

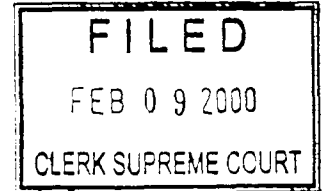
IN THE COURT OF APPEALS OF IOWA

No. 9-398 / 98-0896
Filed February 9, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EVELYN LOU TANGIE,
Defendant-Appellant.



Appeal from the Iowa District Court for Wapello County, Richard J. Vogel,
Judge.

Defendant appeals from her conviction for second-degree murder.

REVERSED AND REMANDED FOR NEW TRIAL

R. E. Breckenridge and Thomas M. Walter of Johnson, Hester, Walter &
Breckenridge, L.L.P., Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Karen Doland and Douglas D.
Hammerand, Assistant Attorneys General, Victoria Siegel, County Attorney, and
Ronald Kelly, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink, Vogel, Mahan, Zimmer, JJ., and
Schlegel, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

MAHAN, J.

Defendant Evelyn Tangie appeals her conviction for second-degree murder. Tangie contends: 1) she was denied her Sixth Amendment right to confront witnesses; 2) she was denied *Brady* material and the right to properly impeach witnesses; 3) the trial court prevented her from exercising proper avenues of discovery; 4) the jury was erroneously instructed it could infer from the actions of another she had malice and a specific intent to kill; and 5) there was insufficient evidence to support her conviction. Since we conclude Tangie was denied her Sixth Amendment right to confront witnesses, we reverse and remand for new trial.

On July 28, 1996, the body of John Terry was found by the side of a road. Terry had died from numerous head wounds inflicted by Ben Schreiber with a pick ax handle, which was discovered near the murder scene. Tangie eventually admitted having been with Terry and Schreiber at the time the murder took place. She denied, however, having any involvement in the murder itself.

Tangie and Terry had been in an on-again, off-again relationship for approximately four years. At the time of his death, they had been living together with Tangie's son. Testimony was presented which indicated Tangie wanted Terry to move out of their home but he refused to leave, had told Schreiber she wanted to obtain a ~~re~~straining order against Terry, and Tangie had stated several times she wished Terry was dead.

A few days before the murder, Tangie's friend Mary Gerlich had introduced Tangie and Schreiber. On July 27, 1996, the day of the murder, Gerlich took Tangie to see Schreiber twice and Tangie called Schreiber twice, once in the late afternoon and once at dusk. After the second phone call, Schreiber went to

Gerlich's house where he met up with Tangie, Terry, and Gerlich, all of whom had been drinking. Tangie spoke with Schreiber privately, then Schreiber and Tangie suggested Terry look at trailers with Schreiber¹. Upon Terry and Schreiber's return, Tangie said she wanted to look at trailers.

Schreiber took Tangie and Terry to look at several trailers. While Tangie and Terry were walking hand and hand up to the last trailer, Schreiber struck and killed Terry. Tangie and Schreiber then left the scene together. Tangie and Schreiber apparently showered and changed clothes before returning to Gerlich's house, where Tangie, Schreiber, and Gerlich determined what story they should tell the police if questioned.

On July 29, 1996, police officers went to Tangie's place of employment, the Heartland Laundry, to inform her of Terry's death. Tangie acted surprised and cried at the news, then told officers she last saw Terry on the night of July 27, when he left Gerlich's house to fight with Tangie's son-in-law. Gerlich backed up Tangie's story.

Officers again interviewed Tangie on the afternoon of July 30, 1996. Tangie described shopping and visiting with Gerlich on July 28, 1996, but did not mention Schreiber's name. Tangie informed the officers she last saw Terry walking away from Gerlich's house with a beer in his hand. She described him as angry and intoxicated. She stated she was not concerned when he failed to return home that evening.

¹ Terry and Tangie had been looking for a new place to live because their apartment was infested with cockroaches.

Officers interviewed Tangie a third time at approximately 8:30 p.m. that same day. Officers confronted her with new evidence, including the discovery of Terry's billfold. During this interview, Tangie mentioned Schreiber's name for the first time. She stated a reluctance to get Schreiber involved, but admitted looking at trailers with both Terry and Schreiber. Tangie admitted being present at the murder scene. She described walking hand in hand with Terry and reaching for a trailer door when Terry was struck from behind by Schreiber. She admitted seeing the pick ax handle which had been used in the murder. The weapon was on the back seat floorboard of Schreiber's car, and Tangie indicated Schreiber threw it out the window as they returned to town.

Schreiber was convicted as the principal in the murder of Terry in a separate proceeding. Schreiber did not testify against Tangie, however, out-of-court statements attributed to Schreiber were introduced into evidence by witness Charles Denham. During trial, Tangie was not permitted to return Gerlich to the stand for impeachment purposes nor was she permitted to depose Dr. Michael Taylor, a rebuttal witness for the State. The jury was instructed on first-degree murder and the lesser-included offenses of second-degree murder and involuntary manslaughter. Tangie was convicted of second-degree murder and sentenced to an indeterminate fifty-year term in prison.

Tangie appeals.

I. Right to Confront Witnesses. We review this constitutional claim de novo. *State v. Jefferson*, 574 N.W.2d 268, 271 (Iowa 1997). We review the district court's hearsay evidentiary rulings for correction of errors at law. *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998).

Charles Denham was allowed to testify at trial concerning a conversation he had with his employee, Schreiber, on Saturday, July 27, 1996. Denham testified Schreiber was excited about a new relationship he had with Tangie.

Denham testified in part:

Q. When you were talking to Mr. Schreiber, did he talk about a plan? A. Yes.

Q. Tell the jury what happened. A. Benny had mentioned that – talking about this relationship with Evelyn and mentioned – there was only one problem and that she'd had a boyfriend. And I had replied, one problem, she's got a boyfriend? And he says, I hear he's a real asshole. I never knew the guy. And I replied, well, good, hopefully he'll kick your ass and I can get some work out of you again. Then later on Benny mentioned, well, the plan is that them or Mary and Evelyn are to take him out and get him drunk tonight, and I'm going to drive him and drop him off in Des Moines.

Q. And after that conversation after Mr. Schreiber told you that, was there any talk about gas money? A. Yes.

Q. Tell us about that. A. Benny had asked for some money for some gas so I wrote him out a check for \$15, I believe.

Q. Did you write the check out to him personally? A. No. I wrote it out to Amoco.

Q. So when Mr. Schreiber told you the plan was to get – Mary and Evelyn were to get – John Terry drunk and go drop him off, did he say where? A. He said Des Moines.

Tangie contends her right to confront witnesses against her was violated by the admission of Schreiber's statements to Denham, and those statements were inadmissible under *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). The State argues Tangie was tried separately, thus *Bruton* does not apply. *State v. Ross*, 573 N.W.2d 906, 916-17 (Iowa 1998). Second, the State points out the Confrontation Clause does not operate as an absolute ban on hearsay evidence. *Idaho v. Wright*, 497 U.S. 805, 813, 110 S. Ct. 3139, 3145, 111

L. Ed. 2d 638, 651 (1990). Thus, the State argues the district court properly admitted the statement of Schreiber through the testimony of Denham under Iowa Rule of Evidence 801(d)(2). Finally, the State argues any error by the district court in admitting the evidence was harmless beyond a reasonable doubt.

A. Joint Versus Separate Trial.

Federal and state appellate courts have long recognized the inherent confrontation problem which exists when the statements of one unavailable codefendant are admitted against another at trial. The United States Supreme Court has held the Confrontation Clause of the Sixth Amendment to the federal constitution renders inadmissible a non-testifying codefendant's confession incriminating the other defendant. *Bruton*, 391 U.S. at 126, 88 S. Ct. at 1622, 20 L. Ed. 2d at 479. The reasoning is the admission violates a defendant's right to cross-examine the witness. *Id.*

Bruton involved a joint trial of two men accused of committing an armed postal robbery. The post-arrest confession of one codefendant was admitted during the joint trial of both defendants. The Court held:

Here the introduction of Evans' confession posed a substantial threat to petitioner's right to confront the witnesses against him, and this is a hazard we cannot ignore. Despite the concededly clear instruction to the jury to disregard Evans' inadmissible hearsay evidence inculcating petitioner, in context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all.

Bruton, 391 U.S. at 137, 88 S. Ct. at 1628, 20 L. Ed. 2d at 485-86 (emphasis added).

The Court went on to state:

[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here where the powerfully incriminating extra judicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect. . . . The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.

Id., at 135-36, 88 S. Ct. at 1627-28, 20 L. Ed. 2d at 485 (emphasis added).

Our supreme court has applied the *Bruton* rationale. *Jefferson*, 574 N.W.2d at 272. *Jefferson* involved a joint trial and the court stated, in part:

We conclude Jefferson's Sixth Amendment right of confrontation was violated and, because we cannot say with confidence that the error was not harmless beyond a reasonable doubt, we reverse and remand for new trial against him.

Id. at 270.

However, our supreme court in applying the *Bruton* rationale specifically held it only applies to situations where codefendants are tried jointly and does not apply to situations where separate trials are held. *Ross*, 573 N.W.2d at 916-17.

The court stated:

Bruton holds that the Confrontation Clause of the Sixth Amendment to the federal Constitution makes inadmissible a non-testifying codefendant's confession incriminating the other defendant. The admission of such a confession violates a defendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.

We can quickly dispose of Ross's contentions because the State tried Ross alone. . . . *Bruton* simply does not apply.

Id. at 917 (citations omitted).

The State argues we should apply the *Ross* holding and quickly dispose of Tangle's constitutional argument because she was tried separately and, therefore, *Bruton* does not apply. We decline to do so in light of *Lilly v. Virginia*, 527 U.S. 116, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999).

Benjamin Lilly, his brother Mark, and Mark's roommate were arrested following a two-day crime spree for several criminal offenses, including car jacking and murder. Mark and his roommate gave separate statements claiming Benjamin masterminded the car jacking and had killed the victim. Benjamin was charged with murder and was tried separately. Mark was called as a witness at his brother's trial but invoked his Fifth Amendment privilege against self-incrimination. Virginia offered Mark's statements contending they were admissible as a declaration of the unavailable witness against penal interest. Benjamin objected on the grounds the admission of said statements would violate his Sixth Amendment right to confrontation. The objection was overruled and the statements were admitted. The jury convicted Lilly of capital murder and the court imposed the death penalty. The Supreme Court of Virginia affirmed the conviction. The United States Supreme Court reversed holding the admission of the untested confession and statements of Mark Lilly violated Benjamin's Confrontation Clause rights. The matter was remanded to the Virginia court for a determination whether the Sixth Amendment violation was "harmless beyond a reasonable doubt." *Lilly*, 527 U.S. at ___, 119 S. Ct. at 1901, 144 L. Ed. 2d at ___ (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 711 (1967)).

We observe, without holding, the decision in *Lilly* has apparently extinguished the distinction between separate and joint trials in the context of Sixth Amendment

Confrontation Clause issues. We conclude Tangle is entitled to a *Bruton* and *Lilly* analysis of her constitutional argument.

B. Confrontation Clause Versus Iowa Rule of Evidence 801(d)(2)(E).

The State argues the district court properly admitted Denham's testimony under Iowa Rule of Evidence 801(d)(2)(E). This rule provides a statement is not hearsay if made "by a coconspirator of a party during the course and in furtherance of the conspiracy." In order for this rule to apply, two conditions must be met. *Ross*, 573 N.W.2d at 915. "First, the statement must have been made during the pendency of the conspiracy. Second, it must have been in promotion of the object or design of the conspiracy." *Id.* (quoting *State v. Kidd*, 239 N.W.2d 860, 864 (Iowa 1976)). The State argues these two conditions were met, and the district court properly admitted the statements even in light of any possible *Bruton* argument.

In discussing general Confrontation Clause interpretations, the United States Supreme Court stated:

In all criminal prosecutions, state as well as federal, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, "to be confronted with the witnesses against him." U.S. Const., Amdt. 6; *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) (applying Sixth Amendment to the States). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845, 110 S. Ct. 3157, 3163, 111 L. Ed. 2d 666, 678 (1990). When the government seeks to offer a declarant's out-of-court statements against the accused, and, as in this case, the declarant is unavailable, courts must decide whether the Clause permits the government to deny the accused his usual right to force the declarant "to submit to cross-examination, the 'greatest legal engine ever

invented for the discovery of truth.” *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 1935, 26 L. Ed. 2d 489, 497 (1970) (footnote and citation omitted).

Lilly, 527 U.S. at ___, 119 S. Ct. at 1893-94, 144 L. Ed. 2d at ___.

The Supreme Court previously found hearsay statements to be sufficiently trustworthy to allow admission over a Confrontation Clause objection when (1) “the evidence falls within a firmly rooted hearsay exception” or (2) it contains “particularized guarantees of trustworthiness such that adversarial testing would be expected to add little, if anything, to the statements’ reliability.” *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 2539, 65 L. Ed. 2d 597, 600 (1980).

The Court in *Lilly* in specifically discussing the decision of the Virginia Supreme Court stated in part:

The Supreme Court of Virginia affirmed petitioner’s convictions and sentences. As is relevant here, the court first concluded that Mark’s statements were declarations of an unavailable witness against penal interest; that the statements’ reliability was established by other evidence; and, therefore, that they fell within an exception to the Virginia hearsay rule. The court then turned to petitioner’s Confrontation Clause challenge. It began by relying on our opinion in *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992), for the proposition that “[w]here proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.” 255 Va. 558, 574, 499 S.E. 2d 522, 534 (1998) (quoting *White*, 502 U.S. at 356, 112 S. Ct. at 743, 116 L. Ed. 2d at 859). The Virginia court also remarked:

“[A]dmissibility into evidence of the statement against penal interest of an unavailable witness is a ‘firmly rooted’ exception to the hearsay rule in Virginia. Thus, we hold that the trial court did not err in admitting Mark Lilly’s statements into evidence.” *Id.* at 575, 499 S.E. 2d at 534.

Our concern that this decision represented a significant departure from our Confrontation Clause jurisprudence prompted us to grant certiorari. 525 U.S. ___, 119 S. Ct. 443, 142 L. Ed. 2d 398 (1998).

Lilly, 527 U.S. at ___, 119 S. Ct. at 1893, 144 L. Ed. 2d at ___.

The Court in discussing the three principal situations where statements against penal interest are offered into evidence focused on the third category involving statements by an accomplice which incriminate a criminal defendant. *Lilly*, 527 U.S. at ___, 119 S. Ct. at 1897, 144 L. Ed. 2d at ___. The Court, in discussing the inherent unreliability of said statements, indicated it had consistently "spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants." *Id.* The Court added: "It is clear that our cases consistently have viewed an accomplice's statements that shift or spread the blame to a criminal defendant as falling outside the realm of those 'hearsay exception[s] [that are] so trustworthy that adversarial testimony can be expected to add little to [the statements'] reliability.'" *Id.* (citation omitted). *"The decisive fact, which we make explicit today, is that accomplices' confessions that inculcate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence."* *Lilly*, 527 U.S. at ___, 119 S. Ct. at 1898, 144 L. Ed. 2d at ___ (emphasis added).

Thus, the State cannot rely on the "firmly rooted hearsay exception" argument to support the introduction of Schreiber's statement through Denham's testimony in the instant case. Instead, the second prong of *Roberts* must be met.

However, an analysis under the second prong of *Roberts* is unnecessary since ~~we conclude~~ Schreiber's statement does not meet the *Ross* requirements of Iowa Rule of Evidence 801(d)(2)(E) and should not have been admitted.

Denham testified, in part, as follows:

Q. Did he tell you he wanted the gas money in order to go to Des Moines to take this guy? A. No.

Q. Did he ever say he wanted the gas money in order to carry out this plan? A. No.

Denham also testified in his deposition he may have said the conversation took place early Saturday morning while the request for gas money took place Saturday evening. In addition, Denham indicated Schreiber's request for gas money was not an uncommon occurrence. Under these circumstances, we conclude the district court erred in ruling the statements made to Denham were in furtherance of a conspiracy. It was error to admit Schreiber's statement through Denham's testimony under either a Confrontation Clause analysis or a Iowa Rule of Evidence 801(d)(2)(E) analysis.

C. Harmless Error Beyond a Reasonable Doubt.

In reversing and remanding *Lilly* to the Virginia court, the Court stated "adhering to our general custom of allowing state courts initially to assess the effect of erroneously admitted evidence in light of substantive state criminal law, we leave it to the Virginia courts to consider in the first instance whether this Sixth Amendment error was 'harmless beyond a reasonable doubt.'" *Lilly*, 527 U.S. at ___, 119 S. Ct. at 1901, 144 L. Ed. 2d at ___ (quoting *Chapman*, 386 U.S. at 24, 87 S. Ct. at 828, 17 L. Ed. 2d at 711).

The State in the instant case argues any error in admitting the statement of Schreiber through the testimony of Denham was harmless beyond a reasonable doubt for two reasons. First of all, the State argues any prejudicial effect of the erroneously admitted evidence was rendered insignificant and harmless beyond a reasonable doubt because of the overwhelming evidence of Tangie's guilt. *State v. Means*, 547 N.W.2d 615, 624 (Iowa App. 1996). Secondly, the State argues similar testimony was introduced into evidence, without objection, through witness April Babcock. *State v. McGuire*, 572 N.W.2d 545, 547 (Iowa 1997); *State v. Rice*, 543 N.W.2d 884, 887 (Iowa 1996).

The prosecution bears the burden of showing said error in admitting Schreiber's statement through the testimony of Denham was harmless beyond a reasonable doubt. *See Jefferson*, 574 N.W.2d at 275. Our harmless-error analysis requires us to weigh the untainted evidence in the case against the probative force of the tainted evidence. *State v. Leutfaimany*, 558 N.W.2d 200, 206 (Iowa 1998). This court must examine several factors in the final analysis. *Id.* Our supreme court has stated: "as we noted in *Jefferson*, the 'inquiry is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.'" *Id.*

We disagree with the State the evidence in this case was overwhelming. The State has failed to meet its burden on this argument. With regard to the State's second argument, we agree with Tangie she would have arguably had meaningful options to protect herself from Babcock's testimony had it not been for the earlier erroneous admission of Schreiber's statement through Denham's testimony.

We have carefully reviewed this matter and conclude Tangie's Confrontation Clause rights were violated. Since "we cannot say with confidence that the error was not harmless beyond a reasonable doubt", we reverse and remand for new trial. *Jefferson*, 574 N.W.2d at 270.

III. Tangie's Other Arguments. We have reversed and remanded on the Confrontation Clause issue and, therefore, we will not address Tangie's other issues.

REVERSED AND REMANDED FOR NEW TRIAL.