

IN THE SUPREME COURT OF THE STATE OF NEVADA

IGNACIO DEALBA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 47122

**FILED**

JAN 02 2009

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of robbery with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and possession of a firearm by an ex-felon. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Veronica Gonzales was robbed at gunpoint in the parking lot of a Las Vegas Chevron gas station, which has an adjoining McDonald's restaurant. At the time Gonzales was being robbed, Sergeant Timothy Shalhoob was in the drive-thru at the McDonald's. Sergeant Shalhoob attempted to apprehend the robber, but the robber was able to elude Sergeant Shalhoob and fled the scene in a red BMW. Sergeant Shalhoob proceeded to chase the red BMW in his car. During this chase, the robber shot at Sergeant Shalhoob multiple times out of the BMW's sunroof. Less than two hours after the incident, Sergeant Shalhoob gave a statement describing the man who had robbed Gonzales and shot at him as a black, male adult wearing a light-colored short sleeve shirt.

The red BMW was eventually traced to James Vaughn's mother, and Vaughn was arrested by Detective Lance Spiotto. Vaughn made several statements to Detective Spiotto, which implicated appellant Ignacio Dealba as the man who had robbed Gonzales and shot at Sergeant

Shalhoob. Dealba was eventually arrested at his home based on the information provided to the police by Vaughn. Following Dealba's arrest, Sergeant Shalhoob was dispatched to Dealba's residence to make an identification while Dealba was detained. Sergeant Shalhoob identified Dealba as the shooter, even though his previous statement had described the shooter as a black male, and Dealba is Hispanic.

Gonzales was also called to Dealba's residence to make an identification a few hours after Dealba was detained. Gonzales was unable to identify Dealba as the man who had robbed her. During trial, Gonzales was also unable to identify Dealba as the man who robbed her.

Dealba and Vaughn were eventually brought to trial and tried together. During the trial, Vaughn invoked his Fifth Amendment right not to incriminate himself and did not testify. However, Detective Spiotto did testify to statements made to him by Vaughn. Detective Spiotto redacted Dealba's name with the word "individual" during his testimony. Due to oversight by all involved in the trial, the district court did not give the jury a limiting instruction concerning Detective Spiotto's testimony regarding Vaughn's statements.

After a four-day trial, a jury convicted Dealba of one count each of robbery with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and ex-felon in possession of a firearm. The district court sentenced Dealba to: (1) a term of 24 to 84 months for robbery with an equal and consecutive sentence for the use of a deadly weapon, (2) a term of 32 to 144 months for attempted murder with an equal and consecutive sentence for the use of a deadly weapon, and (3) a term of 12 to 48 months for possession of a firearm by an ex-felon. This appeal followed.

We conclude that Dealba's conviction must be reversed because it was error for the district court to fail to give the jury a limiting instruction regarding the jury's use of Detective Spiotto's testimony concerning Vaughn's statements in accordance with Richardson v. Marsh.<sup>1</sup> Further, this error was not shown to be harmless beyond a reasonable doubt, since Vaughn had a motive to implicate Dealba, the independent identification of Dealba by Sergeant Shalhoob was unreliable, and the victim, Gonzales, was unable to identify Dealba, on two separate occasions, as the man who robbed her.

Redaction of Vaughn's statements during the trial testimony of Detective Spiotto

Dealba argues that the district court erred in allowing the use of the word "individual" as a redaction of his name during the trial testimony of Detective Spiotto when referring to Vaughn's statements, which implicated someone else as the person who robbed Gonzales and shot at Sergeant Shalhoob. Dealba argues that the redaction was insufficient under this court's decision in Lisle v. State<sup>2</sup> and, therefore, the district court violated his Confrontation Clause rights by admitting Detective Spiotto's testimony regarding Vaughn's statements. We disagree.

The Confrontation Clause is not violated when a witness testifies to statements made by a non-testifying co-defendant that incriminate another co-defendant, as long as the other co-defendant's

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<sup>1</sup>481 U.S. 200, 211 (1987).

<sup>2</sup>113 Nev. 679, 692-93, 941 P.2d 459, 468 (1997).

name is sufficiently redacted, and the district court gives a proper limiting instruction.<sup>3</sup> We have adopted an extension of this rule and have held that a co-defendant's name may be replaced by a neutral word such as "individual" when a witness testifies to statements made by a non-testifying co-defendant.<sup>4</sup>

Here, Detective Spiotto referred to Dealba as "individual" throughout his trial testimony when referring to Vaughn's statements. We conclude that Detective Spiotto's use of "individual" in place of "Dealba" satisfies the standards for redaction used by this court. Specifically, the use of the word "individual" was neutral enough, even with Dealba being present at the defense table during Detective Spiotto's testimony, to satisfy Lisle.<sup>5</sup> Thus we conclude that the redacted version of Vaughn's statement, as presented through Detective Spiotto's testimony, did not violate Dealba's Confrontation Clause rights.

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<sup>3</sup>Richardson, 481 U.S. at 211.

<sup>4</sup>Lisle at 692-93, 941 P.2d at 468 (citing U.S. v. Enriquez-Estrada, 999 F.2d 1355, 1359 (9th Cir. 1993) overruled on other grounds by U.S. v. Peterson, 140 F.3d 819, 822 (1998) stating that, "the substitution of a neutral pronoun is not permissible if it is obvious that an alteration has occurred to protect the identity of a specific person" applying Gray v. Maryland, 523 U.S. 185 (1998).

<sup>5</sup>Id.

Failure of the district court to give a limiting instruction on Vaughn's statements

Dealba argues that the district court erred in failing to give the jury a limiting instruction concerning the use of Detective Spiotto's testimony regarding Vaughn's statements. Specifically, Dealba contends that the district court's failure to give the jury such a limiting instruction violated his Confrontation Clause rights. We agree.

As we recognized in Lisle, the United States Supreme Court held in Richardson v. Marsh that "if a statement is redacted to exclude defendant's existence and the statement is not incriminating on its face, but only when linked with other evidence introduced later at trial, then a limiting instruction will cure any prejudice."<sup>6</sup>

At oral argument, the State conceded that the district court erred in failing to give a limiting instruction concerning the use of Detective Spiotto's testimony regarding Vaughn's statements. We agree with the State's concession.<sup>7</sup> Because the district court failed to give the

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<sup>6</sup> Id. (citing Richardson, 481 U.S. at 211); see also Fowler v. Ward, 200 F.3d 1302, 1307 (10th Cir. 2000) (observing that Richardson sets forth what "is clearly a two-pronged requirement; a redaction, no matter how perfect, nevertheless, requires an appropriate limiting instruction"), overruled on other grounds as recognized by Moore v. Marr, 254 F.3d 1235 (10th Cir. 2001).

<sup>7</sup>We also note that the district court asked the State to prepare instructions which would satisfy the standards of Richardson v. Marsh to be presented at oral argument. The State failed to provide the district court with those instructions.

necessary limiting instruction, we conclude that Dealba's Sixth Amendment right to confront witnesses against him was violated.<sup>8</sup>

Harmless error<sup>9</sup>

Dealba argues that the failure of the district court to give a limiting instruction concerning the jury's use of Detective Spiotto's testimony regarding Vaughn's statements was not harmless, and therefore, his conviction should be reversed. We agree.

Confrontation Clause errors are subject to a harmless error analysis.<sup>10</sup> "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."<sup>11</sup> The party who benefited from the error has the burden of showing that the error was harmless beyond a reasonable doubt.<sup>12</sup> When reviewing Confrontation Clause errors under the harmless error standard, the United States Supreme Court has identified 'a host' of relevant factors. "These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was

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<sup>8</sup>See Richardson, 481 U.S. at 211.

<sup>9</sup>Dealba also argued that this court should view the district court's error in not giving a limiting instruction as structural error. However, this court has long used harmless error analysis for violations of the Confrontation Clause, and we continue to do so here. See Power v. State, 102 Nev. 381, 384, 724 P.2d 211, 213 (1986).

<sup>10</sup>Power at 384, 724 P.2d at 213 (1986); accord Coy v. Iowa, 487 U.S. 1012, 1021 (1988).

<sup>11</sup>Medina v. State, 122 Nev. 346, 355, 143 P.3d 471, 477 (2006) (quoting Chapman v. California, 386 U.S. 18, 24 (1967))

<sup>12</sup>Id.

cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, . . . and, of course, the overall strength of the prosecution's case."<sup>13</sup>

We conclude that the district court's error in failing to give the jury a limiting instruction concerning the use of Detective Spiotto's testimony regarding Vaughn's statements was not harmless beyond a reasonable doubt. Absent an appropriate limiting instruction, the jury could have used the statements made by Vaughn against Dealba despite the redactions that replaced Dealba's name with a neutral term. Further, the evidence against Dealba was not particularly strong, making it less likely that Vaughn's statement did not contribute to the verdict against Dealba. In particular, Sergeant Shalhoob's identification of Dealba can be characterized as shaky at best. That identification was so suggestive, as it was made at night outside of Dealba's home and shortly after Dealba had been arrested, that its reliability is questionable. And further undermining that identification is the fact that Sergeant Shalhoob first described the man who robbed Gonzales and shot at him as a black male, not a Hispanic male.<sup>14</sup> Additionally, Gonzales was unable to identify Dealba as the man who robbed her. And she originally described the man who robbed her as a black man with no identifying marks on his arms, but Dealba is a Hispanic male who has "sleeve" tattoos that cover both of his

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<sup>13</sup>Medina at 355, 143 P.3d at 477. (Citing Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)).

<sup>14</sup>We note that at oral argument the State conceded the discrepancies between Sergeant Shalhoob's initial description of the man who robbed Gonzales and shot at him and Dealba's appearance.

arms from the forearm to the wrist. Given the weak case against Dealba, we cannot conclude that the district court's failure to give a limiting instruction was harmless beyond a reasonable doubt, and we therefore reverse Dealba's convictions for robbery with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and possession of a firearm by an ex-felon.

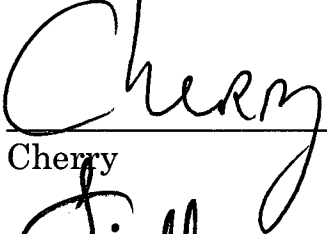
Conclusion

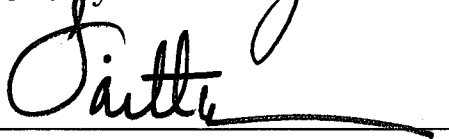
Because the district court erred by not giving the jury a limiting instruction concerning the jury's use of Detective Spiotto's testimony regarding Vaughn's statements in accordance with Richardson v. Marsh,<sup>15</sup> and the State failed to show that this error was harmless beyond a reasonable doubt, Dealba's convictions must be reversed.

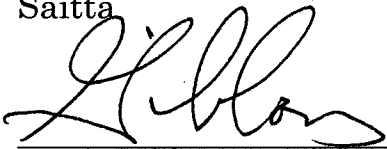
Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

It is so ORDERED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

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<sup>15</sup>481 U.S. at 211.



cc: Hon. Valorie Vega, District Judge  
Amesbury & Schutt  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk