

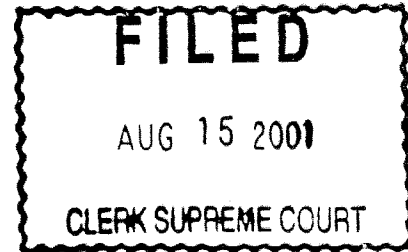
IN THE COURT OF APPEALS OF IOWA

No. 0-603 / 99-1590
Filed August 15, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARCUS GAY,
Defendant-Appellant.



Appeal from the Iowa District Court for Scott County, James E. Kelley,
Judge.

Marcus Gay appeals from the judgments and sentences entered upon his
convictions for first-degree robbery and assault causing bodily injury.

REVERSED AND REMANDED FOR NEW TRIAL.

Alfredo Parrish and Andrew Dunn of Parrish, Kruidenier, Moss, Dunn &
Montgomery, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney
General, William E. Davis, County Attorney, and Robert Weinberg, Assistant
County Attorney, for appellee.

Considered by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

ZIMMER, P.J.

This is a companion case to *State v. Hickman*, 623 N.W.2d 847 (Iowa 2001). Marcus Gay appeals from the judgments and sentences entered upon his convictions for first-degree robbery in violation of Iowa Code section 711.2 (1997) and assault causing bodily injury in violation of Iowa Code section 708.2(2). Gay contends: (1) the admission of nontestifying codefendants' confessions violated his Sixth Amendment confrontation clause rights; (2) the evidence was insufficient to convict him of the charges; (3) he was denied effective assistance of counsel; (4) the trial court erred by denying Gay a jury instruction requiring corroboration of accomplice testimony; and (5) the cumulative effect of all asserted errors denied him a fair trial. Because we find merit in Gay's first contention, we reverse and remand for a new trial.

I. Background Facts and Proceedings.

Gay's convictions occurred as a result of his alleged participation in a robbery in Davenport, Iowa. The jury could have found the following facts from the evidence presented at trial. During the early evening hours of April 6, 1999, Dee Hickman, Marcus Gay, and Greg Irving stopped by the home of codefendant Marvin Hughes. Hickman made several phone calls and pages to John Thorpe in order to arrange the purchase of some marijuana. The men agreed to meet Thorpe at 6:30 p.m. near a stadium to buy one pound of marijuana for \$950. During the conversations, Hickman asked Thorpe whether he would come to the stadium alone and Thorpe stated he would. Hickman told the others they would not need money for the marijuana—they would just take it. Gay agreed to sit in

the front seat of Thorpe's car during the transaction and hit him in the head while Hickman took the marijuana.

Hughes drove the other three men to meet Thorpe. When they arrived at the rendezvous site, Hickman entered Thorpe's car and sat in the backseat. Gay sat in the front passenger's seat next to Thorpe. Thorpe took out the marijuana and placed it on a scale on the passenger's side floor. As he sat up, Thorpe felt what he believed was a gun in his right ear. Someone told Thorpe "You're jacked" and Gay hit Thorpe in the face. At that point, Thorpe tried to grab his gun from underneath his left thigh. However, he decided to let go of it because one of the attackers yelled that Thorpe was reaching for something and Thorpe did not want to get shot. Hickman then shot Thorpe in the back of the head. The bullet entered near the junction of the right ear, jaw, and neck and exited through the roof of the mouth. Thorpe was able to drive himself to his aunt's home where an ambulance was called. Thorpe survived the wound after treatment.

Hickman, Irving, and Gay fled the scene with the marijuana in Hughes's vehicle and returned to Hughes's residence. Hughes's girlfriend, Faith Beasley, observed their nervous behavior. She noted Hickman and Gay both had guns and Irving had a ziploc bag of marijuana. Hickman warned Beasley not to talk about the incident. The four men then divided the marijuana.

On May 20, 1999, the State charged Gay, Hughes, and Hickman with first-degree robbery in violation of Iowa Code section 711.2 (Count I), attempted murder in violation of section 707.11 (Count II), willful injury in violation of section 708.4 (Count III), and assault while participating in a felony in violation of section 708.3 (Count IV). Following a joint trial, a jury found Gay guilty of first-degree

robbery and two counts of assault causing bodily injury, lesser-included offenses of Counts II and III. Count IV was not submitted to the jury. Co-defendant Hughes was convicted of robbery in the first degree and two counts of assault causing bodily injury. Co-defendant Hickman was convicted of robbery in the first degree, assault with intent to inflict serious injury, and willful injury. On the first-degree robbery charge, the district court sentenced Gay to an indeterminate twenty-five-year term of imprisonment. The court merged the assault convictions and sentenced Gay to serve an indeterminate one-year term of imprisonment for his conviction under Count III.

Gay appeals. He urges five grounds for reversal of his convictions: (1) the admission of nontestifying codefendants' confessions violated his Sixth Amendment confrontation clause rights; (2) the evidence was insufficient to convict him of the charges; (3) he was denied effective assistance of counsel; (4) the trial court erred by denying Gay a jury instruction requiring corroboration of accomplice testimony; and (5) the cumulative effect of all asserted errors denied him a fair trial.

II. Confrontation Clause Claims. Following their arrests, Hickman and Hughes gave separate statements to police incriminating themselves and their codefendant, Gay. Prior to trial, Gay filed a motion in limine regarding the pretrial statements of his co-defendants. In his motion in limine, Gay sought to exclude the following evidence: “. . . 3. Any hearsay statements made by third parties who will not be testifying at trial[;] 4. Any statements made by alleged co-conspirators implicating the defendant in this matter. . . .” Hickman and Hughes did not testify at the joint trial of all of the codefendants, and therefore were not

subject to cross examination. At trial, the court permitted Detective Brown, who took the statements from Hickman and Hughes to summarize their confessions during his testimony. The district court ordered the statements of both defendants redacted to exclude all references to the other defendants by changing specific names to various pronouns such as "they," "someone," or "others."

Gay maintains the trial court deprived him of his Sixth Amendment right to confront witnesses, as enunciated in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), by admitting the testimony concerning the statements of two nontestifying codefendants, Hickman and Hughes. In *Bruton*, the United States Supreme Court held that in a joint trial, admission of an agent's testimony concerning a nontestifying codefendant's confession violated a defendant's right to confront witnesses under the Sixth Amendment to the United States Constitution. *Id.* at 127-28, 88 S. Ct. at 1623, 20 L. Ed. 2d at 480. Specifically, Gay alleges four *Bruton* violations. First, he claims the method of redaction (pronoun substitution) directly led the jury to conclude Gay was involved in the robbery. Second, he contends the trial court permitted Detective Brown to identify Gay as one of the persons to whom the pronouns referred. Third, he argues the prosecutor, in his opening statement, urged the jury to accept the confessions of Hickman and Hughes as evidence of Gay's guilt and improperly connected Gay as the unnamed participant in the crime. Finally, he contends the trial court failed to give a limiting instruction to the jury informing it that the nontestifying codefendants' confessions could only be used against the individual defendant who gave the statement. The State contends Gay failed to

preserve error because he did not raise the specific *Bruton* claims he now raises on appeal in his motion in limine or at trial.

A. Scope of Review. We review confrontation clause claims de novo. *State v. Hoeck*, 547 N.W.2d 852, 856 (Iowa App. 1996).

B. Preservation of Error. When Gay's motion in limine was addressed prior to trial, Gay's defense counsel did not make specific reference to a *Bruton* or confrontation clause violation. However, the record reveals the parties and the district court clearly viewed the defendant's motion to exclude any statements by Hickman and Hughes implicating Gay as raising a *Bruton* issue. When the motion was discussed, the State advised the court it would comply with *Bruton* and the court stated it would enforce the *Bruton* rules. On appeal, the State contends Gay's objections were too general.

Generally, a motion in limine is insufficient to preserve error. *State v. Frazier*, 559 N.W.2d 34, 39 (Iowa Ct. App. 1996). An objection is properly preserved when an objection is made at trial. *Id.* However, a defendant is not required to object at trial where a prior ruling on a motion in limine amounts to "an unequivocal holding concerning the issue raised." *Id.* In such a situation, the decision on the motion has the effect of a ruling during trial. *State v. Tangie*, 616 N.W.2d 564, 568-569 (Iowa 2000). In overruling Gay's motion, the trial court stated, "As to the confessions, the Court will enforce the rules of *Bruton* and counsel will abide by those rules." Just prior to the court's comment, the prosecutor stated he had instructed the officer who took the statements from Hickman and Hughes to comply with the rules regarding any statements those

persons made about other codefendants. We conclude Gay was not required to make further objection at trial to preserve this issue for appeal.

C. Analysis. A *Bruton* violation occurs where a non-testifying codefendant's confession is used to incriminate the other defendant. *State v. Ross*, 573 N.W.2d 906, 916-17 (Iowa 1998). However, a redacted version of the confession may be admitted if it does not facially incriminate or lead the jury directly to the nontestifying declarant's codefendant. *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 1709, 95 L. Ed. 2d 176, 188 (1987). Here, the State entered testimony regarding the confessions of Gay's two codefendants, Hickman and Hughes, into evidence. The confessions were redacted to remove reference to Gay by name, inserting pronouns in its place.

Although a confession has been redacted, a *Bruton* violation may still occur if the redacted confessions themselves implicate a codefendant. *State v. Jefferson*, 574 N.W.2d 268, 273 (Iowa 1997). The use of the terms "'they' and 'someone' violate *Bruton* when the unnamed defendant is tied directly to the confession in the manner and context in which the confession is presented. . . ." *Id.* (citing *United States v. Jones*, 101 F.3d 1263, 1270-71 (8th Cir. 1996), *cert. denied*, 520 U.S. 1202, 117 S. Ct. 1566, 137 L. Ed. 2d 712 (1997)). For example, in *State v. Hoeck*, 547 N.W.2d 852, 858 (Iowa Ct. App. 1996), this court found the way a codefendant's confession was redacted clearly invited the jury to insert the defendant's name into the redacted confession. Under such circumstances, the *Bruton* rule is violated. *Hoeck*, 547 N.W.2d at 858.

In the present case, we have three codefendants and two confessions. Hughes's confession mentions four people. In it, Hughes states that two people

went to Thorpe's car while Hughes and Irving stayed in their car. While the terms "they," "others," "other people," and "person" were used, the jury could infer the two people who went to Thorpe's car were Hughes's two codefendants, Hickman and Gay. Additionally, Hickman's redacted confession stated that he was in the back seat of Thorpe's car and "someone" was in the front seat. When coupled with Hughes's confession, it is clear the "someone" was Gay. Finally, Hickman's confession also stated that the person in the front seat was struggling with the victim. When asked on re-direct who was struggling with the victim, Detective Brown testified over objection that Hickman told him Gay was struggling with the victim. This testimony could leave no doubt in the jury's mind as to Gay's participation in the crime. The redacted statements of the two codefendants, especially when coupled with the identification by Detective Brown, clearly implicate Gay. Therefore, a *Bruton* violation occurred.

Although we find there has been a *Bruton* violation, reversal is not required if the error was harmless beyond a reasonable doubt. *State v. Puffinbarger*, 540 N.W.2d 452, 458 (Iowa Ct. App. 1995). The court must consider the amount of untainted evidence against the probative force of the tainted confession. *Jefferson*, 574 N.W.2d at 275. We thus ask whether "the guilty verdict actually rendered in this trial was surely unattributable to the error." *Id.* (citations and internal quotations omitted).

In Gay's case, the evidence against him was the fingerprint found on the top of Thorpe's car, Thorpe's statement, and the testimony of Beasely. However, Thorpe was unable to identify anyone involved in the crimes. Beasely admitted that she was using drugs on the day in question, and that she had just met Gay.

Additionally, Beasley was the girlfriend of codefendant Hughes and had a motive to protect him. We cannot say this evidence outweighs the probative force of the codefendants' confessions. We also note the jury was not given a limiting instruction informing it not to consider the statements of Hickman and Hughes in determining the guilt or innocence of Gay. Whether a limiting instruction is given is also a factor in determining prejudice when applying the harmless error analysis. *Puffinbarger*, 540 N.W.2d at 458. In this case, we find the error was not harmless beyond a reasonable doubt.

We conclude Gay's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution were violated and he suffered prejudice when the statements of his co-defendants were presented to the jury in a manner that violated *Bruton v. United States*. Therefore, we reverse Gay's convictions for first-degree robbery and assault causing bodily injury and remand for new trial.

Gay raises several other points of error. Because we have reversed and remanded the case for a new trial, we find it unnecessary to reach the remaining issues.

REVERSED AND REMANDED FOR NEW TRIAL.