in practical effect”); Richards, 241 F.3d, 341 (determining that Confrontation Clause was violated by admission of co-defendant’s confession that referred to “friend” and “inside man”); United States v. Gonzalez, 183 F.3d 1315, 1321–22 (11th Cir.1999) (concluding that there was a Confrontation Clause violation because prosecutor’s presentation of redacted confession implicated precise number (four) of confessor’s co-defendants), overruled on other grounds, United States v. Diaz, 248 F.3d 1065 (11th Cir.2001); United States v. Payne, 923 F.2d 595, 597 (8th Cir. 1991) (holding that confession indicating plan to help “someone” escape from prison violated Confrontation Clause because everyone at trial knew that “someone” meant defendant).

(internal quotation marks omitted). After Gray, however, the Fourth Circuit has continued to allow general references to “another person” or “another individual” in such statements, because “[t]he Supreme Court has strongly implied that such statements do not offend the Sixth Amendment.” United States v. Akinkoye, 185 F.3d 192, 198 (4th Cir. 1999). The implication to which Akinkoye refers is the Supreme Court's explicit pondering in Gray about “[w]hy could the witness not, instead, have said: ‘Question: Who was in the group that beat [the victim]? Answer: Me and a few other guys,’ ” suggesting that such a neutral response would have been acceptable. Gray, 523 U.S. at 196. In Akinkoye, the non-testifying co-defendants' confessions were retyped, with the defendants' respective names replaced with the neutral phrase “another person” or “another individual,” and the statements were read to the jury. Akinkoye, 185 F.3d at 198. So redacted, neither confession facially implicated the other defendant. Id.³ In McDonald, 400 S.C. 272 (cert. granted), the Court of Appeals concluded that Bruton was not violated where the defendant's name, like in this case, was redacted and replaced by the neutral phrase “another

³ In U.S. v. Lighty, 616 F.3d 321, 376-377 (4th Cir. 2010), the Court found no constitutional violation in Flood's case. CW's testimony concerning the statements made by Lighty were found to be like those in Akinkoye and unlike the offending statements in Gray. In Gray, the defendants' names were redacted in response to the direct question of who beat the victim. It was clear to the jury upon hearing the non-testifying codefendant's response that the statement had been altered by the deletion of two names. Gray, 523 U.S. at 196, 118 S.Ct. 1151. There, as in Akinkoye, there was no way to facially identify the three other people without more information. Also, unlike in Gray, the 4th Circuit determined that it would have been unclear to the jury that the statements had been altered at all. Indeed, only when Lighty's out-of-court statement to CW is linked with in-court testimony, which Flood had an opportunity to challenge through cross-examination, might one infer that the out-of-court statement refers to Flood. Following Gray, the Fourth Circuit Court of Appeals applied this reasoning to general references to “another person” or “another individual” in Akinkoye v. United States, 185 F.3d 192, 198 (4th Cir. 1999). Specifically, the Fourth Circuit said that redacted statements taken from Akinkoye, a male, and Afolabi, a female, each of which utilized the redaction mentioned above, and were offered only against themselves in their joint trial, did not violate either of their rights under the Confrontation Clause, despite the fact their statements said that another person aided them in committing the charged offenses. Id. In so holding, the Fourth Circuit said, “[t]he Supreme Court has strongly implied that such statements do not offend the Sixth Amendment.” Id. Thus, the proposition from Gray, that redactions which are not readily apparent to a juror and do not ask them to speculate whose identity is being concealed, but are instead, accepted at face value, do not violate one's Confrontation Right's under Bruton.

The Fourth Circuit has recently relied upon Akinkoye in United States v. Cone, 714 F.3d 197 (4th Cir. 2013). In Cone, the Court held that the substitution of the name “another individual” sufficient to protect the defendant's rights. Id. 714 F.3d at 218. As the Court therein stated: “only reference to other evidence could the jury arrived at the conclusion that [the defendant] was the subject of Cone's out of court statement. In such circumstances, we have concluded that the Confrontation Clause is not offended.”

person.” The statement therein only implicated the statement’s maker and did not limit participation to the three defendant’s on trial.

The Court of Appeals erred in its assessment in this case. First, the method of redaction utilized in the non-testifying co-defendant’s statement did not require the jury to speculate or fill in any obvious blanks with the non-testifying co-defendant’s name. And second, since it did not, it also did not facially incriminate the accused? Because neither of these were correctly resolved, rehearing is proper.

The various redacted statements did not facially incriminate Jackson. There was no reference to Jackson “on the face” of any of the statements by Canty. The various and multiple references to “another person” “other person” at the time of the killing could not be always read by the jury to facially refer to the Appellant without otherwise being linked with other evidence. Contrary to the claim of Appellant and Court of Appeals, the evidence would require linkage to the other evidence presented. The jury could not have made any connection without relying upon other evidence presented at trial.

Second, the Court misapprehended the way a jury would have construed the statements. The number of other unidentified participants was unclear within the statements, as redacted, and inconsistent from the various statements. Concerning the crime scene, the number of involved participants were either one person [(State Exhibit 9, R.p. 767, ll. 9-10)(“looked like it could be James or J-boy”)], [State Exhibit 8, R.p. 765, ll. 1-8 (“I see two people fighting and I hear someone said no, stop, then I hear gunfire ... and the person that was holding the gun had a hoodie”)], two persons [(State Exhibit 9, R.p. 767, ll. 17-18)(“I hear more than one footsteps running)], [State Exhibit 3, R. 40-47, (“I saw a white man wrestling with a tall black man over a gun, the black man told him to stop, and then I heard a gunshot. The other person was standing

next to the van looking at the guys wrestle. The other guy had a handgun that looked like a revolver. After the gunfire everyone ran ...”]; (R.p. 574, ll. 9-13)(he stood in his yard by the gate and saw a black male struggling with the pizza man and another black male holding a revolver ...”), three males with hoodies, (State Exhibit 5, R.p. 581, ll. 1-8)(“The pizza man was met by three males with hoodies. Another person was one of the males, and I didn’t - - and I don’t know who the other two were. The pizza man was trying to take the gun rifle away from the black male, and the black male told the pizza man to stop and then the gun fired.”) or an unclear amount of perpetrators due to the ambiguity in the Canty’s written usage of “another person.” See (State Exhibit 7, R.p. 586, l. 25 – p. 587, l. 9)(“another person went to the back of the trailer, and he wait for the pizza man to come, they started to rob the man. The pizza man was trying to take the gun away from another person, and this person said stop. And after he said stop, he shot the pizza man ... he stayed there for a second. Then he ran. It looked like another person running away with the other person around the car.”). The use of neutral pronouns in each of the co-defendant’s statements removed the jury’s speculation that a redaction had occurred. Rather, it enhanced Jackson’s own argument that Canty’s statements were inconsistent and lacked credibility. Contrary to the assessment of the Court of Appeals, the jury is hearing all these various references to “another person” or “other person” which allows for various construction. The jury did not have the unredacted version to bias their review or suggest that “another person” was always the same person. Even if they realized that the purchaser of the Little Debbie was Jackson as “another person,” it did not require that the person be the same person who killed in the statements. A reasonable juror looking only at each of the “confessions” themselves would not be able to reasonably infer that Jackson was the trigger person or another person identified at the crime scene from any of the statements. This is a major

fault in the assessment.

The reference to the purchase of a Little Debbie snack cake in the redacted statement by the “other person” (R.p. 574, ll. 1-3), “another person” (R.p. 579, ll. 19-24) or “the other person bought a snack cake” (R.p. 558, l. 25 – p. 559, l. 2) did not create Bruton error. These are not facially incriminating statements against Jackson. Unlike Gray, this reference would not be read to refer obviously to Jackson even if the statements were the first piece of evidence at the trial. Any significance to the purchase of a Little Debbie cake had to be developed through the trial evidence. The clerk testified “they” came in and bought a Little Debbie cake, but he could not identify who bought it. R. 260-61, 275. Another employee was able to identify Jackson from the video. R. 296. Subsequently, a Little Debbie wrapper was found near the crime scene. R. 374, 416-18. However, there was nothing that could identify the particular wrapper to a purchase that evening. R. 428, 858. This reference did not refer “on its face” to Jackson, although it was plainly inferable through the other evidence that was properly admitted against him. However, the statement did not plainly indicate that this person was the only person involved in the crime.

Further, the degree of inference is slight due to the multiple possibilities of “another” or “other” persons within the individual statements. The inferential connection to the trigger person or the person with the revolver is tenuous and is not “facially incriminating” to Jackson than it is to the hooded unidentified person in the video at the grocery store. R. 281 (State Exhibit 18, State Exhibit 20, 21:01:09). Simply put, these statements do not incriminate Jackson on their face. A juror would not know what or anything that Jackson did from the statements. It may have been Marcus Branch, Desmond Canty, Junior’s nephew, or the unidentified man in the black hoodie in the store or any “other person” or other persons. This extensive redaction of Canty’s

statements were consistent with Bruton-Richardson-Gray.

The attenuated reference to “another person” or “other person” is distinguishable from cases recently addressed by the court. Unlike Henson, the Cauty statements would not be read to facially refer specifically to Jackson. To the contrary, the jury here would have to refer to other evidence to determine what role Appellant had in the crime. Unlike Henson, no other co-defendants were named though there were multiple other unnamed persons suggested in the statements. The jury could not assume from the face of any statement what Jackson did. Similarly, unlike Holder, the various statements had other individuals who were unidentified and did not uniquely point to Jackson as it did in Holder who was the only female on trial, where the jury would likely infer the reference to Holder. Similarly, the specific reference to “James or J-boy” was not a reference to the appellant and did not implicate any Bruton issue. In fact, it is not clear from the statement how many were involved.

Further, there was no singular “another person” identified in the various statements who had a particular role that the jury would have only inferred was Jackson. From the collateral evidence presented to the jury, it was clear that Jackson was identified by the store employee on the video. R. 296. His presence at the store was conceded by his counsel in his opening and closing statement. R. 173, 977, 982-83, 998. Similarly, it was shown that someone bought a Little Debbie snack on the video, but one of the employees was unable to identify who or what was brought. R. 260-64, 287. But see Tr. 275 (on video fairer skinned person purchases Little Debbie).⁴ Contrary to Henson, Holder, and State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278

⁴ There were references to the other person seen on the video in the store wearing a black hooded sweatshirt. R. 280-81. Counsel Wilder presented this unidentified individual as leaving the store prior to Jackson in support of his theory. R. 183. He similarly referenced this unknown person in the hooded jacket in his closing. R. 977, 982. He also notes that this person left before an employee named Junior’s nephew, who both left before Jackson and Cauty, during the critical time period. R. 981-82. See also, R. 258, 274-76, 284. The nephew was seen dancing in the store and walked to the right when he left. R. 282. However, the employee could not tell on the video what way the hooded sweatshirt man left. R. 281.

(1980)(replacement of “LaBarge” to “Mister X” pointed directly to Defendant), it cannot be said that “another person” or “other person” at any or all times pointed to Jackson. Similar to McDonald, 400 S.C., 274-276 (S.C. App. 2012), the “another person” phrase only implicated Canty and did not limit the participants or their discrete roles in the killing.

The Court also suggested the manner of the redactions where Jackson’s name was removed and replaced with “another person” or “other person” was clumsy and invited the jury to speculate about the identity and suggest an obvious deletion. While it may suggest bad grammar, it does not support the concern about obvious deletions previously criticized. It was only through the eyes the Court of Appeals with the knowledge of who Canty was specifically referring to that allowed the resolution that was made by the Court in its “bad grammar” equals obvious deletion assessment. Contrary to the conclusion of the Court of Appeals, it is equally reasonable that the juror would read the redacted statements use of another person at face value rather than constructing it a manner that would lead to the assertion that it was always the same person. To assert that the multiple use of the phrase “another person” caused it to lose its effectiveness to obscure cannot stand closer scrutiny when viewing each statement in totality rather than through parsing of a few individual sentences from the separate statements was an error of law because a reasonable juror would not have similarly parsed those sentences in light of the entire statements.

2. The Court of Appeals misapprehended the record where the trial court did not violate the Appellant’s Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses pursuant to Crawford v. Washington, 541 U.S. 36 (2004), by allowing five statements by Appellant’s non-testifying co-defendant into evidence, which did not directly implicate Appellant in the murder and armed robbery due to the redaction of Appellant’s name with neutral pronouns and it use only against Canty.

Due to the co-defendant’s exercise of his Fifth Amendment right not to testify, he was unavailable as a witness and Appellant had no prior opportunity to cross-examine his accuser.

Thus, the introduction of the inadequately redacted statements violated Appellant's Sixth and Fourteenth Amendment rights to cross-examine and confront the witnesses against him. Crawford, 541 U.S. at 42. However, Respondent submits that the statements were not introduced against the Appellant, but against his co-defendant – the maker of the statements. Thus his confrontation right was not violated because it was not a witness against him. The Court of Appeals misapprehended the law and Crawford in concluding that it was a violation of the Confrontation Clause and the decision of this Court and the South Carolina Supreme Court that suggest or hold otherwise are improperly decided.

In Crawford, 541 U.S. 68, the Supreme Court held that testimonial statements of unavailable witnesses are admissible against a defendant only where there had previously been an opportunity for confrontation. Otherwise, the admission of such statements offends a defendant's rights under the Confrontation Clause. *Id.* However, the statement at issue here was redacted as to Petitioner and admitted only against Canty - the defendant who made the statement. Crawford could not apply. In short, the statement was not admitted against Petitioner, but against Canty. Petitioner's confrontation rights were protected by redaction under Bruton, 391 U.S. 123

In Bruton, the Supreme Court held that "admission of [the co-defendant's] confession in [a] joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." 391 U.S. at 126. Thus, to avoid a confrontation right violation, and for the statement to be admissible, any such statement must be redacted to avoid directly implicating (by name or direct, or inescapable inference) a defendant's co-defendant. *Id.* Gray, *supra*, Holder, *supra*. Here the statement was properly redacted which prevented any Confrontation Clause issue.

Crawford's main concern was for a defendant's right "to be confronted with the witnesses against him." Crawford, 541 U.S. at 42. Crawford did not abrogate the Supreme Court's prior holdings in Bruton or Marsh, which found no Sixth Amendment violation when the admitted statement is not facially incriminating. See Crawford, 541 U.S. at 57 (finding its decision consistent with other Confrontation Clause cases, including Bruton; Richardson, 481 U.S. at 206 ("Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant"). Thus, while co-defendant Canty's statements are testimonial, the admission did not violate the petitioner's confrontation rights because it did not implicate Appellant. Appellant had no need for cross-examination because the testimonial evidence did not reference him or implicate him in any crime. Crawford is therefore inapplicable. See, e.g., U.S. v. Akefe, 2010 WL 2899805, at 25-26 (S.D.N.Y. July 21, 2010).⁵

3. The Admission of the Redacted Statements was Harmless Error. The Court of Appeals misapprehended the record and the effect of the admission of the statements when viewed against the separate evidence of guilt to Jackson.

Even if Jackson's Confrontation Clause rights were violated, a harmless-error analysis must be applied. "Whether the error is harmless depends upon a host of factors, including: (1) the importance of the witness's testimony in the prosecution's case, (2) whether the testimony was cumulative, (3) the presence or absence of evidence corroborating or contradicting the testimony

⁵ In regard to a similar situation, the Fifth Circuit found that "while Crawford certainly prohibits the introduction of a codefendant's out-of-court testimonial statement against the other defendants in a multiple-defendant trial, it does not signal a departure from the rules governing the admittance of such a statement against the speaker-defendant himself, which continue to be provided by Bruton, Richardson, and Gray." United States v. Ramos-Cardenas, 524 F.3d 600, 609-610 (5th Cir. 2008). By the same logic, the Second Circuit, also in reviewing a Bruton redaction, found "there is no separate Crawford problem, and we see no indication that Crawford overrules Richardson or expands the holding of Bruton." United States v. Lung Fong Chen, 393 F.3d 139, 150 (2nd Cir. 2004). See also United States v. Williams, 429 F.3d 767, 773 n.2 (8th Cir. 2005) ("We note that Crawford did not overrule Bruton and its progeny"). Applying the same logic here, because Canty's statements were properly redacted of any specific reference to Jackson by the use of neutral pronouns. At any rate, as shown in the prior argument in the instant brief, that statement was properly redacted; thus, there could be no error under the Confrontation Clause. Ramos-Cardenas.

of the witness on material points, (4) the extent of cross-examination otherwise permitted, and (5) the overall strength of the prosecution's case." Delaware v. Van Arsdall, 475 U.S. at 684. The Court of Appeals failed to recognize that the strongest evidence against the guilt of Jackson was not the statements of Canty (which did not directly implicate Jackson), but the possession of the weapon. As the court acknowledge the evidence was "strong" against Jackson, but the Court sought to mitigate the strength by characterizing it as "purely circumstantial." However, the fact that the case is based upon circumstantial evidence rather than eyewitness or a personal confession does not preclude the obvious conclusion that the admission of the statements against Canty was harmless beyond a reasonable doubt against Jackson.

The Appellant conceded being in the store contemporaneous to when the telephone call setting up the pizza man was made. R. 173, 977, 998. Jackson was identified with Canty at the store on the video. R. 296. Upon arrest, Jackson made an inculpatory statement when served with the armed robbery warrant that "how could I be charges with armed robbery if I didn't steal anything from the pizza man." R.p. 595, ll. 1-2. His guilty knowledge was reflected in his hiding when the police came to his aunt's apartment in Summerton and watched them leave before returning. R.p. 595, ll. 5-7. Also, R. 486-88. The day after the shooting, an empty-handed Jackson was picked up by his uncle Isaac Boyd at a motel in Sumter and he asked him to take him to Curtis Wheeler's house to pick up clothes and Jackson and Wheeler went to an abandoned trailer. R. 507-510. After Jackson brought a clothes basket back, Boyd saw a rifle which Jackson took into his aunt's house. R. 510-11. Jackson asked Boyd to lie for him and tried to get Boyd to hold the rifle. R. 511, 516, 518. Jackson asked Toya Rush on the evening of January 12, 2008 for socks and gloves, but she claimed she did not give him any. R. 914-15. The rifle that was recovered from the apartment of Jackson's aunt was identified as one of the fired

two murder weapons through ballistic testing of the rifle and the fired bullet. [State Exh. 58-A]. R. 486, 490, 496, 502, 510-11, 673-77.

Further, a pizza box with pizza in it and a warmer from Sambino's were recovered on January 22, 2008 at St. Mark's Court. R. 386, 408, 803. Also R. 204-05. This was the location where Jackson's uncle took him where the Winchester model 94 rifle was picked up. R. 386, 408, 508, 803. On the night of the crime, 3 large pizzas were ordered. R. 198. At the crime scene on January 13, two pizza boxes had been recovered. R. 381-82, 384.

The Appellant claims that to satisfy the harmless error standard, there needed to be additional forensic evidence such as fingerprints or DNA specifically linking him to the crime scene. This is not necessary. There are specific links to the crime scene from the rifle in his identified in his possession, the pizza and a pizza warmer from the crime located where Appellant recovered the rifle the day after the shooting. His assessment would be more evidence would have been helpful, but it does not preclude the reasonable conclusion that the available evidence satisfied harmless error.

Under these discrete circumstances, any error was harmless. The Court of Appeals misapprehended the record in dismissing the claim. Contrary to the parentheticals in the cited cases by the Court of Appeals, the assessment of whether an evidentiary error in harmless error must be done on a case by case basis and not by a characterization of the evidence. Here. The evidence was overwhelming such that the admission of the statements if error was harmless.

CONCLUSION

For the aforementioned reasons, the State respectfully asks this Court to grant the petition for rehearing and affirm the judgment and conviction and sentences.

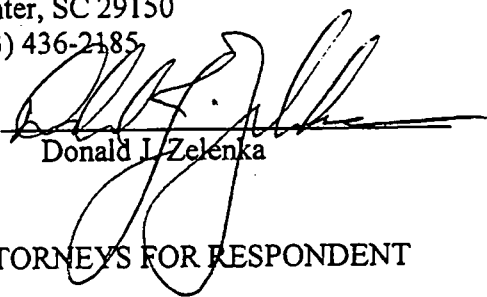
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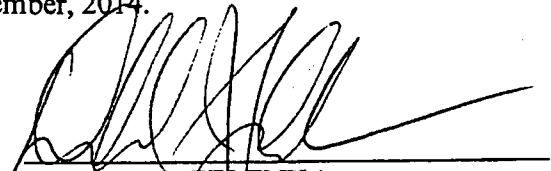
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November 20, 2014

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that I have served the RESPONDENT'S Petition for Rehearing in the foregoing action by depositing copies in the United States Mail, postage prepaid, to Carmen V. Ganjehsani Appellant Defender, Division of Appellate Defense, P. O. Box 11589, Columbia, SC 29211 this 20th day of November, 2014.



DONALD J. ZELENA
Senior Assistant Deputy Attorney General

The South Carolina Court of Appeals

The State, Respondent,

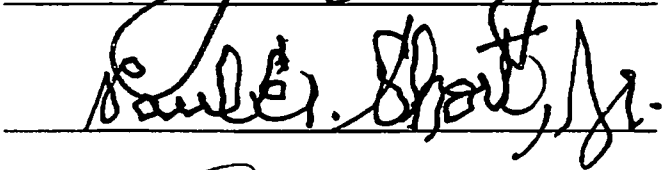
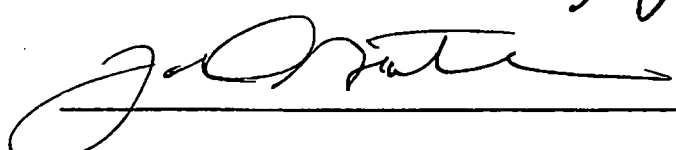
v.

Daniel D'Angelo Jackson, Appellant.

Appellate Case No. 2011-199366

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc: Donald J. Zelenka, Esquire
 Alan McCrory Wilson, Esquire
 John W. McIntosh, Esquire
 Dayne C. Phillips, Esquire
 Carmen Vaughn Ganjehsani, Esquire
 The Honorable W. Jeffrey Young

FILED

December 17, 2014