No. 92653-1
COA No. 72390-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MOHAMED A. AHMED,

Petitioner.

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

The Honorable William L. Downing

PETITION FOR REVIEW

THOMAS M. KUMMEROW
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
tom@washapp.org

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A. IDENTITY OF PETITIONER

Mohamed Ahmed asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Mohamed A. Ahmed*, No. 72390-1-I (November 23, 2015). A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

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 testimonial statement directly implicates the defendant. Here the trial court admitted recorded jail telephone calls of non-testifying co-defendant Mohamed implicating Mr. Ahmed. The Court of Appeals ruled the phone calls were not testimonial because they did not involve a government official. Is a significant question of law under the United States and Washington Constitutions involved where the admission of the testimonial statements of a non-testifying co-defendant were admitted violating Mr. Ahmed's right to confrontation?

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. 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[.]" 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.

In an unpublished decision, the Court of Appeals ruled that Mr. Mohamed's statements implicating Mr. Ahmed were not testimonial, thus there was no violation of the right to confrontation. Decision at 5.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

Mr. Mohamed's hearsay statements implicating Mr. Ahmed were testimonial, thus violating Mr. Ahmed's right to confrontation.

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*, 184 Wn.App. 766, 771, 338 P.3d 897 (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).

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]

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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

In a short cursory decision, the Court of Appeals ruled that Mr. Mohamed's hearsay statements implicating Mr. Ahmed were not testimonial because they did not involve "any active participation by a government official." The decision fails to cite any authority for the Court's conclusion.

The Court of Appeals' conclusion is at best incomplete and at worst simply wrong. The test for determining whether a hearsay statement is testimonial does not rely on the status of the declarant, i.e. whether they are a governmental official. The proper test where a declarant makes a statement to a nongovernmental witness:

> The proper test to be applied in determining whether the declarant intended to bear testimony against the accused is whether a reasonable person in the declarant's position would anticipate his or her statement being used against the accused in investigating and prosecuting the alleged crime. This inquiry focuses on the declarant's intent by evaluating the specific circumstances in which the out-of-court statement was made.

State v. Beadle, 173 Wn.2d 97, 107-08, 265 P.3d 863 (2011), *citing* *State v. Shafer,* 156 Wn.2d 381, 390 n.8, 128 P.3d 87, *cert. denied,* 549 U.S. 1019 (2006).

> (ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

The primary purpose of recording jail telephone calls is penal security, but these calls frequently are admitted at a subsequent criminal trial as evidence, as was the case. At the beginning of the call, there is an admonition noting that the call is recorded and subject to monitoring. *See e.g. State v. Modica*, 164 Wn.2d 83, 86, 186 P.3d 1062 (2008) (quoting the admonition at the King County Jail). Given this admonition, one in Mr. Mohamed's position would anticipate his statements implicating Mr. Ahmed were recorded and could be used at his own trial as well as that of his co-defendant, Mr. Ahmed. Further, by implicating Mr. Ahmed in the offense and attempting to minimize his own conduct, Mr. Mohamed was certainly bearing witness against Mr. Ahmed. As a result, the recorded phone call admitted at trial and implicating Mr. Ahmed was testimonial and violative of his right to confrontation.

This Court should accept review and rule that the non-testifying co-defendant's admissions in the recorded jail telephone call were testimonial and violative of the right to confrontation.

F. CONCLUSION

Mr. Ahmed asks this Court to accept review and reverse his convictions and remand for a new trial.

DATED this 22nd day of December 2015.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BASHIR ABDIRASHID MOHAMED,

Defendant,

MOHAMED A. AHMED,

Appellant.

No. 72390-1-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: November 23, 2015

TRICKEY, J. — Mohamed Ahmed appeals his judgment and sentence for his conviction of robbery in the first degree. He claims that the admission of statements made by his non-testifying codefendant violated his right to confrontation. Because the challenged statements are not testimonial, we disagree and affirm.

FACTS

One night in December 2013, Abdirisak Hashi went to Waid's, a bar in Seattle's Central District. While at Waid's, Hashi saw Bashir Mohamed and Mohamed Ahmed.[1] Hashi knew Bashir, because Hashi had dated Bashir's sister for a period of several years. Hashi recognized Ahmed but did not know his name. Over the course of the night, Hashi consumed several drinks. He became intoxicated.

[1] The court record reflects alternative spellings for the defendants' names, e.g., Mohamed Ahmed, Mohamud Ahmed, Bashir Mohamed, and Basher Mohamed. To avoid confusion, we adopt the following spellings in this opinion: Mohamed Ahmed and Bashir Mohamed. Further, due to the similarity in names, we refer to Bashir Mohamed by his first name. We mean no disrespect to the parties.

Later that night, Hashi left Waid's and went to his car, which was parked outside. He got into his car and tried to start the ignition. At that moment, Ahmed entered Hashi's car, grabbed the keys from Hashi's hand, and threw the keys to Bashir. Hashi ran over to Bashir and demanded his keys. The men refused to return Hashi's keys, and Bashir punched Hashi in the mouth. Bashir and Ahmed then got into Hashi's car and drove away. Two hours later, Tukwila police found Hashi's severely damaged car.

Based on these events, the State jointly charged Bashir and Ahmed with robbery in the first degree. The case proceeded to a joint jury trial, where the State sought to admit portions of jail telephone calls made by Bashir. Ahmed argued that Bashir's statements in the telephone calls implicated him, and he moved to sever his case from Bashir's several times during the trial. The court denied these requests. It admitted the telephone calls into evidence but instructed the jury that the calls were to be used solely against Bashir. Bashir did not testify at trial. The jury convicted Ahmed as charged.

Ahmed appeals.

ANALYSIS

Ahmed argues that the admission of Bashir's out-of-court statements made during the jail telephone calls violated his right to confrontation under Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), because the statements directly implicated him and because Bashir did not testify.[2] We disagree.

[2] Br. of Appellant at 1, 6-11.

The Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to be confronted with the witnesses against him. U.S. CONST. amend. VI; CONST. art. I, § 22. In Bruton, the United States Supreme Court held that a criminal defendant was deprived of his confrontation rights under the Sixth Amendment when he was incriminated by a pretrial statement of a codefendant who did not take the stand at trial. 391 U.S. at 135-36.

In recent years, however, the United States Supreme Court has clarified the contours of the confrontation clause. Beginning with Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Court has explained that the confrontation clause applies only to "testimonial" statements made by an out-of-court declarant. State v. DeLeon, 185 Wn. App. 171, 208, 341 P.3d 315 (2014).

Both Washington and federal courts have recognized that because Bruton is based on the protections afforded by the confrontation clause, "'[I]t is . . . necessary to view Bruton through the lens of Crawford.'" DeLeon, 185 Wn. App. at 208 (alterations in original) (quoting United States v. Figueroa-Cartagena, 612 F.3d 69, 85 (1st Cir. 2010)). Thus, the Bruton rule similarly applies only to testimonial statements. Accordingly, the "threshold question" in every case is whether the challenged statement is testimonial. Figueroa-Cartagena, 612 F.3d at 85. If it is not, the confrontation clause has no application. Figueroa-Cartagena, 612 F.3d at 85.

With regard to what constitutes a "testimonial" statement, the Crawford court indicated that "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial'" are testimonial. 541 U.S. at 52. The Crawford court also stated, "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." 541 U.S. at 51.

We review de novo alleged violations of the state and federal confrontation clauses. State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

Here, the court admitted statements made by Bashir to Hashi during jail telephone calls. Ahmed challenges several of these statements, arguing that Bashir's references to the "other guy" implicated him.[3] In one of these calls, Bashir stated as follows:

> I will be in jail 20 years if you show up the court. Don't show up at the court. . . . 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 who is in jail, he's—he's motherf[***]er. Uh, 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.[4]

In another call, Ahmed asserts that Bashir stated, "Tell him the other guy did it. And he was high and crashed the car."[5] It is unclear on this record whether this statement was also admitted at trial. For purposes of our analysis, we assume that it was.

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[3] Br. of Appellant at 4, 5, 8-10.
[4] 5 Report of Proceedings (RP) at 68.
[5] Br. of Appellant at 5.

We conclude, and Ahmed does not assert otherwise, that Bashir's remarks were not made under circumstances that would lead an objective witness to understand that the statements would later be used in criminal proceedings. The telephone calls did not involve any active participation by a government official. In short, Bashir's out-of-court statements are not testimonial, and their admission at trial did not violate Ahmed's right to confrontation.

Ahmed relies on State v. Vincent, 131 Wn. App. 147, 120 P.3d 120 (2005), and State v. Fisher, 184 Wn. App. 766, 338 P.3d 897 (2014), review granted in part, 183 Wn.2d 1024, 355 P.3d 1154 (2015). But neither of those cases considered whether the challenged statements were testimonial. Thus, they are not helpful to the threshold inquiry before this court, and we do not address them any further.

Given our resolution of this issue, we need not address the State's argument that the admission of Bashir's statements was harmless beyond a reasonable doubt.

We affirm the judgment and sentence.

Trickey, J

WE CONCUR:

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[PAOAppellateUnitMail@kingcounty.gov]
[kristin.relyea@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

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