IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN M. FERGUSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51664

FILED

JUL 07 2009

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of two counts of burglary and one count each of grand larceny and possession of burglary tools. Eighth Judicial District Court, Clark County; David Wall, Judge. The district court sentenced appellant Bryan M. Ferguson to serve various concurrent and consecutive prison terms amounting to 72 to 240 months.

Ferguson contends that the district court erred by admitting the recording of a telephone call his codefendant made from jail to an unrelated third person. Specifically, Ferguson argues that his codefendant's use of the term "we" implicated him in the crimes his codefendant admitted to committing, and that admission of the call violated his Sixth Amendment confrontation rights as interpreted in Bruton v. United States, 391 U.S. 123 (1968). We disagree.

In Bruton, the United States Supreme Court held that the admission of a nontestifying codefendant's confession expressly implicating the defendant in the crime deprives the defendant of his rights under the Confrontation Clause, even if the jury is instructed to consider the confession only against the codefendant. Id. at 135-36. However, even

when a nontestifying codefendant's statement refers to a defendant by name, the Confrontation Clause is not violated by the admission of the statement if the statement "is redacted to eliminate not only the defendant's name, but any reference to his or her existence," or if the defendant's name is replaced with a neutral word and if the statement becomes incriminating "only when linked with evidence introduced later at trial," because a limiting instruction will cure any prejudice. Richardson v. March, 481 U.S. 200, 211, 208 (1987); see also Lisle v. State, 113 Nev. 679, 692-93, 941 P.2d 459, 468 (1997) (finding no Confrontation Clause violation where codefendant's statement was redacted to replace defendant's name with "the other guy"). Nevertheless, where the nontestifying codefendant's redacted statement suggests the participation of another person in the admitted offenses and it is likely that the jury deduced that this other person was the defendant, admission of the statement may violate the protections provided by Bruton. Gray v. Maryland, 523 U.S. 185, 196-97 (1998); see also Ducksworth v. State, 113 Nev. 780, 795, 942 P.2d 157, 166-67 (1997). "In determining whether admission of a co-defendant's statement violates Bruton, the central question is whether the jury likely obeyed the court's instruction to disregard the statement in assessing the defendant's guilt." Ducksworth v. State, 114 Nev. 951, 955, 966 P.2d 165, 167 (1998).

Ferguson challenges the admission of a September 24, 2006, telephone call that Ferguson's codefendant, Daimon Monroe, made from jail to an unrelated third person. At trial, Ferguson's counsel and the State agreed on the redaction of six other telephone calls made to or from Monroe and Ferguson while they were in jail by replacing all instances of Ferguson's name with a neutral pronoun. However, Ferguson objected to

admission of the September 24, 2006, call, even with the redaction of Ferguson's name, because Monroe used the term "we" when discussing the offenses. Ferguson specifically objected to the following passages:

> "Well, we were drivin' and uh, well, doin' a walk thru and somebody had seen it and we came back out and a body said, 'hey, you oughta get out of here they're callin'. So I started gettin' in and we pushed out and they pulled me. And they were gettin' ready to let us go and then this guy said, 'I think we had one of those up the street' and we had two or three pieces from there."
>
> "Yea, they were [unintelligible] when we were in there I told [neutral pronoun], I said, "we don't want none of that crap, dude. I didn't and f***in' he had to have 'em and so we put 'em in and then, it was [unintelligible] fault though, you know?"

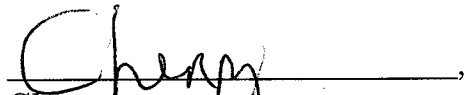
Ferguson argues that because there were only two people at the defense table, Monroe's references to "we" implicated him in the crimes.

Here, the telephone call at issue did not refer to Ferguson by name. The district court read an appropriate limiting instruction prior to its admission, which we conclude was likely followed by the jury. In addition, the State reinforced the limiting instruction in its closing argument, reminding the jury that the call could be considered only with respect to Monroe. The evidence of Ferguson's guilt in this case was overwhelming, and the telephone call incriminated Ferguson only when it was linked with other evidence presented at trial, including six additional phone calls from jail in which Ferguson and Monroe discussed their offenses, the testimony of an eyewitness to the second burglary, and testimony that all of the property stolen during the first burglary was found either in Ferguson's pocket or the vehicle Ferguson and Monroe occupied at the time of their arrest. Based on the foregoing, we conclude

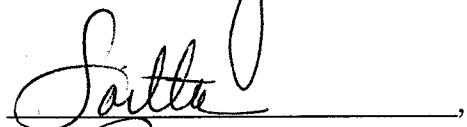
that Monroe's references to "we" provided minimal, if any, prejudice to Ferguson and admission of this telephone call did not violate the Confrontation Clause as interpreted in Bruton.

Having considered Ferguson's contention and concluded it is without merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Cherry



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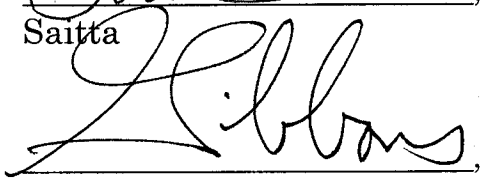

_____, J.
Gibbons

cc: Hon. David Wall, District Judge
Kocka & Bolton
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk