



The Supreme Court of South Carolina

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May 8, 2015

The Honorable Joyce McDonald
PO Box 1557
Camden SC 29021-1557

REMITTITUR

Re: The State v. Derrick McDonald
Lower Court Case No. 2007GS2800019, 2007GS2800018,
2007GS2800015, 2007GS2800020, 2007GS2800016, 2007GS2800017
Appellate Case No. 2012-213686

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: Robert Michael Dudek, Esquire
Melody Jane Brown, Esquire
Daniel Edward Johnson, Esquire

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Derrick McDonald, Petitioner.

Appellate Case No. 2012-213686

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Kershaw County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 27515
Heard December 11, 2014 – Filed April 22, 2015

AFFIRMED AS MODIFIED

Chief Appellate Defender Robert M. Dudek, of
Columbia, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, Senior
Assistant Attorney General Melody J. Brown, and
Solicitor Daniel E. Johnson, all of Columbia, for
Respondent.

JUSTICE KITTREDGE: Petitioner Derrick McDonald and two codefendants were convicted of murder and first-degree burglary. The court of appeals affirmed, rejecting McDonald's argument that his Confrontation Clause rights were violated when the trial court admitted the redacted confession of one of his nontestifying codefendants. We granted a writ of certiorari to review the court of appeals' decision in *State v. McDonald*, 400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012). We find the court of appeals erred, for the jury would readily infer from the face of the codefendant's confession that it referred to and incriminated McDonald. We nevertheless affirm McDonald's conviction, for the error was harmless in light of the overwhelming evidence of guilt.

I.

McDonald, Christopher Whitehead, Robert Cannon and Joshua Zoch (Victim) worked together at various times at a Sonic fast food restaurant in Columbia, South Carolina. On the evening of December 12, 2006, Victim was brutally murdered in his Kershaw County home. McDonald, Whitehead, and Cannon were charged, tried together, and convicted of burglarizing Victim's home and murdering him.

Earlier on the day of the murder, Whitehead called a co-worker looking for Victim. Whitehead wanted to know if Victim would be home that evening. According to the co-worker, Whitehead wanted to go over to Victim's home to fight him. Whitehead was upset because he believed Victim was a "snitch" who was cooperating with the police in various drug investigations.

At approximately 10:00 in the evening, Whitehead, McDonald and Cannon arrived together at Sonic in Whitehead's car. Cannon was wearing a ski mask, and the assistant manager on duty told all three men to leave the premises. The trio left Sonic together in Whitehead's car and drove to a Wal-Mart, where they purchased a ski mask and latex gloves.

Victim's brutally beaten body was discovered in his home the next day by his girlfriend. Victim was beaten to death by multiple objects. The forensic pathologist testified that he identified between six and eight injuries to Victim's head that were each independently capable of causing death.

The investigation quickly focused on Whitehead, McDonald, and Cannon (Defendants). Investigators spoke to Cannon, who gave a detailed confession implicating all of the Defendants in Victim's murder. Following Cannon's confession, McDonald and Whitehead were arrested. McDonald also confessed

and admitted that the Defendants, after going to Wal-Mart, drove to Victim's home and broke in and killed him. Defendants punched and kicked Victim repeatedly and hit him with a baseball bat and a lamp.

II.

Defendants were indicted on charges of first-degree burglary and murder. The State chose to try the Defendants jointly and sought to introduce McDonald's and Cannon's confessions during its case-in-chief. Defense counsel and the State argued about how the confessions should be redacted in order to comply with the Confrontation Clause. The State contended redacting the confessions using the neutral phrase "another person" was sufficient, while defense counsel insisted on redacting all references to anyone other than the confessing defendant in each of the statements. The trial court overruled defense counsel's objections and instructed the State to redact the confessions using the phrase "another person." The confessions were admitted over counsel's objection.

According to Cannon's statement, with "another person" substituted for the names of the codefendants:

On Tuesday the 12th December 2006 at 2:00 p.m. *another person* got off of work and picks me up. We go to the mall and I got a new cell phone and shoes. We then went to pick up *another person* and then we went to McDonalds in Blythwood and eat and from there we went to Sonic. I had on a ski mask and was joking around while *another person* talked to a girl in the back and *another person* was talking to Leroy. I don't know Leroy's last name. We then left Sonic and went to the Two Notch Walmart and *another person* got a ski mask. So we went riding and *another person* said you know we need to do something with these mask, and I ask and *another person* ask like what. And *another person* said like beat Josh's ass because he's a snitch, and I told *another person* I didn't think he was a snitch. *Another person* then ask if me, and *another person* wanted to ride and we said whatever.

Because I had nothing else to do and no certain time to be home, that was about 11 p.m. *Another person* was real quiet in the car while we were going to Josh's house. We pulled up to Josh's about 11:30 p.m. *another person* knocked on the front door and Josh didn't answer. So *another person* said that he was going to pull one of my moves and

kick the door. So *another person* went to the side door and he *another person* busted it in.

He went in first and me and *another person* followed him to watch the fight. Josh was asleep on the couch and *another person* yelled hey bitch, and when Josh looked up, *another person* hit him with a glass lamp. Right after that Josh was in a daze and *another person* drags him off the couch part of the way. Then *another person* started pressuring another person to hit Josh with the bat that was in the house and *another person* then hit Josh in the back of head. After that Josh was basically crawling trying to get up, and the whole time *another person* was talking shit to him about being a snitch. At that time *another person* kicked Josh in the ribs and ask Josh where the weed was and Josh was just grunting. That when *another person* ask me to check the room and we started pulling draws and *another person* flipped the mattress and *another person* was just standing their. Then Josh went unconscious and I got Josh a towel and put it to his head. *Another person* said fuck we don't have anything and pushed the Christmas tree over on Josh. *Another person* then got mad again and took the house phone. But before *another person* left he got some frozen chicken from the freezer and put it on Josh's head to try and stop the bleeding. After that we went back out the same way we came in.

We left and *another person* dropped *another person* off 1st and me second and I guess he went home.

Q: Did you, *another person*, and *another person* have on gloves?

A: Yes.

Q: What kind of gloves?

A: Purple latex and I had on 2 pair white and purple ones on top.

Q: Where was the bat from that was used to hit Josh?

A: It was in Josh's house. I just looked over their and *another person* picked it up.

Q: What were you, *another person*, and *another person* wearing that night?

A: Black pants and shirts and ski mask.

Q: What color was the ski mask?

A: Mine was black and theirs was black or dark blue.

Q: Did you change cloths that night after the incident?

A: Yes and *another person* done something with them.

No defendant testified.

The jury found Defendants guilty of both charges. McDonald appealed,¹ contending that his Confrontation Clause rights were violated by the admission of Cannon's redacted confession, arguing that given the context, Cannon's written confession clearly implicated McDonald in the crimes. The court of appeals affirmed, "find[ing] that the neutral phrase 'another person' inserted into Cannon's statement avoided any [Confrontation Clause] violation."² *State v. McDonald*, 400 S.C. at 279, 734 S.E.2d at 170. We now review the court of appeals' Confrontation Clause determination.

III.

"The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant 'to be confronted with the witnesses against him.'" *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (quoting U.S. Const. amend. VI). This constitutional right "include[s] the right to cross-examine those witnesses." *Pointer v. Texas*, 380 U.S. 400, 401 (1965). In *Bruton v. United States*, the United States Supreme Court held that a defendant's Confrontation Clause rights are violated when a nontestifying codefendant's confession that implicates the defendant is admitted during a joint trial. 391 U.S. 123, 127–28 (1968). The Court noted that these "powerfully incriminating extrajudicial statements of a codefendant" are not only "devastating

¹ Whitehead also raised a Confrontation Clause challenge on appeal, and the court of appeals affirmed his conviction in an unpublished opinion. *State v. Whitehead*, Op. No. 2012-UP-526 (S.C. Ct. App. filed Sept. 12, 2012). This Court granted a writ of certiorari to review the court of appeals' decision.

² McDonald also argued in the court of appeals that the admission of Cannon's statement violated *Crawford v. Washington*, 541 U.S. 36 (2004). The court of appeals held that issue to be unpreserved. *State v. McDonald*, 400 S.C. at 279–80, 734 S.E.2d at 171. This Court denied certiorari as to the *Crawford* issue.

to the defendant but [also] their credibility is inevitably suspect." *Id.* at 135–136. "While appearing to establish a bright-line rule against the admission of a codefendant's confession which incriminates a defendant, the [*Bruton*] Court acknowledged there are alternatives which may allow the admission of a confession while still protecting a defendant's Confrontation Clause rights and in a footnote, mentioned redaction as one of those alternatives." *State v. Henson*, 407 S.C. 154, 162, 754 S.E.2d 508, 512 (2014) (citing *Bruton*, 391 U.S. at 133–34. 134 n.10).

The Supreme Court has revisited the issue twice since *Bruton*. In *Richardson v. Marsh*, the Court addressed the issue of whether the Confrontation Clause is violated "when the codefendant's confession is redacted to omit any reference to the defendant, but the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial." 481 U.S. 200, 202 (1987). The Court held that there was no Confrontation Clause violation "by the admission of a nontestifying codefendant's confession with a proper limiting instruction" when "the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id.* at 211. The Court expressly declined to opine "on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* at 211 n.5.

Eleven years later, the Supreme Court reached that issue in *Gray v. Maryland*, 523 U.S. 185 (1998). The defendant's name in *Gray* was redacted by using the word "deleted" or inserting a blank space, and the Court found that "redaction that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol, still falls within *Bruton*'s protective rule" as it "refers directly to the 'existence' of the nonconfessing codefendant." *Id.* at 192. The Court noted that "the obvious deletion may well call the jurors' attention specially to the removed name." *Id.* at 193. "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." *Id.* "In other words, the Court brought within *Bruton*'s prohibition those confessions which facially incriminate through inference." *Henson*, 407 S.C. at 164, 754 S.E.2d at 513.

This Court has followed *Gray*. First, in *State v. Holder*, the Court held that the admission of a nontestifying codefendant's oral statement which replaced the defendant's name with "she" violated the Confrontation Clause "because the jury could readily determine that the statement referred to [defendant] as she was the only female defendant." 382 S.C. 278, 285, 676 S.E.2d 690, 694 (2009). More

recently, in *Henson*, we found that the State's use of a nontestifying codefendant's confession that replaced defendant's name with "the guy," "he," and "him" violated the Confrontation Clause because "the jury could infer from the face of [nontestifying codefendant's] confession without relying on any other evidence, that the confession referred to and incriminated [the defendant.]" 407 S.C. at 166, 754 S.E.2d at 514.

In the instant case, Cannon's confession was redacted using the phrase "another person." However, even a casual reading of the confession makes it apparent that the confession describes the actions of Cannon and two other male individuals. For example, Cannon's confession begins: "On Tuesday the 12th December [sic] 2006 at 2:00 p.m. *another person* got off of work and picks [sic] me up. We go [sic] to the mall and I got a new cell phone and shoes. We then went to pick up *another person*" Moreover, the redacted version of Cannon's statement repeatedly uses the pronouns "he" and "him," clearly indicating that the unnamed individuals in the confession were male. In light of the fact that there were three male defendants in the trial, the jury was left with the inescapable conclusion that Cannon's confession referred to McDonald and Whitehead, who were seated at counsel table.³ Under *Bruton* and its progeny, this is insufficient to satisfy the demands of the Confrontation Clause. See *Gray*, 523 U.S. at 196 ("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"); *Henson*, 407 S.C. at 164, 754 S.E.2d at 513 (stating that *Bruton* prohibits statements "which facially incriminate through inference").

Moreover, we reject the State's invitation to find no Confrontation Clause violation based on the trial court's limiting instruction. The presence of a limiting instruction is not curative here, as it was not in *Bruton*, for "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton*, 391 U.S. at 135 (citations omitted). We hold that the court of appeals erred in finding that the

³ We also note that immediately after the investigator read Cannon's confession to the jury, the solicitor asked, "What happened next in the investigation? What did you do next?" The investigator responded, "After obtaining [Cannon's] statement, we then obtained an arrest warrant for Mr. Derrick McDonald." The inescapable conclusion is that Cannon's statement inculpated McDonald.

admission of Cannon's redacted confession did not violate McDonald's Confrontation Clause rights.

"The mere finding of a violation of [the Confrontation Clause] in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction." *Schneble v. Florida*, 405 U.S. 427, 430 (1972). "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." *Id.* In this case, we find that the overwhelming evidence of McDonald's guilt renders the error harmless beyond a reasonable doubt.

We first note the presence of strong evidence of guilt, apart from the erroneous admission of Cannon's confession. On the evening of the murder, Whitehead informed a co-worker that he intended to go over to Victim's home to fight him. Later that evening, around 10:00 p.m., Defendants arrived at the Sonic, with Cannon donning a ski mask. The shift manager told the Defendants to leave. An on-duty employee then observed Defendants leave together. That employee testified that Whitehead drove a four-door sedan with a noticeably loud muffler sound. Investigators obtained a receipt from the Wal-Mart on Two Notch Road in Columbia, which confirmed that a ski mask and purple latex gloves were purchased at 10:43 p.m. on the night of the murder. At approximately 11:30 p.m., near the time of Victim's murder, Victim's neighbor took his dog outside and heard "a lot of knocking noise[s], loud, like somebody kicking something or slamming doors." About ten minutes later, the neighbor heard "a lot of noise" and "a lot of people getting excited." He then heard a loud muffler sound and observed headlights in the road. A short time later, at about 1:30 a.m., McDonald showed up at a co-worker's house and was visibly upset. The co-worker testified that, although McDonald did stay at his house from time to time, this was the first time McDonald had showed up so late. In addition, the morning after the murder, Whitehead showed up to work at the Sonic with a scratch under one of his eyes and a limp. He began acting strange and lied to his manager about the source of the injuries, claiming that he fell at work. Several days later, he walked out of work during a shift and told his manager that he's "got problems" and was "about to move to Aiken." We find this evidence of guilt, independent of Cannon's confession, compelling.

Beyond the independent evidence of guilt, McDonald gave a confession that was entirely consistent with Cannon's confession. McDonald's confession detailed going to the restaurant with Whitehead and Cannon, purchasing a ski mask and

gloves from Wal-Mart, arriving at Victim's home, kicking in the door, hitting Victim repeatedly in the body and head with a baseball bat, and stealing various items from Victim's home. The properly admitted evidence at trial aligns with the details McDonald provided in his confession. In addition to the corroboration of the purchase at Wal-Mart, part of a purple latex glove was found at the crime scene. Victim's girlfriend further testified that Victim kept a baseball bat at his home, which investigators also found at the crime scene.

Given the extensive evidence of guilt, we conclude that the *Bruton* violation was harmless beyond a reasonable doubt. *See Schneble*, 405 U.S. at 431 (finding a *Bruton* violation to be harmless error when the "details of petitioner's [confession] were internally consistent, were corroborated by other objective evidence, and were not contradicted by any other evidence in the case").⁴

IV.

We conclude that the admission of Cannon's redacted confession violated McDonald's Confrontation Clause rights. However, in light of the overwhelming evidence of guilt, we determine that the error in this case was harmless beyond a reasonable doubt. We affirm the court of appeals as modified.

AFFIRMED AS MODIFIED.

TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.

⁴ Although we find the error in this case harmless, we take this opportunity to repeat our cautionary warning from almost three decades ago when we "urge[d] the [S]tate to carefully consider all the available alternatives before deciding to try co-defendants jointly." *State v. Bellamy*, 293 S.C. 103, 106, 359 S.E.2d 63, 65 (1987), overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991). "While we realize there will be circumstances in which a joint trial will be the best route to follow, the decision to pursue this route should be made only after giving due deliberation to the inherent problems, such as redacted statements, which arise from joint trials." *Id.*

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Derrick McDonald, Appellant.

Appellate Case No. 2008-104547

Appeal From Kershaw County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5033
Heard June 19, 2012 – Filed September 12, 2012

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of
Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Assistant Deputy Attorney
General Donald J. Zelenka, and Assistant Attorney
General Melody Jane Brown, all of Columbia, and
Solicitor Daniel E. Johnson, of Columbia, for
Respondent.

SHORT, J.: Derrick McDonald appeals from his convictions of murder and burglary in the first degree. He argues the trial court erred in admitting the statement of his non-testifying co-defendant, given to a law enforcement officer during the course of the investigation, without adequately redacting the portions of the co-defendant's statement implicating McDonald because it denied him of his right to confront and cross-examine the witness. We affirm.

FACTS

Josh Zoch died from multiple blunt force trauma to his head after being beaten with a baseball bat the night of December 12, 2006. Zoch, McDonald, Christopher Whitehead, and Robert Cannon all worked at the same Sonic Restaurant at one time. McDonald and Cannon both gave statements to police admitting their and Whitehead's involvement in the murder. Cannon told the police they had beaten Zoch to punish him for being a "snitch."¹ Whitehead told the police he did not know a "damn thing" about Zoch's murder.

McDonald, Whitehead, and Cannon were tried together as co-defendants in May 2008. None of the three co-defendants testified at trial. The jury found all three guilty, and the trial court sentenced Cannon and McDonald each to two concurrent terms of thirty-five years imprisonment for murder and first-degree burglary. The court sentenced Whitehead to two concurrent sentences of life without parole for murder and first-degree burglary.² This appeal followed.

LAW/ANALYSIS

McDonald argues the trial court erred in allowing Cannon's written statement into evidence without adequately redacting the portions of the co-defendant's statement implicating McDonald because it denied him his right to confront and cross-examine the witness. We disagree.

"The Confrontation Clause of the Sixth Amendment, which was extended to the states by the Fourteenth Amendment, guarantees the right of a criminal defendant

¹ Throughout the trial, it was mentioned that Zoch was a police informant who had committed at least one first-degree burglary.

² The trial court sentenced him to life without parole pursuant to section 17-25-45 of the South Carolina Code because of his 2005 guilty plea to attempted armed robbery. S.C. Code Ann. § 17-25-45 (Supp. 2011).

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 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 United States Supreme Court held 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 Supreme Court clarified the rule announced in *Bruton* is a "narrow" one that applies only when the statement implicates the defendant "on its face," and the rule does not apply to statements that only become incriminating when linked to other evidence introduced at trial, such as the defendant's own testimony. In *State v. Evans*, 316 S.C. 303, 307, 450 S.E.2d 47, 50 (1994), our supreme court held *Bruton* did not bar a statement that "on its face" did not incriminate Evans even though its incriminating import was certainly inferable from other evidence that was properly admitted against him.

The *Richardson* court also noted *Bruton* can be complied with by the use of redaction:

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 redaction has come into play as a tool to allow 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 avoiding implicating the co-defendant). However, in *Gray v. Maryland*, 523 U.S. 185, 192 (1998), the Supreme Court noted the *Richardson* decision limited the scope of *Bruton* to instances where the reference to the defendant was on the face of the statement; therefore, a statement that substituted blanks and the word 'delete' for the petitioner's proper name falls within the class of statements to which *Bruton's* protections apply. The court explained:

Redactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indications of alteration, however, 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.

Id. at 192. Further, this court has held the "Confrontation Clause is not violated when a defendant's name is redacted but other evidence links the statement's application to the defendant, if a proper limiting instruction is given." *Page*, 378 S.C. at 482, 663 S.E.2d at 359.

At trial, the State argued replacing the co-defendants' names in Cannon's written statement with "another person" would resolve any confrontation problem.³ Cannon's attorney objected on behalf of all three co-defendants, arguing the limited redaction would not satisfy *Bruton* and *State v. LaBarge*, 275 S.C. 168, 268 S.E.2d 278 (1980), "because the statement clearly implicates someone else and it's obviously prejudicial to the people who are sitting right here." Further, he stated "there's an easier way to do it, which is simply to not put a reference to what someone else did." The following colloquy occurred between Cannon's attorney and the judge:

The Court: But that's not the law. . . . We've been over this. I mean, I've been over this many times. And the courts have said when replacing the offensive language with "the other person," "the other guy" or "we" or "they" when there's no reference, specific reference to a co-defendant, it satisfies *Bruton*.

³ Following a *Jackson v. Denno*, 378 U.S. 368 (1964), hearing, the judge ruled Cannon's statement was admissible.

Mr. Kendrick: Your Honor, and I understand that. I am just arguing my position for this record, is that that [sic] does not satisfy *Bruton*. I know you're ruling I'm wrong, but I have to put it on the record.

The judge ruled in favor of the State. Counsel renewed their objections when the State introduced Cannon's statement into evidence.

In summary, Cannon stated he and at least two others decided to "beat [Zoch's] ass because he is a snitch." The group arrived at Zoch's house at approximately 11:30 p.m. on December 12, 2006, and "busted" the side door in, finding Zoch asleep on the couch. Cannon's statement, when redacted, read:

[W]e went to Sonic. I had on a ski mask . . . We then left Sonic and went to the Two Notch Walmart [sic] and another person got a ski mask. So we went riding and another person said [']you know we need to do something with these ski mask[s'], and I ask, and another person ask [']like what?'] and another person said [']like beat [Zoch's] ass because he's a snitch['] and I told another person I didn't think he was a snitch. Another person then ask if me and another person wanted to ride and we said whatever. . . . That was about 11 pm. . . . We pulled up to [Zoch's] about 11:30 pm. . . . Another person went to the side door and another person busted it in. . . . [Zoch] was asleep on the couch and another person yelled [']hey Bitch,['] and when [Zoch] looked up, another person hit [Zoch] with a glass lamp. Right after that . . . another person drag[ged] him off the couch part of the way. Then another person started pressuring another person to hit [Zoch] with the bat that was in the house and another person then hit [Zoch] in the back of [his] head. After that [Zoch] was basicly [sic] crawling trying to get up . . . At that time another person kicked [Zoch] in the ribs and ask[ed] [Zoch] where the weed was and [Zoch] was just grunting. That[s] when another person ask[ed] me to check the room and we started pulling draws [sic] and another person flipped the

mattress . . . Then [Zoch] went unconscious and I got [Zoch] a towel and put it to his head. Another person said, [']fuck, we don't have anything['] and pushed the Christmas tree over on [Zoch]. Another person then got mad again and took the house phone. But before another person left, he got some frozen chicken from the freezer and put it on [Zoch]'s head to try and stop the bleeding. After that we went back out the same way we came in.

Cannon also answered some questions in his statement:

Q. Did you[,] another person[,] and another person have on gloves?

A. Yes.

Q. What kind of gloves?

A. Purple latex and I had on 2 pair WHT [sic] and purple ones on top.

Q. Where was the bat from that was used to hit [Zoch]?

A. It was in [Zoch's] house. I just looked over their [sic] and another person picked it up.

Q. What were you[,] another person[,] and another person wearing that night?

A. Black pants and shirts and ski mask.

Q. What color was the ski mask?

A. Mine was black and theirs was [sic] black or dark blue.

The court also gave the jury a limiting instruction:

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

On appeal, McDonald argues that given the context of the record, Cannon's written statement clearly implicated him as a person involved in the burglary and murder of Zoch. Therefore, its admission violated his rights under the Confrontation Clause. He argues this case is similar to *LaBarge*, 275 S.C. 168, 268 S.E.2d 278. In *LaBarge*, the State presented a confession given by his co-defendant that

implicated LaBarge in the crimes and, in accordance with *Bruton*, the statement was redacted in an attempt to exclude all direct references to LaBarge. *Id.* at 170, 268 S.E.2d at 279-80. Where the name "LaBarge" appeared, "Mister X" was substituted; however, in light of other testimony, "Mister X" pointed directly to LaBarge. *Id.* at 170, 268 S.E.2d at 280. Regardless, the court did not specifically hold the redaction would not have satisfied *Bruton*, but simply stated, "It can be forcefully argued that the method of redacting was ineffective." *Id.* 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 court held the redaction was analogous to that in *Gray* because, despite the redaction, it was apparent the co-defendant was referring to Holder, and the inference was one that could be made even without reliance on the other testimony developed at trial. *Id.* Therefore, the 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 contrast, in *United States v. Akinkoye*, 185 F.3d 192, 198 (4th Cir. 1999), the Fourth Circuit Court of Appeals held the defendants were not prejudiced because the confessions were retyped to replace the defendants' respective names with the neutral phrases "another person" or "another individual." Also, in *United States v. Vogt*, 910 F.2d 1184, 1191-92 (4th Cir. 1990), the Fourth Circuit Court of Appeals held that a redacted statement, in which the co-defendant's name was replaced with the word "client," did not on its face impermissibly incriminate the co-defendant even though the incriminating import was inferable from other evidence. The court further stated that even though it may not be easy for a jury to obey the cautionary instruction, "there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton's* [rule]." *Id.* at 1192 (quoting *Richardson v. Marsh*, 481 U.S. at 208).

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

McDonald also argues Cannon's written statement was a violation of *Crawford v. Washington*, 541 U.S. 36 (2004), because the statement was given during the course of an investigation, and McDonald did not have an opportunity to confront and cross-examine Cannon.

Counsel for Cannon argued for all three co-defendants concerning redacting Cannon's written statement to the police. Counsel's argument was based on *Bruton* and did not mention *Crawford v. Washington*. Counsel did not raise a *Crawford* violation until hundreds of pages later in the transcript in regard to an oral statement made by Cannon during a polygraph exam. The judge noted this was the first time *Crawford* was mentioned, and Cannon's previous redacted statement had already been admitted. Counsel stated, "[F]or the record, I'm going to go ahead and put on the record that the other statements should have been suppressed due to *Crawford*, too." Because the *Crawford* issue was not raised when Cannon's written statement was redacted and admitted, this issue is not preserved for our review. See *State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."); *State v. Burton*, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct. App. 1997) ("Failure to object when the evidence is offered constitutes a waiver of the right to object."); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue is not preserved for appeal where one ground is raised below and another ground is raised on appeal).

CONCLUSION

Accordingly, McDonald's convictions for murder and burglary in the first degree are

AFFIRMED.

HUFF, J., concurs.

FEW, C.J., concurs in a separate opinion.

FEW, C.J., concurring: I concur in the majority opinion insofar as it holds that the use of the term "another person" satisfied the requirements of *Bruton v. United States*, 391 U.S. 123 (1968). However, I disagree with the majority's treatment of *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* relates to the question of whether the Sixth Amendment right of confrontation is implicated by a particular statement. See *State v. Ladner*, 373 S.C. 103, 111, 644 S.E.2d 684, 688 (2007) (recognizing that *Crawford* held the confrontation clause is implicated *if* the statement is testimonial). The State agrees Cannon's statement is testimonial, and therefore McDonald had the right to confront Cannon. In my opinion, therefore, the *Crawford* issue the majority holds is unpreserved was never an issue at all, and there is no need to discuss *Crawford*. The question is properly analyzed under *Bruton*.