72390-1

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No. 72390-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MOHAMUD ABDI AHMED,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable William L. Downey

BRIEF OF APPELLANT

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A. INTRODUCTION

Basher Mohamed and Mohamud Ahmed were charged with first degree robbery. Mr. Ahmed moved to sever his trial from Mr. Mohamed's in anticipation of the State seeking to admit Mr. Mohamed's telephone calls to the victim that directly implicated Mr. Ahmed. The trial court denied severance and, over Mr. Ahmed's repeated objections and renewals of the severance motion, admitted Mr. Mohamed's statements. As a result, Mr. Ahmed's right to confrontation under the United States and Washington Constitutions was violated necessitating reversal of his conviction and remand for a new trial.

B. ASSIGNMENT OF ERROR

In violation of the Confrontation Clause of the United States and Washington Constitutions, the trial court erred in admitting statements by the codefendant where the codefendant did not testify and the statements directly implicated Mr. Ahmed.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Confrontation Clause bars admission of a codefendant's out-of-court statements at a joint trial where the codefendant does not testify and the statement directly implicates the defendant.

D. STATEMENT OF THE CASE

On December 9, 2013, at about 10 p.m., Abdirisak Hashi, a native of Somalia, went to Waid's on Jefferson Street in Seattle, where many Somalis gather socially. 6/12/2014RP 16, 21. Mr. Hashi drove his 2002 Honda Accord and parked it on 15th Avenue and Jefferson Street in Seattle. 6/12/2014RP 24. Mr. Hashi was at Waid's approximately two to two and one-half hours. 6/12/2014RP 35. While at Waid's, Mr. Hashi was greeted by codefendant, Basher Mohamed. 6/21/2014RP 35. Mr. Hashi knew Mr. Mohamed because Mr. Hashi and Mr. Mohamed's sister dated for a time. 6/12/2014RP 18. Accompanying Mr. Mohamed was appellant, Mohamud Ahmed. 6/21/2014RP 19. Mr. Hashi did not know Mr. Ahmed but had met him on a prior occasion. 6/12/2014RP 19.

At some point in the evening, Mr. Hashi drove Mr. Mohamed and Mr. Ahmed to a nearby shisha bar.[1] 6/21/2014RP 36. The three stayed at the shisha bar for a bit and then returned to Waid's and parked in the same location. 6/12/2014RP 37-38.

Mr. Hashi stayed at Waid's for approximately another hour alone before deciding to leave. 6/12/2014RP 40-41. According to Mr.

[1] "Shisha" is an Arabic water pipe similar to a Hookhah, in which flavored tobacco is smoked. http://en.wiktionary.org/wiki/shisha.

Hashi, as he was in the driver's seat attempting to start the car, Mr. Ahmed entered the car and grabbed the keys from Mr. Hashi's hands. 6/12/2014RP 43. Mr. Hashi claimed Mr. Ahmed threw the keys to Mr. Mohamed, who punched Mr. Hashi in the mouth, causing a wound which required four stitches. 6/12/2014RP 43-49. Mr. Mohamed and Mr. Ahmed drove away with Mr. Mohamed driving. 6/12/2014RP 44-46. The car was later discovered abandoned and totaled in Tukwila. 6/12/2014RP 53.

Mr. Hashi identified Mr. Mohamed to the police as one of the people he claimed took his car. 6/12/2014RP 120. Mr. Hashi subsequently identified Mr. Mohamed in a police photo montage. 6/12/2014RP 208-09.

On December 17, 2013, Mr. Hashi contacted the King County Sheriff's Office after observing a person he believed to be involved with Mr. Mohamed in taking his car. 6/12/2014RP 57-59. Sheriff's deputies detained Mr. Ahmed and later arrested him for outstanding warrants. 6/12/2014RP 200-01. Mr. Ahmed's fingerprint was later discovered in Mr. Hashi's car. 6/16/2014RP 107.

Mr. Mohamed and Mr. Ahmed were charged together with first degree robbery. CP 40-41. Prior to trial, *in limine*, Mr. Ahmed moved

to sever his trial from Mr. Mohamed's on the ground that the State sought to admit jail telephone calls in which Mr. Mohamed instructed his girlfriend to urge Mr. Hashi not to testify. CP 48-54; 6/9/2014RP 93. In addition, the State sought to admit a jail telephone call between Mr. Mohamed and Mr. Hashi where Mr. Mohamed implicated Mr. Ahmed. CP 48-54, CP Supp ___, Sub. No. 66, Exhibit 9, 27; 6/9/2014RP 93. In this telephone call on December 17, 2013, Mr. Mohamed is heard telling Mr. Hashi that he will help him "get the other guy," referring to Mr. Ahmed. 6/9/2014RP 89-90; 6/12/2014RP 60-68.

> Basher talk to me. He said, "I will be in jail 20 years if you show up the [sic] court. Don't show up at the court." Uh, and then, "I will go to trial and it will be dismissed. Of (inaudible) of God, I did not take your car. *The other guy is in jail.* He was in jail, but this guy was outside. Uh, uh, the other guy is in jail, he's a motherfucker. *Uh, and I can work with you to find him and to prove (phonetic) him.* Uh, don't come to court otherwise I will be in jail 20 years."

6/12/2014RP 68 (emphasis added). The trial court refused to sever the trials, but agreed to instruct the jury that the jail telephone calls were to be used solely against Mr. Mohamed. 6/9/2014RP 95.

On June 16, 2014, Mr. Ahmed renewed his motion to sever the defendants and exclude the telephone calls on the ground that he did not have the ability to cross-examine Mr. Mohamed about his

statements. 6/16/2014RP 16-17. The court again denied the motion and reminded itself to instruct the jury that the telephone calls were to be used only against Mr. Mohamed. 6/16/2014RP 17.

Later that same day of trial, the State admitted a telephone call by Mr. Mohamed made on December 31, 2013, in which he stated: "Tell him the other guy did it. And he was high and crashed the car[.]" CP Supp ___, Sub. No. 66, Exhibit 27; 6/12/2014RP 37. Mr. Ahmed renewed his motion to sever, noting Mr. Mohamed's statements implicated him. 6/12/2014RP 80-82. The court denied the motion. 6/12/2014RP 83.

Upon the State resting its case, Mr. Ahmed again renewed his motion to sever and the court again denied the motion. 6/17/2014RP 42-43. Consistent with its earlier rulings, the court instructed the jury that Mr. Mohamed's statements were to be used only against him. 6/17/2014RP 56-57.

The jury convicted Mr. Mohamed and Mr. Ahmed as charged. CP 69; 6/17/2014RP 115.

E. ARGUMENT

Admission Of Mr. Mohamed's Hearsay Statements Implicating Mr. Ahmed Violated Mr. Ahmed's Right To Confrontation

1. The Confrontation Clause bars the admission of a non-testifying codefendant which implicates the defendant.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantees criminal defendants the right to confront and cross-examine witnesses. A criminal defendant is denied the right of confrontation when a nontestifying codefendant's confession that names the defendant as a participant in the crime is admitted at a joint trial, even where the court instructs the jury to consider the confession only against the codefendant. *Bruton v. United States,* 391 U.S. 123, 135-36, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The *Bruton* Court recognized the "powerfully incriminating" effect of the extrajudicial statements of a codefendant "who stands accused side-by-side with the defendant." *Ibid.* Violations of the Confrontation Clause are reviewed *de novo*. *State v. Fisher*, ___ Wn.App. ___, 338 P.3d 897, 899 (2014).

However, no violation of the confrontation clause occurs by the admission of a nontestifying codefendant's confession where the trial

court gives a proper limiting instruction and where the confession is redacted to eliminate not only the defendant's name, but any reference to his existence. *Richardson v. Marsh,* 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). Any such redaction must be more than an obvious blank space or other similarly obvious indications of alteration. *Gray v. Maryland,* 523 U.S. 185, 192, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998).

"Under *Bruton,* a criminal defendant may be entitled to severance if (1) his codefendant implicates him in a confession, (2) the confession is introduced into evidence without sufficient redaction, and (3) the defendant who confessed does not testify and is, therefore, not subject to cross-examination." *State v. Johnson,* 147 Wn.App. 276, 288-89, 194 P.3d 1009 (2008).

A claim of a violation of the defendant's right to confrontation by admitting a codefendant's statement is reviewed *de novo*. *State v. Larry,* 108 Wn.App. 894, 901-02, 34 P.3d 241 (2001).

To comply with the *Bruton* rule, the Washington Supreme Court adopted CrR 4.4(c), which provides that a motion for severance must

be granted unless the State elects not to offer the statement, or the State deletes all references to the defendant.[2]

Here, the trial court denied Mr. Ahmed's motion to sever and refused to redact the statement, despite the statements making a reference to Mr. Ahmed ("the other guy"), and instead relied solely on the limiting instruction to attempt to cure any prejudice Mr. Ahmed may have suffered. This was error and the court's instruction could not cure the taint.

2. Mr. Mohamed's hearsay statement implicated Mr. Ahmed.

In determining whether a redacted statement by a codefendant cures any error under *Bruton*, the question is not the precise words used in a redaction, but whether the redaction is sufficient to protect the defendant from the prejudice of a statement he cannot cross-examine. That is, to prevent the jury from concluding that the redacted reference

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[2] CrR 4.4 states in relevant part:

> (1) A defendant's motion for severance on the ground that an out-of-court statement of a codefendant referring to him is inadmissible against him shall be granted unless:
>
> > (i) the prosecuting attorney elects not to offer the statement in the case in chief; or
> >
> > (ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

is obviously to the codefendant, making it impossible for the jury to comply with the court's instruction to consider the evidence only against the defendant who made the statements.

In *State v. Vincent,* the State charged Vidal Vincent with attempted murder and assault stemming from a drive-by shooting. 131 Wn.App. 147, 150, 120 P.3d 120 (2005), *review denied,* 158 Wn.2d 1015 (2006). As he awaited trial, Mr. Vincent's codefendant confessed to Jason Speek, another jail inmate, simultaneously incriminating Mr. Vincent. *Id.* at 150-51. Over Mr. Vincent's objection, the trial court allowed the State to introduce the codefendant's statements via Speek's testimony, provided that all references to Vincent were omitted. *Id.* at 151. Speek testified that Mr. Vincent's codefendant told him that the codefendant and "the other guy" had been involved in an earlier gang fight and that when they returned to the scene, the codefendant shot the victim. *Vincent,* 131 Wn.App. at 155. The appellate court held that the admission of Speek's testimony violated Mr. Vincent's rights under *Bruton* because there were only two participants in the crime and Speek testified that there was only one "other guy" with the codefendant before, during, and after the shooting:

> Here, there were only two participants in the crimes and only two defendants. On direct examination, Speek

> testified repeatedly that there was only one "other guy" with Vinson before, during, and after the shooting of Thomas. As in *Vannoy,* the only reasonable inference the jury could have drawn from Speek's references to the "other guy" was that the other guy was Vidal. The redaction thus failed in its purpose, and admission of Speek's testimony in the joint trial violated Vidal's rights under *Bruton.*

Vincent, 131 Wn.App. at 154.

More recently, in *Fisher, supra*, the State inserted the term " the first guy" for the defendant Trosclair's name in codefendant Fisher's statement. 338 P.3d at 898. The Court of Appeals found this to be an insufficient redaction because the record revealed it would be easy for the jury to infer that the "first guy" was Trosclair. *Id.* at 900-01.

Here, as in *Vincent*, there were only two defendant's and codefendant's statements referred as they did in *Vincent* to the "other guy." The implication to the jury, as it was in *Vincent*, was that the "other guy" was Mr. Ahmed. Thus, the admission of Mr. Mohamed's statements violated Mr. Ahmed's right to confrontation under *Bruton.*

3. The limiting instruction was insufficient to cleanse the taint from Mr. Mohamed's statements.

The trial court was of the opinion that a limiting instruction rather than redaction was sufficient to cleanse the taint of Mr. Mohamed's incriminating statements. A limiting instruction without

more is never sufficient to purge any prejudice from the admission of a codefendant's hearsay statements. *Bruton*, 391 U.S. at 128-29, 135-37.

A limiting instruction is ineffective and severance is appropriate only when testimony includes "powerfully incriminating extrajudicial statements of a codefendant." *State v. Dent,* 123 Wn.2d 467, 486, 869 P.2d 392 (1994), *quoting Bruton,* 391 U.S. at 135-36.[3]

The limiting instruction here was ineffective because the court failed to eliminate any reference to Mr. Ahmed as required by *Richardson* and *Bruton.*

4. The error in admitting Mr. Mohamed's statement implicating Mr. Ahmed was not a harmless error.

The State has the burden of demonstrating beyond a reasonable doubt that a confrontation violation did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) ("The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error

[3] The Supreme Court narrowed its holding in *Bruton* somewhat in *Richardson v. Marsh,* where the Court held that the right of confrontation is not violated by the admission of a non-testifying codefendant'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*. 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987).

was harmless beyond a reasonable doubt"); *State v. Coristine,* 177 Wn.2d 370, 380, 300 P.3d 400 (2013). The remedy for a violation of the Confrontation Clause is reversal and remand for a new trial. *Gray,* 523 U.S. at 197.

While the evidence at trial was overwhelming as to the codefendant Mr. Mohamed, it was less so regarding Mr. Ahmed. While Mr. Hashi knew Mr. Mohamed, he did not know Mr. Ahmed, and on the night in question, he admitted he may have met Mr. Ahmed on one occasion. Following the incident, Mr. Hashi could only give the police a vague description of the other person who acted with Mr. Mohamed. It was not until a week following the incident that Mr. Hashi saw Mr. Ahmed and claimed Mr. Ahmed was Mr. Mohamed's accomplice in the robbery. This was far from overwhelming evidence.

The fingerprint evidence allegedly tying Mr. Ahmed to Mr. Hashi's car also is less substantial than at first blush. Fingerprint analysis by human fingerprint examiners has been criticized in the National Academy of Sciences in a Congressionally mandated study:

> ACE-V provides a broadly stated framework for conducting friction ridge analyses. However, this framework is not specific enough to qualify as a validated method for this type of analysis. ACE-V does not guard against bias; is too broad to ensure

> repeatability and transparency; and does not guarantee that two analysts following it will obtain the same results. For these reasons, merely following the steps of ACE-V does not imply that one is proceeding in a scientific manner or producing reliable results. A recent paper by Haber and Haber presents a thorough analysis of the ACE-V method and its scientific validity. Their conclusion is unambiguous: "We have reviewed available scientific evidence of the validity of the ACE-V method and found none."

National Academy of Sciences, *Strengthening Forensic Sciences in the United States, A Path Forward*, 142-45 (2009), *citing* J.L. Mnookin, The validity of latent fingerprint identification: Confessions of a fingerprinting moderate. *Law, Probability and Risk* 7:127 (2008). Thus, instead of being the infallible piece of evidence it once was, fingerprint analysis simply cannot be considered a substantial piece of evidence any further.

The admission of Mr. Mohamed's statement implicating Mr. Ahmed violated Mr. Ahmed's constitutionally protected right to confrontation and the admission of the statement was not a harmless error. Mr. Ahmed asks this Court to reverse his conviction.

F. CONCLUSION

For the reasons stated, Mr. Ahmed asks this Court to reverse his conviction and remand for a new trial.

DATED this 27th day of February 2015.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. MOHAMUD AHMED, Appellant.	)))))))))	NO. 72390-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF FEBRUARY, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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