STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No: 2011-204008

THE STATE,

Respondent,

v.

DAVONTAY HENSON,

Appellant.

FINAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

RESPONDENT'S QUESTIONS PRESENTED

I. Whether the trial court violated Appellant's Confrontation Rights in denying Appellant's motion for severance and admitting a redacted statement made by Appellant's non-testifying co-defendant Donta Reid where the references to Appellant contained within Reid's statement were seamlessly replaced with the phrases "the guy who did the shooting," "the guy" and "he" meaning the redacted statement, consistent with established precedent, did not implicate any particular person or leave the jury to fill in any obvious blanks, and as a result of a limiting instruction given by the trial court, was only construed as evidence against Reid meaning Appellant failed to demonstrate the denial of a trial right. (Appellant's Issues I, II and III).

II. Whether the trial court abused its discretion in dismissing Juror #79 since the issue is unavailable for appellate review, Reid's counsel said she would have likely struck Juror #79 and after further discussion on the matter, did in fact ask the trial court to substitute an alternate for Juror #79. (Appellant's Issue IV).

STATEMENT OF THE CASE

On October 1, 2009, shortly before 11:00 PM, Tyrone King, Kenny Cunningham and Maurice Jackson were robbed at gunpoint on the front porch of Jackson's Rock Hill home. (R. 97, 166-67, 197-98, 216). During the course of the robbery, King, Cunningham and Jackson were all shot at by a black male, who according to witnesses, was wearing all black and was accompanied by a female in pink pants and a grey sweatshirt. (R. 103-04, 167, 170, 200, 216). While Jackson escaped without being shot, Cunningham was shot in the leg and foot. (R. 104, 171). King, who was shot in the head, died from his injuries. (R. 172, 693, 698, 702).

The ensuing investigation culminated in the arrest of Samantha Ervin, Aileen Newman, Donta Reid and Davontay Henson ("Appellant").[1] (R. 467, 479). The four were subsequently charged with murder, assault and battery with intent to kill ("ABWIK"), armed robbery, possession of a firearm during the commission of a violent crime and criminal conspiracy. (R. 389, 467, 479, 618-19). Prior to trial, Ervin pled guilty to the armed robbery charges in addition to criminal conspiracy. (R. 389). Additionally, Newman pled guilty to the armed robbery charges, criminal conspiracy and one count of ABWIK.[2] (R. 618-19). Meanwhile, Reid and Appellant invoked their respective rights to trial by jury and on November 14-18, 2011, stood trial before the Honorable John C. Hayes, III and a jury. (R. 1). At trial, Reid was represented by Melissa Inzerillo and Ashley Anderson while Appellant was represented by Derek Chiarenza. (R. 1). The State was represented by Kevin Brackett and Willie Thompson. (R. 1).

At the conclusion of their joint trial, Appellant was convicted on all charges while Reid was found not guilty of the murder charge, but guilty as to criminal conspiracy, armed robbery,

[1] As a result of information conveyed by Reid to authorities, Darius "Duke" Jeter was also arrested, however, authorities subsequently cleared Jeter from any wrongdoing in the incident. (R. 297-98, 299-300, 301, 338-39).

[2] Both Ervin and Newman, as part of their plea agreement, gave statements and agreed to testify against Reid and Henson in exchange for the dismissal of the murder and firearms charges. (R. 389-391, 618-19).

possession of a weapon during the commission of a violent crime and, as a lesser-included offense of the ABWIK charges, assault and battery of a high and aggravated nature ("ABHAN").[3] (R. 878-79).

STATEMENT OF THE FACTS

During the evening hours of October 1, 2009, Appellant, Reid, Ervin, and Newman, met at Ervin's residence, which she shared with her uncle, Alfonso Leach and cousins Shaleika Black and Alijah James.[4] (R. 359). While there, Appellant, Reid, Newman and Ervin discussed committing a robbery. (R. 361, 362, 587). At the time the group discussed the robbery, Ervin, Newman and Reid were all aware that Appellant was armed with an automatic rifle, which he had previously shown them outside of Ervin' residence. (R. 360-61).

After initially discussing the prospect of robbing someone, the group left Ervin's residence in her uncle's green truck. (R. 363-64, 429). Ervin explained she was driving the truck, while Appellant, who was armed with the automatic rifle, was in the passenger seat. (R. 364). Newman was in the backseat and Reid was in the truck's bed. (R. 364).

While the group was driving around the Rock Hill area, they continued to contemplate "robbing someone." (R. 587). Specifically, Newman explained that as the group was dropping Reid off at his residence to smoke marijuana with Jackson, who lived down the street, Appellant again suggested committing a robbery. (R. 587). In response, Reid offered up Jackson adding that Jackson may have marijuana, money or both. (R. 587). Over the next thirty (30) minutes, the group concocted a plan to rob Jackson while Reid began communicating with him via Ervin's cell phone. (R. 589). According to Newman, the plan was for Reid to speak with

[3] Reid's case is currently on appeal before this Court. At issue are the admissibility of Reid's fourth statement to police and whether Reid was entitled to directed verdict on the firearms charge under an accomplice liability theory. See State v. Reid, Appellate Case No. 2011-204288.

[4] Appellant is also known as "B'more," Newman is also known as "Le-Le" or "Lee-Lee" and Reid is also known as "Crud." (R. 354, 356). Ervin is frequently referenced as "Sam" throughout the record.

Jackson and lure him to the corner where Newman would act like she was selling drugs; Appellant would then jump out of the bushes and "rob" Reid, Newman and Jackson at gunpoint. (R. 588).

Putting the group's plan into action, Reid walked down to Jackson's residence advising the group he would call and tell them how many people were with Jackson. (R. 589). Five to ten minutes later, Reid lived up to his word, calling Ervin from Jackson's cell phone and telling her he would be coming with Jackson and two others. (R. 590-91). Hearing this, Appellant and Ervin left in the truck leaving Newman alone at the street corner. (R. 590-91). After standing at the corner for what she believed to be ten minutes, Newman observed Reid returning from Jackson's residence alone. (R. 592). She then asked Reid where Jackson and the others were to which Reid replied, "they didn't feel like walking." (R. 592). Presumably hearing this, Appellant, who was dressed in all black, came out of the bushes. (R. 592). Ervin then pulled up in the truck and the group hatched a new plan wherein Newman and Appellant would simply walk up and rob the group, since Reid explained they were unarmed and sitting on Jackson's front porch. (R. 592).

As Newman and Appellant began to approach Jackson's residence, Newman asked the men on the porch if they had any "weed." (R. 594). Once the group said they did not, Appellant pulled out his gun. (R. 594). Newman then began robbing the men of their belongings while Appellant continued pointing the gun at them. (R. 594). As Appellant and Newman were leaving, Appellant fired at the men, who authorities later confirmed, were Tyrone King, Kenneth Cunningham and Maurice Jackson. (R. 104, 172, 702). While Jackson escaped physical injury, Cunningham was shot in the leg and foot; King died as a result of a gunshot wound to the head. (R. 104, 171, 172, 702). As explained above, Appellant was charged with murder, three counts

of ABWIK, three counts of armed robbery, criminal conspiracy, and possession of a weapon during the commission of a violent crime. (R. 467, 479); (R. 896-918).

After the case was formally called for trial, the trial court engaged in *voir dire* of the jury panel and following the introduction of Appellant and Reid, informed the prospective jurors of the victims in the case as well as the basic allegations contained within the indictment. (R. 2-15). Next, the court inquired if anyone had knowledge of the case or had expressed an opinion about any matter at issue in the case stating:

> You've been introduced to the defendants and the alleged victims and the place where this happened in the day. Do any of you know anything about this case? Have any of you formed or expressed any opinion about any matter or issue which would be involved in this case. If so, please stand.

(R. 6). One juror responded affirmatively, but after further examination, remained with the panel after the trial court determined the juror could be fair and impartial. (R. 6). After further questioning the jury panel, the trial court concluded general *voir dire* asking whether "you know of any reason whatsoever why you could not or should not serve as a fair and impartial juror on trial of this particular case[.]" (R. 15). There were no responses. (R. 15).

Following these statements, a jury was struck and alternates were selected. (R. 16-26). Included on the jury was Juror #79. (R. 21-22). At the conclusion of jury selection, the State retained seven of its' ten strikes while Reid had four strikes and Appellant had six. (R. 22).

After selecting the jury, the trial court prepared to dismiss them for the day in order to address a variety of outstanding motions with the parties. (R. 28-29). As the court was doing this, Juror #79 interjected explaining he was a student taking online criminal justice classes at Waller University. (R. 29). Juror #79 further informed the trial court he had been involved in a "case study" regarding the incident and had participated in a classroom discussion on it. (R. 29). As a result, the trial court dismissed the rest of the jury and Juror #79 remained. (R. 29).

In response to the trial court's request for the State's thoughts on the matter, the State suggested the trial court engage in individual *voir dire* with Juror #79 to determine whether it would affect his ability to be fair and impartial. (R. 31). Reid's counsel agreed, but added, "I would also add that surely had we had this information prior to the selection, it may have affected our selection. So we would ask that he either be substituted or voir dired." (R. 31). Appellant's counsel also agreed to individual *voir dire*, however, before conducting it, the trial court asked whether individual *voir dire* would be necessary since Reid's counsel said she would have struck the juror had she been aware of his previous knowledge of the case. (R. 32).

None of the parties objected to the trial court's reasoning on this issue, however, before dismissing Juror #79, the trial court mentioned the juror was the sole African-American on the jury. (R. 32). After hearing this, counsel for Reid asked that the jury be re-pulled. (R. 32). In response, the trial court explained that re-pulling was not an option since the remedy for replacing a juror in this instance was substitution rather than re-pulling. (R. 33). He then gave Reid's counsel a choice of engaging in individual *voir dire* of Juror #79 or requesting that Juror #79 be replaced with an alternate. (R. 33). Reid's counsel requested an alternate and Appellant failed to lodge an objection to Reid's counsel's request. (R. 33). The trial court then excused Juror #79.[5] (R. 33). Appellant never objected to Juror #79's excusal. (R. 33-34).

Once Juror #79 was excused, the trial court took up pre-trial motions. (R. 39). In particular, counsel for Appellant requested severance of Reid and Appellant's joint trial on the basis that Reid, who gave four statements to authorities, implicated Appellant in his fourth

[5] Appellant's counsel, understanding the time for making a motion under Batson v. Kentucky, 476 U.S. 79 (1986) had expired, still provided a proffered Batson motion. In response the State explained its basis for dismissing other potential jurors was the presence of prior criminal charges. (R. 35-36). At that point, counsel for Appellant agreed this was a race and gender neutral reason. (R. 36). The State then placed the criminal histories at issue on the record and the trial court said that while a Batson motion was not timely made, he would have denied the motion had it been made at the appropriate time. (R. 36-37).

statement, which counsel first claimed, would violate Appellant's right to a fair trial.[6] (R. 40-41). Responding, the State explained that Appellant had failed to demonstrate how he was prejudiced by a joint trial noting that Appellant and Reid were facing the same charges stemming from the same facts. (R. 41). Additionally, the State highlighted that a joint trial would clearly serve judicial economy since it would allow Ervin and Newman to testify against both Reid and Appellant at the same time. (R. 41). Further, the State argued that by trying the case jointly, the jury would receive the complete picture and could better assess the involvement of each person. (R. 41).

Addressing Appellant's concern regarding Reid's statement, the State informed the trial court it had a solution which should resolve any issues regarding potential Bruton[7] concerns. (R. 41). Continuing, the State explained that while Reid gave four statements to authorities during their investigation, Reid's first three statements implicated Darius Jeter, and therefore, by simply redacting portions of Reid's fourth statement the State could alleviate concerns regarding Appellant's Confrontation Rights under Bruton. (R. 43). The State then read the unredacted version of Reid's fourth statement into the record.[8] (R. 43-47). Next, the State prepared to read the redacted version of the statement into the record, but before doing so, noted:

> Your Honor, there are no blanks or lines that are struck through. This has been seamlessly put together so that it appears as if it hasn't been altered at all. So, that's one of the concerns, I believe, in the case law on these type of issues with Bruton.

(R. 47). With that, the State read the redacted version of Reid's statement into the record and after doing so, passed up the unredacted and redacted statements in addition to the relevant case

[6] Subsequently, counsel for Appellant clarified that the specific trial right that allegedly prejudiced his client would be his right to confront Reid regarding his fourth statement. (R. 42). In particular, counsel said, "we are anticipating . . . Mr. Reid would not take the stand" but his statement would come in, meaning Appellant would not have an opportunity to cross-examine Reid on his statement. (R. 42-43).

[7] Bruton v. United States, 391 U.S. 123 (1968).

[8] The unredacted statement can be found at page 893 of the record on appeal.

law.[9] (R. 47-51, 51). The proposed redaction replaced references to Appellant with "the guy that had done the shooting," (R. 47); "the guy that did the shooting," (R. 47) and "the guy" (R. 47-51). The pronouns relating to the redactions were "he" and "him[.]" (R. 48-51).

Understanding the motion for severance was based upon the Bruton matter, the State reiterated that, consistent with the case law, the redactions made were not obvious and contained no blanks, blacked out spaces or large gaps in between paragraphs or sentences. (R. 51). Continuing, the State correctly summarized the statement's appearance saying, "[It] appears to be a seamless statement as it would have been taken if he had not mentioned the name of the final co-defendant." (R. 51-52).

Moving to the substance of the redactions and their context within the statement, the State distinguished the present case from State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009). (R. 52). In particular, the State explained that unlike Holder, a homicide by child abuse case where the redaction "she" was inappropriate because Holder, who lived with her male non-testifying co-defendant, was the only female mentioned in connection with the incident and was the child's mother and primary caretaker, Appellant's case was much different. (R. 52). In particular, the State detailed the Holder Court found error because the redacted statement made by the non-testifying co-defendant, said that "[co-defendant] felt like she had been inflicting [bruises]" on the victim who was Holder's two-year-old son, and thus, *on its face*, the statement obviously incriminated Holder. (R. 52).

In contrast, the State explained the reference in Reid's redacted statement to, "the guy" and "he" did not, on its' face, implicate Appellant because the inference stemming from these references did not lead the jury to the obvious conclusion that Appellant must be the person referenced as "the guy" in the statement. (R. 52-53). Supporting this claim, the State noted the

[9] The redacted version of the statement can be found at page 890 of the record on appeal.

statement's reference to "the guy" and "he" could refer to any male noting that Reid's previous three statements had implicated Jeter and that there were several other males mentioned in the case. (R. 53).

Continuing to go through the law related to the case, the State highlighted that in State v. Johnson, 390 S.C. 600, 703 S.E.2d 217 (2010) the Supreme Court reversed on a Bruton issue because immediately after reviewing a non-testifying co-defendant's obviously redacted statement[10] with an investigator, the State elicited testimony from the investigator that the accused was arrested based upon the statement made by the non-testifying co-defendant. (R. 54). The State said it had no intention of doing this since arrest warrants were already issued for Appellant prior to Reid giving his fourth statement. (R. 54).

In response, counsel for Appellant agreed the State had accurately summarized the law on the issue, but argued the State's case against Appellant was allegedly weak, specifically noting the redacted statement was "vague" and therefore of questionable evidentiary value *against Reid.* (R. 56-57). Additionally, counsel for Appellant, apparently assuming the redacted statement somehow implicated Appellant, said he should be able to cross-examine Reid regarding his numerous inconsistent statements. (R. 57).

Ruling on the issue, the trial court found the redacted statement did not facially incriminate Appellant. (R. 57-58). Specifically, the trial court stated the redaction terms, "the guy," and "the guy that did the shooting" were consistent with the current status of the law noting the redaction is different from leaving blanks, an "x" or some other similar method. (R. 58). The trial court further found the situation was factually different from the Holder case. (R. 58). Accordingly, the trial court ruled the admission of the redacted statement was not a Bruton

[10] According to the State, the obvious redaction was an "x[.]" (R. 58).

violation, did not violate the confrontation clause and as a result, Appellant failed to demonstrate that a trial right was prejudiced resulting in the denial of his motion to sever.[11] (R. 58).

At trial, counsel for Appellant renewed his objection to the introduction of Reid's redacted statement. (R. 472). The trial court overruled the objection and admitted the redacted statement into evidence. (R. 472). Later, during its' charge to the jury, the trial court instructed the jury that:

> Any statement or confession by Mr. Reid can only be considered by you as it pertains to him and not as to his co-defendant Mr. Henson. As to any statements made by Mr. Reid, you can only consider them as to him, as I say, and not as to . . . Mr. Henson. This applies only, as I said, if you find that Mr. Reid gave the statement freely, voluntarily, and knowingly.

(R. 838-39). Shortly thereafter, the jury found Appellant guilty as charged. (R. 862-63).

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).

ARGUMENTS

I. The trial court correctly concluded Appellant's Confrontation Rights were not violated by admitting Reid's redacted statement where the references to Appellant contained within Reid's statement were seamlessly replaced with the phrases "the guy who done the shooting," "the guy who did the shooting," "the guy," "him," and "he" meaning the redacted statement, consistent with established precedent, did not leave the jury to speculate or fill in any obvious blanks, nor did it implicate Appellant on its' face, and therefore, when combined with the limiting instruction given by the trial court, was only construed as evidence against Reid meaning the trial court did not abuse its' discretion in declining to grant Appellant's motion for severance

Appellant contends his Confrontation Rights were violated by the admission of Reid's redacted statement arguing Bruton v. United States, 391 U.S. 123 (1968) and its progeny prohibit

[11] Appellant subsequently renewed his objection to the admission of the statement at trial. (R. 472). The trial court overruled the objection and admitted the statement into evidence. (R. 472).

the type of redaction used in the statement because the redaction was not gender neutral and the statement, as redacted, limited the potential participants in the crime to four individuals. Br. of App. at 12. In response, the State submits neither Bruton nor its' progeny require gender neutral redaction. 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 Bruton violation. In fact, South Carolina has rejected both of these contentions in the same case. See 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 Reid's statement, the redacted statement does not facially incriminate Appellant and the trial court issued a limiting instruction telling the jury Reid's confession could only be construed against Reid, the trial court properly concluded

Appellant's Confrontation Rights under Bruton were not in issue and as a result, correctly denied his motion for severance.

A. 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 inculpates 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. 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.

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. at 196. 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 193-94. 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 193-94; Id. at 196.

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 ones Confrontation Right's under Bruton.

Indeed this Court, in State v. Garrett, 350 S.C. 613, 567 S.E.2d 523, 526 (Ct. App. 2002) 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.

In fact, the situation in 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.

Thus, it seems clear that South Carolina's Courts, like the Supreme Court of the United States, asks 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? And second, if it does not, does the statement itself facially incriminate the accused?

B. Appellant's Confrontation Rights were not Violated since the Method used to Redact Reid's Statement did not leave the jury to speculate or fill in any obvious blanks and Reid's Statement Does not Facially Incriminate Appellant

The State submits Appellant's Confrontation Rights were not violated by the admission of Reid's redacted statement. First, the method of redaction was clearly consistent with the example provided in Gray, in that the redactions were seamless and there was no risk the jury, when reviewing the statement, would do anything but evaluate the statement on its face. Indeed, it seems clear the redaction problems noted in Gray and Johnson are simply not present on these facts. The State's redactions never required the jury to speculate or fill in any obvious blanks. This is remarkably different from cases such as Gray or Johnson where the jury was in fact aware that the statement in issue attempted to conceal a specific individual's identity which of course, could lead the jury to speculate as to whose identity is being protected and why. In fact, contrary to both Gray and Johnson, a juror in Appellant's case, when reviewing the redacted statement, would have no reason to believe Reid's statement was anything other than his own words.

Moreover, the substance of the redactions were clearly consistent with both the example provided in Gray and the redactions that were approved of by this Court in Garrett. Specifically,

the Gray Court, by using the phrase "some other guys" in a case with five other men at least tacitly approved of the redaction used in this case. Additionally, the redactions used by the State in this case are consistent with previous precedent from this Court in Garrett. Thus, it cannot be said that the use of the phrase "the guy who done the shooting," "the guy who did the shooting," "the guy," "him," and "he" are at odds with the redactions "some other guy" that were used in Garrett, especially where both cases involved only two co-defendants with only one of the two co-defendants in each case providing a statement.

Furthermore, a review of the redacted statement itself plainly reveals that it does not implicate Appellant on its' face as did the statement in Holder. Importantly, there is no mention of Appellant's first or last name. Likewise, there are no references to Appellant's nickname "B'more." In other words, there is nothing within the statement itself that would inform the reader that Appellant was "the guy that did the shooting." Thus, while it is true that Reid's statement specifically names three individuals and references the fourth individual as "a guy," this does not render the statement facially incriminating simply because Appellant, like the unknown person in the statement, is a "guy." Indeed, after reviewing Reid's redacted statement, the only reasonable inference one could come to is that Reid is either protecting the identity of the individual involved in the shooting, or, simply does not know the name of "the guy that did the shooting." Therefore, when taking these facts in conjunction with the trial court's jury instruction that Reid's statement could only be used against Reid, an instruction which under South Carolina law, jurors are presumed to follow, there is no Bruton violation since the statement does not facially incriminate Appellant. See State v. Dunlap, 346 S.C. 312, 319, 550 S.E.2d 889, 893 (Ct. App. 2001), aff'd as modified on writ of cert., 353 S.C. 539, 579 S.E.2d 318 (2003) (quoting Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n. 1 (1999) ("A jury is

presumed to [have followed the trial judge's] instructions."). As such, Appellant's Confrontation Clause Rights are not implicated meaning the trial court properly denied Appellant' motion to sever his and Reid's joint trial.[12] Accordingly, the State asks this Court to affirm on this issue.

II. The trial court did not abuse its discretion in dismissing Juror #79 since the issue is unavailable for appellate review, Reid's counsel said she would have likely struck Juror #79 and after further discussion on the matter, did in fact ask the trial court to substitute an alternate for Juror #79

In his fourth issue on appeal, Appellant maintains the trial court abused its' discretion in failing to allow for additional *voir dire* of Juror #79 when, prior to the jury being sworn, he disclosed he was previously involved in a case study and discussion regarding the matter in his criminal justice class. Specifically, Appellant contends the trial court erred because after the State and counsel for both Reid and Appellant agreed additional *voir dire* would be helpful in determining whether to seat an alternate, the trial court failed to do so, and instead, at Reid's attorney's insistence, sat an alternate.

In response, the State notes this issue is unpreserved. First, Appellant failed to register any sort of contemporaneous objection when the trial court initially made such a remark and then later consented to the request by Reid's counsel to seat an alternate. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (requiring an issue be raised to and ruled upon by the trial court in order to be preserved for appellate review). Furthermore, even if one could somehow argue this issue was raised to and ruled upon in some form or fashion, it is obvious the

[12] Also, in the event this Court disagrees with the State's analysis of this issue, any error would be harmless. See Schneble v. Florida, 405 U.S. 427, 430 (1972) (stating "in some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the co-defendant's admission is so insignificant by comparison, it is clear beyond a reasonable doubt the improper use of the admission was harmless error");State v. Graham, 314 S.C. 383, 444 S.E.2d 525, 527 (1994) (concluding a reviewing court must determine an error is harmless beyond a reasonable doubt);Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992) (holding harmless beyond a reasonable doubt means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt). Here, because Newman and Ervin's testimony regarding the planning and execution of the robbery entirely corroborate the substance of Reid's fourth statement any error is harmless especially when combined with both Cunningham and Jackson's testimony regarding how the robbery unfolded. Understanding this, the State submits any error would be harmless beyond a reasonable doubt.

argument Appellant now advances was never raised to the trial court. See State v. Sheppard, 391 S.C. 415, -- , 706 S.E.2d 16, 20 (2011) ("Our law is clear that an issue may not be raised for the first time on appeal."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting the issues and arguments on appeal).

In I'On, the Supreme Court of South Carolina explained the preservation requirement placed on an appellant stating, the "preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments*." 338 S.C. at 422, 526 S.E.2d at 724 (emphasis added). Elaborating, the I'On Court found, "the requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve - intentionally or by chance - in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." Id.

Here, a review of the record plainly shows Appellant, other than proffering a belated Batson motion, never objected when the trial court suggested additional *voir dire* would be unnecessary and then later acquiesced to Reid's request to seat an alternate. Further, Appellant certainly never objected on the grounds that are now being raised on appeal. In fact, instead of objecting, the record reflects the parties at least tacitly agreed with the trial court's analysis that if Reid's counsel would have struck Juror #79 had he previously disclosed this information prior to the jury being struck, additional *voir dire* would have been unnecessary. See State v. Bryant, 372 S.C. 305, 315-16, 642 S.E.2d 582, 588 (2007) (holding an issue conceded at trial cannot be argued on appeal). As such, the State submits this issue is unavailable on appeal.

Additionally, even assuming this issue is somehow preserved, Appellant's argument still fails. Specifically, since Reid's counsel first noted she would have likely utilized a strike in jury selection if she had the information regarding Juror #79's prior knowledge, there was no need for additional *voir dire* of the juror. Moreover, even if one were to assume that counsel's statement that she likely would have exercised a strike is not enough to support the trial court's decision to forego additional *voir dire*, the fact Reid's counsel later requested that an alternate be seated would seem to erase any doubt. Thus, since the record reflects that Reid's counsel, even without the benefit of additional *voir dire*, would have requested an alternate, the trial court's decision to forego additional *voir dire* simply does not make a difference in terms of the decision to ultimately seat an alternate. See McClurg v. Deaton, 395 S.C. 85, 91, 716 S.E.2d 887, 891 (2011) (Toal, C.J. dissenting) (citing McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("Appellate courts recognize-or at least they should recognize-an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter.")).

Finally, because a criminal defendant does not have a right to be tried by a particular juror, but only has a right to a fair and impartial jury, the State submits there is no prejudice to the trial court's decision to forego additional *voir dire*. See State v. Rayfield, 369 S.C. 106, 113, 631 S.E.2d 244, 248 (2006) ("Petitioner may not have received the jury he wanted, but as we held in Adams, a defendant has no right to a particular jury."). Here, even if additional *voir dire* would have resulted in a finding that the juror could remain fair and impartial, since there is no right to a particular juror, the substitution of an alternate who later swore and was instructed to be fair and impartial cannot prejudice Appellant in any way, shape, or form. Accordingly, in the event this issue is available for appellate review, the State asks this Court to affirm on this issue.

CONCLUSION

For the aforementioned reasons, the State respectfully asks this court to affirm the ruling and judgment of the trial court as well as Appellant's underlying convictions and sentences.

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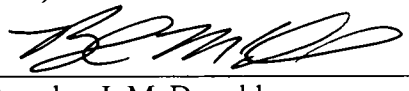

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May 3, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2011-204008

THE STATE,

RESPONDENT,

V.

DAVONTAY HENSON,

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 " Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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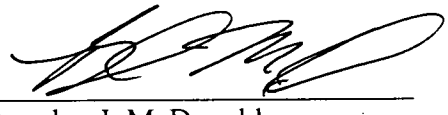
PROOF OF SERVICE

I, Brendan J. McDonald, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record, Susan B. Hackett, SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, SC 29201-3332.

I further certify that all parties required by Rule to be served have been served.

This 3rd day of May, 2013.



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