FILED
June 10, 2015
Court of Appeals
Division I
State of Washington

72390-1

NO. 72390-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MOHAMED AHMED,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE WILLIAM L. DOWNING

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

KRISTIN A. RELYEA
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Washington State:

Other Jurisdictions:

Constitutional Provisions

Federal:

Rules and Regulations

Washington State:

Other Authorities

A. ISSUE

1. Whether Ahmed's claim that his rights under the Confrontation Clause should be rejected because the statements in question were not testimonial, and any possible error is harmless beyond a reasonable doubt.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Mohamed Ahmed, and his codefendant Bashir Mohamed, with Robbery in the First Degree. CP 1-11, 40-41. A jury found both defendants guilty as charged.[1] CP 69; 7RP 115.[2] The trial court imposed a standard-range sentence of 38 months confinement. CP 81-89; 8RP 31.

2. SUBSTANTIVE FACTS

On the night of December 8, 2013, Abdirisak Hashi went to Waid's, a bar in Seattle's Central District. 5RP 21, 111-12. Hashi saw Ahmed and Mohamed there, and although Hashi did not know Ahmed's name, he had seen him four or five times previously, and knew that Ahmed referred to himself as being from Ohio. 5RP 19, 35, 37. Hashi recognized Mohamed because he was the brother of

---

[1] Mohamed has not yet been sentenced for his conviction in this case.

[2] The Verbatim Report of Proceedings consists of eight volumes designated as follows: 1RP (2/27/14), 2RP (4/3/14), 3RP (6/9/14), 4RP (6/11/14), 5RP (6/12/14), 6RP (6/16/14), 7RP (6/17/14), and 8RP (8/5/14).

Hashi's ex-girlfriend, Ian.[3] 5RP 17-18. Mohamed told Hashi that Ian was at a nearby shisha bar, and agreed to take him there.[4] 5RP 36. Hashi drove Mohamed and Ahmed to the shisha bar in his 2002 Honda Accord. 5RP 24, 37.

At the shisha bar, Hashi exchanged hugs with Ian, and then drove her, Mohamed, and Ahmed back to Waid's. 5RP 37. Outside Waid's, Mohamed and Ahmed gave Hashi three sips of Hennessy. 5RP 39-40. Hashi, who had also consumed multiple drinks earlier at Waid's, became "real drunk" after drinking the Hennessy. 5RP 34-35, 40. Hashi went inside Waid's alone, and consumed more alcohol. 5RP 40. When Hashi left an hour later, Mohamed was outside and told him he had a "[b]eautiful car." 5RP 41. Mohamed said, "That car is my car," and Hashi responded, "What?" and got in the car to leave. Id. As Hashi tried to start the ignition, Ahmed reached in and took the car keys, stating, "I'm from Ohio. I'm gangster." 5RP 43.

---

[3] For purposes of clarity, the State will refer to Ian by her first name because she shares the same last name as her brother, Bashir Mohamed. 5RP 17. No disrespect is intended.

[4] "Shisha" is fruit-flavored tobacco smoked through a water pipe. 5RP 36.

Although Hashi asked for his keys back, Ahmed threw them to Mohamed. Id. When Hashi ran to Mohamed and demanded his keys, Mohamed threw them back to Ahmed. Id. Hashi ran back to Ahmed and said, "Give me my key." Id. At that point, Mohamed punched Hashi in the mouth with a closed fist. 5RP 43-44. Blood started gushing from Hashi's mouth, and he had trouble talking. 5RP 44. Hashi later received four stitches to repair the laceration on his lip. 5RP 49, 119.

After punching Hashi, Mohamed and Ahmed jumped into Hashi's car. 5RP 44-45. Hashi touched the window of his car and shouted, "Don't drive. Don't drive." 5RP 45-46. As they drove away, Hashi called 911, "devastated" that his car had been stolen. 5RP 46-47. Seattle police responded within minutes of Hashi's call and found him standing outside Waid's, bleeding from his lip and "extremely intoxicated." 5RP 113, 116, 122. Although Hashi provided suspect descriptions, including Mohamed's name and last known address, neither Mohamed nor Ahmed was apprehended that night. 5RP 118, 120.

Nonetheless, two hours after the robbery, Tukwila police followed a trail of debris leading to Hashi's "severely damaged" car. 5RP 106; 6RP 86-88. The car was located within close proximity to both Mohamed's last known address, and Ahmed's current address. 6RP 130-35; Ex. 36, 37. A later forensic examination of the car revealed Ahmed's fingerprints under the interior driver's side door handle, and Mohamed's fingerprints on a bottle located in the front passenger floorboard area. 6RP 107. Further, a forensic examiner confirmed that Hashi's blood was on the exterior of the driver's side door, and back passenger door. 5RP 157, 162, 166, 219-20.

The day after the robbery, Hashi picked Mohamed's picture from a six-photo montage as one of the people who had taken his car. 5RP 208-09. A little over a week later, Hashi saw Ahmed outside of a store and called 911. 5RP 57-58. Officers responded shortly thereafter and found Hashi waving his arms, pointing at the store, and yelling "He's here, he's here." 5RP 198-99. As Ahmed walked out of the business, Hashi pointed and said, "That's him, that's him." 5RP 200. Post-Miranda,[5] Ahmed admitted that he

[5] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

used to live in Ohio, but denied being part of the robbery, going to Waid's, or ever being inside Hashi's car. Ex. 16; 5RP 213. Ahmed stated that he was "100% sure" that his fingerprints would not be inside Hashi's vehicle. Ex 16 at 5:31-44.

Three weeks after the robbery, Hashi ran into Mohamed's girlfriend, Rahel Tsegaye, at the social security office. 5RP 18, 67; 6RP 27. Tsegaye handed Hashi her phone, and Hashi recognized Mohamed's voice on the other end of the line. 5RP 65, 67. According to Hashi, Mohamed told him in their native Somali language not to "show up" for court, or Mohamed would spend "20 years" in jail. 5RP 68. Further, Mohamed told Hashi, "I did not take your car. The other guy is in jail . . . he's motherfucker. Uh, I can work with you to find him and to prove (phonetic) him." Id.

Since Mohamed called Tsegaye from jail, his conversation was recorded and played at trial. 5RP 62-63. The State called a Somali interpreter to translate the same call at trial. According to the interpreter, Mohamed told Hashi, "I will be sentenced to 20 years in jail if you point me out. He's arrested. I can help you with him. I can help you telling what he did. I have not done anything

with him." 6RP 58. Mohamed did not identify the "other guy" by name, or provide any identifying details about him.[6]

Ahmed objected to the admission of Mohamed's statements in the jail call. 5RP 62. At multiple points during the trial, Ahmed sought to have his case severed from Mohamed's, arguing that the jury would inevitably conclude that the "other guy" was him. 3RP 89-91; 6RP 16-17, 80-82; 7RP 42. Each time, the court denied Ahmed's severance motion based on judicial economy, and the "less than perfect interpretation" of Mohamed's statements that neither identified Ahmed, nor served as a "clear cut" allegation against him. 3RP 92-93; 6RP 17, 81-83; 7RP 43. The court provided two oral instructions, and one written instruction,

---

[6] Additionally, Ahmed claims in his statement of the case that "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." Brief of Appellant at 5. Ahmed does not provide any analysis of this specific call in his argument. Nonetheless, and more importantly, undersigned counsel has been unable to locate these alleged statements. The supplemental clerk's papers designated by Ahmed refer to the trial exhibit list. According to that list, Exhibit 27 was *not* admitted at trial, presumably because it contained all of Mohamed's jail calls, and only four calls were excerpted and admitted at trial. See RP 25-27; Ex. 28 (containing the four excerpted jail calls admitted at trial). Undersigned counsel has listened to the excerpt from the December 31, 2013, phone call on Exhibit 28, and has not located Mohamed's claimed statements. In addition, Ahmed's citation to "6/12/2014RP 37" appears to be in error because that portion of the transcript refers to Hashi's testimony about driving to and from the shisha bar. Thus, Ahmed's basis in the record for claiming that these statements were admitted is unclear. Given the state of the record and Ahmed's decision not to analyze the alleged statements separately, the State has not addressed them.

prohibiting the jury from considering Mohamed's statements as evidence against Ahmed. 6RP 28-29, 48; 7RP 56-57.

C. ARGUMENT

1. AHMED'S RIGHT TO CONFRONTATION WAS NOT VIOLATED.

Ahmed argues that the admission of Mohamed's statements violated his right to confrontation. His claim fails for two reasons. First, Mohamed's statements to Hashi were non-testimonial and therefore did not implicate the Confrontation Clause. Second, even if the admission of Mohamed's statements violated Ahmed's right to confrontation, any error was harmless beyond a reasonable doubt.

a. Mohamed's Non-Testimonial Statements Did Not Implicate Bruton.[7]

Under the Sixth Amendment, a criminal defendant has the right to confront the witnesses against him. This right has particular significance in the context of codefendants when one defendant has made statements to police implicating another defendant. State v. Wilcoxon, 185 Wn. App. 534, 540, 341 P.3d 1019 (2015), review granted, __ Wn.2d __, No. 91331-5 (June 4, 2015) (citing Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)). In Bruton, the court ruled that Bruton's confrontation

[7] Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

rights were violated when a codefendant's statement, implicating Bruton, was admitted into evidence, despite the fact that the trial court provided the jury with a limiting instruction telling them that the statement could only be considered against the codefendant. 391 U.S. at 124-26. The court suggested that severing the codefendants' trials, or redacting any reference to the codefendant, could serve as effective remedies. Id. at 131-34.

Following Bruton, Washington adopted CrR 4.4(c), which requires severance when a codefendant's statement refers to another defendant unless the prosecutor does not offer the statement into evidence, or the statement is properly redacted to eliminate any prejudice to the moving defendant. State v. Hoffman, 116 Wn.2d 51, 75, 804 P.2d 577 (1991). Although Ahmed sought to sever his trial on this basis below, he has not assigned error to, or otherwise challenged, the trial court's denial of his severance motion on appeal.

In recent years, the Supreme Court has clarified the contours of the Confrontation Clause, and held that it applies only to testimonial statements made by an out-of-court declarant. Crawford v. Washington, 541 U.S. 36, 51-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Following Crawford, the Washington

Supreme Court recognized that "the common thread" defining testimonial statements as such in Crawford "was some degree of involvement by a government official," such as a police officer; non-testimonial statements, by contrast, are defined as "casual remarks made to family, friends, and nongovernment agents . . . because they were not made in contemplation of bearing formal witness against the accused." State v. Shafer, 156 Wn.2d 381, 389, 128 P.3d 87, cert. denied, 549 U.S. 1019 (2006).

After Crawford, several Washington, state, and federal courts have recognized that because Bruton and its progeny are based on the protections afforded by the Confrontation Clause, Bruton must be viewed "through the lens of Crawford." State v. DeLeon, 185 Wn. App. 171, 208, 341 P.3d 315 (2014) (quoting United States v. Figueroa-Cartagena, 612 F.3d 69, 85 (1st Cir. 2010)); Wilcoxon, 185 Wn. App. at 541-42; People v. Arceo, 195 Cal. App. 4th 556, 574-75, 125 Cal. Rptr. 3d 436, cert. denied, 132 S. Ct. 851 (2011); United States v. Smalls, 605 F.3d 765, 768 n.2 (10th Cir. 2010); United States v. Johnson, 581 F.3d 320, 326 (6th Cir. 2009), cert. denied, 560 U.S. 966 (2010). Consequently, these courts have concluded that Bruton's restriction on the admission of inculpatory statements by a jointly tried codefendant applies only to

testimonial hearsay.[8] DeLeon, 185 Wn. App. at 208; Wilcoxon, 185 Wn. App. at 541-42; Arceo, 195 Cal. App. 4th at 574-75; Smalls, 605 F.3d at 768 n.2; Johnson, 581 F.3d at 326.

Here, Ahmed's Bruton claim fails because the challenged statements were not testimonial in nature. Mohamed's statements arguably implicating Ahmed were not made to a police officer, but to Hashi, the crime victim, in an attempt to dissuade him from testifying in court. 5RP 68; 6RP 58. No government official was involved, and a reasonable person would not believe that the statements would be used against Ahmed for the prosecution of a crime. Bruton does not apply because Mohamed's statements were not testimonial, *i.e.*, they were not "made in contemplation of bearing formal witness against" Ahmed. Shafer, 156 Wn.2d at 389.

Given the weight of authority recognizing that Bruton applies only to testimonial statements, Ahmed's efforts to analogize his case to 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), are unpersuasive. In Vincent, this Court held that the admission of a codefendant's statement to a jail inmate referencing the "other guy,"

[8] Notably, the Bruton court would likely reach the same result today, post-Crawford, because the codefendant's statements in Bruton were to a postal inspector, and thereby "testimonial." 391 U.S. at 124.

when there were only two participants in the crimes and two defendants on trial, violated Bruton without any discussion of whether the statements were "testimonial" under Crawford. 131 Wn. App. at 154. Given that Vincent was decided one year after Crawford, without the benefit of the last decade of United States and Washington Supreme Court jurisprudence interpreting Crawford, it would likely be decided differently today.

Regardless, Vincent should not be read to stand for the *implied* proposition that Crawford does not apply to Bruton, and that non-testimonial statements implicating a codefendant violate the Confrontation Clause. Ahmed does not make such a claim, nor does he make any mention of the substantial body of authority concluding that Bruton does not apply to non-testimonial statements.

Ahmed's reliance on Fisher is also unavailing because the statements challenged in that case, and held in violation of Bruton, were made by the codefendant to an "[i]nvestigator," and thus were presumably "testimonial." 184 Wn. App. at 769. Although the court did not discuss Crawford and its application to Bruton, its holding fits within Crawford's "testimonial" framework.

The trial court's admission of Mohamed's non-testimonial statements to Hashi did not violate Ahmed's Confrontation Clause rights. Ahmed's Bruton claim should be rejected.

b. Any Error Was Harmless Beyond A Reasonable Doubt.

Even if this Court concludes that the admission of Mohamed's statements to Hashi violated the confrontation clause, the error is harmless beyond a reasonable doubt. An error of constitutional magnitude is harmless if the reviewing court is convinced, beyond a reasonable doubt, that it did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Here, strong untainted evidence linked Ahmed to the robbery. First, Hashi had seen Ahmed four or five times before the robbery and knew that Ahmed referred to himself as being from Ohio. 5RP 19, 57-58. Hashi saw Ahmed outside of a store and immediately called 911, reporting, "The guy robbed [sic] my car is here. Please hurry up. If he sees me he will run away." 5RP 58. When officers responded shortly thereafter, they found Hashi waving his arms, pointing at the store, and yelling excitedly, "He's here, he's here." 5RP 198-99. As Ahmed exited the store, Hashi

pointed and said, "That's him, that's him." 5RP 200. The timing, circumstances, and certainty with which Hashi identified Ahmed are compelling evidence that Ahmed perpetrated the crime.

Further, Ahmed's fingerprints were found inside Hashi's car under the interior driver's side door handle, despite his statement that he was "100% sure" that his fingerprints would not be inside the car. 6RP 107; Ex. 16 at 5:31-44. Two latent print examiners separately analyzed the fingerprints using the ACE-V fingerprint identification method, and concluded that they belonged to Ahmed. 5RP 184; 6RP 107. The second print examiner, who performed the verification process, testified that she performed her own independent analysis and that she agreed with the first examiner's conclusions. 5RP 184. Under cross-examination, the examiner testified that she had past experiences where she had disagreed with other examiners' conclusions during the verification process, suggesting that she took her obligations seriously, and that she did not simply "rubber stamp" the first examiner's conclusion. 5RP 188-90.

Despite this testimony, Ahmed attempts to cast doubt on the weight of the fingerprint evidence based on a 2009 study discussing the limits of latent print friction ridge analysis. Notably,

this same study recognizes that "[h]istorically, friction ridge analysis has served as a valuable tool, both to identify the guilty and to exclude the innocent." Nat'l Research Council of the Nat'l Acad. of Sciences, Strengthening Forensic Science in the United States: A Path Forward, at 142 (2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf. Further, the same study notes that "a careful comparison of two impressions *can* accurately discern whether or not they had a common source." Id. (emphasis added).

Thus, the 2009 study does not stand for the broad proposition claimed by Ahmed, that "fingerprint analysis simply cannot be considered a substantial piece of evidence any further." Br. of Appellant at 13. This Court recently considered the same study and rejected the defendant's claim, that based on the study, the ACE-V fingerprint identification method is no longer generally accepted within the scientific community. State v. Piggott, 181 Wn. App. 247, 248-51, 325 P.3d 247 (2014).

Moreover, another court considering the same study and the Habers' paper that it relied on, recognized that "on the critical issue of erroneous positive identifications," the Habers surveyed the literature and calculated that the error rate ranges from a low of "zero to 0.4% to 1% to a high of only 3%." United States v. Rose,

672 F. Supp. 2d 723, 726 (D. Md. 2009). Given this, the court concluded that "there is nothing to contradict the conclusion reached by many courts and other experts that the incidence of error in the sense of erroneous misidentification . . . is extremely rare." Id. Thus, the presence of Ahmed's fingerprints inside Hashi's car is weighty evidence, particularly since the car was recovered two hours after the robbery. 6RP 86.

Additionally, other circumstantial evidence connected Ahmed to the crime. Police found Hashi's car within blocks of Ahmed's home. Ex. 36; 6RP 133. Further, Hashi testified that while being robbed, one of the robbers said, "I'm from Ohio. I'm gangster," and Ahmed admitted to being from Ohio. 5RP 43, 213.

The likelihood that Ahmed may have been prejudiced by Mohamed's brief references to the "other guy" is minimal given the substance of Mohamed's limited statements. According to Hashi and the Somali interpreter who testified at trial, Mohamed referenced the "other guy" in an effort to dissuade Hashi from testifying with the promise that Mohamed would help Hashi get the "other guy." 5RP 68 (Hashi testifying that Mohamed had said, "I did not take your car. The other guy is in jail . . . I can work with you to find him to prove (phonetic) him"); 6RP 58 (interpreter testifying that

Mohamed said "I will be sentenced to 20 years in jail if you point me out. He's arrested. I can help you with him. I can help you telling what he did."). At no point, did Mohamed name the "other guy," provide any identifying details about him, or provide a clear explanation of what the "other guy" had done.

Unlike other Confrontation Clause cases involving a Bruton error, Mohamed's references to the "other guy" were limited in both frequency and scope. See Vincent, 131 Wn. App. at 151 (witness made "repeated references" to "the other guy," and testified "in detail" about the codefendant's account of the shooting and the surrounding events); Fisher, 184 Wn. App. at 775 (codefendant provided several identifying details about the "first guy" from which "the only reasonable inference the jury could have drawn was that [the defendant] was the 'first guy'").

Weighing the low probative value of Mohamed's statements regarding the "other guy," against the ample other untainted evidence against Ahmed – specifically, Hashi's identification of Ahmed shortly after the robbery, Ahmed's fingerprints inside Hashi's car, the close proximity of Hashi's car to Ahmed's residence, and Ahmed's admitted ties to Ohio – this Court can

conclude that any error caused by admitting the challenged statements was harmless beyond a reasonable doubt.

D. CONCLUSION

For the foregoing reasons, the Court should affirm Ahmed's conviction.

DATED this 10th day of June, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

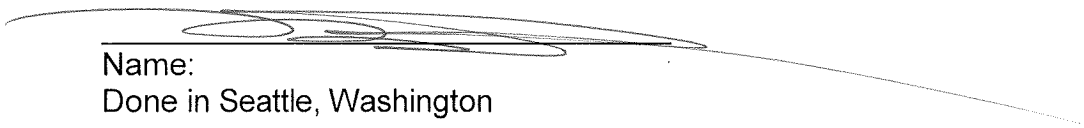
By: _____
KRISTIN A. RELYEA, WSBA #34286
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Thomas Kummerow, the attorney for the appellant, at Tom@washapp.org, containing a copy of the Brief of Respondent, in State v. Mohamed A Ahmed, Cause No. 72390-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 10 day of June, 2015.



Name:
Done in Seattle, Washington