

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOEY SALAS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52004

**FILED**

DEC 23 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, pursuant to a jury verdict, of second-degree murder and robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

The district court sentenced appellant Joey L. Salas to life in prison with the possibility of parole after 10 years for second-degree murder, and 36 to 180 months for robbery, plus an equal consecutive term of 36 to 180 months for a deadly weapon enhancement, both counts to run consecutively. Salas appeals these convictions on various grounds, including the district court's denial of Salas's request to sever his trial and the district court's admission of various writings into evidence under the hearsay exception for statements made by a coconspirator in furtherance of the conspiracy. We determine that all of Salas's contentions are without merit. Therefore, we affirm the lower court's judgment of conviction. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Denial of Salas's request to sever his trial

Salas was tried with codefendant Cassandra Thomas for the murder of Michael McClain. Salas argues that the district court erred by denying his motion to sever his trial from codefendant Thomas for two

reasons: (1) the jury was unable to limit its consideration of Salas's guilt to only evidence that was admissible against him, as provided in Bruton v. United States, 391 U.S. 123 (1968); and (2) Thomas's confession amounted to inadmissible hearsay and was admitted in violation of Crawford v. Washington, 541 U.S. 36 (2004).

The evidence presented at trial indicated that Thomas, Salas, and Corey Pearce, a third defendant who was tried separately, consumed drugs together with McClain over a period of several days. At some point during this timeframe, McClain was beaten, restrained, and eventually killed. McClain's body was dumped and later discovered near a construction site in the Las Vegas desert. While the exact cause of death was disputed, the evidence suggested that McClain suffered a skull fracture in the back of his head and sharp-force injury to the side of his skull. Thomas and Pearce were apprehended on other charges in Florida. During a search of the vehicle in which they were apprehended, detectives discovered Thomas's journal. Various journal entries, which were admitted at trial, led the detectives to question Thomas and Pearce about McClain's killing. Thomas gave a detailed confession regarding the killing, in which she implicated Salas.

Based on information obtained from Thomas, detectives questioned Salas about the murder. Salas admitted to being present at the residence and hitting McClain over the head with a dowel, but he claimed that he immediately left the residence thereafter and was unaware of McClain's death until the police notified him during questioning. The journal entries and statements made by Thomas detailing the killing were admitted against Thomas during trial, with all references to Salas redacted. Thomas did not testify at trial.

NRS 174.165(1) provides that the trial judge may sever a joint trial “[i]f it appears that a defendant or the State of Nevada is prejudiced by a joinder” of defendants for trial. On appeal, this court will not reverse the decision of the trial judge respecting severance “unless the appellant carries the heavy burden of showing that the trial judge abused his discretion.” *Chartier v. State*, 124 Nev. \_\_\_\_, \_\_\_\_, 191 P.3d 1182, 1185 (2008) (quoting *Buff v. State*, 114 Nev. 1237, 1245, 970 P.2d 564, 569 (1998) (internal quotation marks omitted)). “Some form of prejudice always exists in joint trials and such occurrences are subject to harmless error review.” *Ewish v. State*, 110 Nev. 221, 234, 871 P.2d 306, 315 (1994). Accordingly, “[t]o establish that joinder was prejudicial requires more than simply showing that severance made acquittal more likely; misjoinder requires reversal only if it has a substantial and injurious effect on the verdict.” *Marshall v. State*, 118 Nev. 642, 647, 56 P.3d 376, 379 (2002).

#### Bruton challenge

Salas initially argues that the district court erred by refusing to sever his trial in violation of the protections afforded to him by *Bruton v. United States*, 391 U.S. 123 (1968), and other authorities. Specifically, Salas argues that the jury could not have been trusted to limit its consideration of Salas’s guilt to only the admissible evidence against him and not consider Thomas’s statement, even with the court’s redactions and limiting instruction. We disagree.

In *Bruton*, the United States Supreme Court concluded that a codefendant’s Sixth Amendment confrontation rights are violated when a nontestifying codefendant’s confession, implicating his codefendant, is admitted at their joint trial, even if the jury is instructed to consider the confession only against the nontestifying codefendant. *Id.* at 137.

However, the Supreme Court later held that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's statement, with a limiting instruction, if the statement "is redacted to eliminate not only the defendant's name, but any reference to his or her existence." Richardson v. Marsh, 481 U.S. 200, 211 (1987); see also Lisle v. State, 113 Nev. 679, 693, 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"), limited on other grounds by Middleton v. State, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998).

Nevertheless, where the nontestifying codefendant's redacted statement indicates the participation of another person in the admitted offenses, admission of the statement may violate the protections provided by Bruton if it is likely that the jury deduced that this other person was the defendant. Gray v. Maryland, 523 U.S. 185, 193, 197 (1998) (confession was redacted by replacing the nontestifying codefendant's name with a blank space or the word "deleted"); see also Ducksworth v. State, 113 Nev. 780, 795, 942 P.2d 157, 166-67 (1997) (defendant's confession referred, directly and by inference, to an unnamed person). Where admission of a nontestifying codefendant's statement violates Bruton and the evidence presented against the other defendant is mostly circumstantial, reversal is mandated if "it is not clear beyond a reasonable doubt that the improper use of the admission was harmless error." Ducksworth v. State, 114 Nev. 951, 954, 966 P.2d 165, 166 (1998) (quoting Stevens v. State, 97 Nev. 443, 445, 634 P.2d 662, 664 (1981)).

In challenging the district court's admission of Thomas's confession in violation of the protections provided under Bruton, Salas argues that (1) the jury inappropriately had to rely on Thomas's confession

because it was the only framework for the case, (2) the State improperly linked the independent evidence to Thomas's confession during its opening and closing arguments, and (3) the district court erroneously instructed the jury that Thomas's confession had been redacted.

Evidence independent of Thomas's confession

Salas contends that the jury could not limit its consideration of his guilt to only the admissible evidence against him and that it had to rely on Thomas's statement because her statement was the only framework for the case. We disagree.

Independent of Thomas's confession was Salas's own statement to detectives, which established that he stayed with McClain at the home of Michelle Schwandt<sup>1</sup> around the end of May 2006. Further, Salas admitted that during his stay with McClain, an altercation ensued between McClain and Thomas. In the course of their altercation, Salas struck McClain in the head with a dowel, knocking him to the ground where detectives and crime scene analysts later found McClain's dried blood. After Salas was arrested, detectives located a pawn ticket inside Salas's wallet for a woman's solitaire three-and-one-half carat diamond ring that Salas said he received from McClain in exchange for a few grams of methamphetamine.

Also independent of Thomas's confession, the State presented testimonial evidence that the last time McClain's mother had contact with him was the end of May 2006. It was around this time that calls were

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<sup>1</sup>Michelle Schwandt owned the home where McClain was beaten and died but was serving a prison term for a drug conviction. She had permitted McClain to live there while she was incarcerated and he, in turn, had allowed his assailants in the home.

placed via McClain's cellular telephone to various rental car companies, including the company where Salas and Thomas rented a vehicle. Further, at trial, a forensic analyst testified that Salas's left palm print was discovered underneath the left armrest of a wheelchair found at Schwandt's house. The wheelchair was covered in McClain's blood. Tied to that wheelchair's armrests, where a person's wrists would be located upon sitting in the chair, was clear packing tape. Moreover, the homicide detective testified that there was "a very heavy odor of death" in the room in which the wheelchair was located, which indicted that McClain had died in that room.

Also admitted into evidence at trial were various "writings," including: (1) a note discovered at Schwandt's residence, which was drafted in Thomas's handwriting and stated, "[Thomas] [Pearce] & [Salas] Friends 4 Life"; (2) a purported lease for Schwandt's residence with a signature reading "Joey Salas" as the lessee, found in the car in which Thomas was arrested; (3) an envelope, addressed to Schwandt's homeowners' association with Salas and Schwandt listed as the return addressees, also drafted in Thomas's handwriting and discovered in Thomas's car; (4) a notebook page purportedly drafted by Thomas reading, "Home boy: Joey Lee Salas, Washington ID," also found in Thomas's car; and (5) a note purportedly drafted by Thomas that provided instructions to Salas if the police came to the house, which was discovered in a trash bin at Schwandt's house. These writings were admitted into evidence at trial against Salas as constituting a statement made by Thomas, as a coconspirator, in furtherance of the conspiracy and, alternatively, as nonhearsay.

Additionally, independent of Thomas's confession, the State presented testimony from the owner of a car rental business, who attested that on June 4, 2006 (the same day that McClain's cellular phone stopped working), Salas and Thomas rented a vehicle. The witness further testified that Salas first attempted to rent the car, but was denied the rental car due to his lack of insurance. The evidence also demonstrated that the vehicle that Salas and Thomas had rented had mechanical problems a day later, and the rental car business met Thomas at a motel in order to exchange the vehicle. The latter vehicle was later recovered in Colorado, and a Las Vegas detective that processed it testified that the vehicle had an air freshener in the trunk, but that the masking agent was not strong enough to cover the smell of "decomposition."

We determine that the State presented overwhelming independent evidence of Salas's participation in the crimes charged sufficient for the jury to convict Salas without relying on Thomas's confession.

State's use of Thomas's confession during opening and closing arguments

Salas further argues the State improperly used Thomas's confession during opening and closing arguments to support its inference as to how Salas participated in McClain's murder, therefore rendering the court's limiting instruction meaningless. In support of his arguments, Salas relies on Richardson, where the Supreme Court reversed the defendant's conviction and remanded the case because "the prosecutor sought to undo the effect of the limiting instruction by urging the jury to use [the] confession in evaluating the [other defendant's] case." 481 U.S. at 211. We disagree.

During the State's opening argument, it made references to both Thomas's and Salas's participation in the crimes charged. While the State did refer to information that it obtained from Thomas's confession when discussing Salas's participation, Salas did not object contemporaneously to any of the State's opening remarks. In addition, it appears that any specific reference the State made to Thomas's confession was made in connection with Thomas's liability only.

Just prior to closing arguments, Salas reiterated his objection to the court's refusal to sever the trial and orally moved for a mistrial, arguing that the jury would inevitably consider Thomas's confession against him. The district court determined that it would let the parties make their respective arguments but that each party needed to object as appropriate and the court would then rule on that objection. The State proceeded with its closing arguments and again made reference to information that it obtained from Thomas's confession when discussing Salas's participation in the crimes charged. Once again, Salas did not object to any statement made during the State's closing argument.

To the extent that Salas's objection was properly preserved, we conclude that the State presented overwhelming, albeit circumstantial, independent evidence sufficient for the jury to determine Salas's guilt. Therefore, even if the State improperly used Thomas's confession to support its inferences as to how Salas participated in McClain's murder and the robbery, we conclude that the error was harmless. See Abram v. State, 95 Nev. 352, 356, 594 P.2d 1143, 1145 (1979) (concluding that an error will be deemed harmless if the evidence of the defendant's guilt is overwhelming).



The district court's limiting jury instruction informing the jury of the redaction

Citing Gray v. Maryland, 523 U.S. 185 (1998), Salas contends that the jury could not limit its consideration of the evidence because the district court erroneously instructed the jury that Thomas's statement had been redacted. We disagree. In Gray, the trial court redacted the nontestifying codefendant's confession by substituting blank spaces separated by commas or by using the term "deleted" in the portions of the statement where the other defendant was referenced. Id. at 188-89. The Supreme Court vacated the judgment and remanded the case, reasoning that the redaction was insufficient to protect the other defendant's confrontation rights because the obviousness of the redaction would lead the jury to realize that the statement referred to the other defendant. Id. at 192-93, 197.

In this case, the redaction of Thomas's statement was not obvious and did not implicate Salas, as Thomas's statement did not contain blank spaces or substituted words. However, the district court did instruct the jury that "[p]ortions of [the defendants'] statements may have been redacted."<sup>2</sup> Because the court admonished the jury that it was not to

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<sup>2</sup>Jury Instruction No. 52 provided:

Each of the defendants in this case have [sic] given statements which have been memorialized. Portions of these statements may have been redacted by the attorneys and agreed upon by the court.

The jury is not to consider or speculate on any of the portions that have been taken out of the statement. The court further instructs the jury

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consider or speculate what was redacted from the defendants' statements, and "[t]he jury is expected to follow the instructions in limiting evidence for each defendant," Lisle v. State, 113 Nev. 679, 689, 941 P.2d 459, 466 (1997), limited on other grounds by Middleton v. State, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998), we conclude that any error in giving the instruction was harmless, especially considering the overwhelming, independent, admissible evidence presented against Salas.<sup>3</sup>

#### Crawford challenge

Salas challenges the district court's denial of his motion to sever his trial from that of Thomas under Crawford v. Washington, 541 U.S. 36 (2004), based on the argument that Thomas's confession was introduced against him, as well as Thomas, and that Thomas was not subject to cross-examination. While Salas concedes that the statement may not have been directly admitted against him, he argues that because the State discussed in its opening arguments the events surrounding the

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that each statement shall only be used against  
that defendant who gave said statement.

<sup>3</sup>Salas also argues on appeal that there was insufficient evidence to support his robbery-with-use-of-a-deadly-weapon conviction and his second-degree murder conviction. "There is sufficient evidence if the evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998). We conclude that based on the overwhelming evidence presented in this case, a rational trier of fact could find beyond a reasonable doubt that Salas committed robbery with the use of a deadly weapon and second-degree murder.

crime based on Thomas's recollection of the events as detailed in her confession, the confession was essentially admitted against him.

Under Crawford, extrajudicial witness statements that are testimonial in nature and offered against a defendant are prohibited by the Confrontation Clause, unless (1) the witness is unavailable, and (2) the defendant had a prior opportunity to cross-examine the witness. Id. at 68. The parties do not dispute that Thomas was unavailable and that Salas did not have an opportunity to cross-examine her. As a result, the issue turns on whether Thomas's confession was essentially admitted against Salas.

Because Salas's argument here is fundamentally the same as his argument presented in the Bruton challenge above, we conclude that the same rationale applies, and we reiterate that the State presented overwhelming, admissible evidence, independent of Thomas's confession, to establish Salas's participation in the crimes charged and any error committed was harmless.

#### Admission of certain writings

Salas argues that the trial court erred by admitting various writings into evidence under the hearsay exception set forth in NRS 51.035(3)(e) for statements made by a coconspirator in furtherance of the conspiracy.<sup>4</sup> The basis of Salas's challenge rests on the proposition that,

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<sup>4</sup>The writings that Salas challenges on appeal consist of: (1) a note discovered at Schwandt's house, which stated, "[Thomas] [Pearce] & [Salas] Friends 4 Life"; (2) a purported lease for Schwandt's house with a signature providing "Joey Salas," dated March 7, 2006, found in the car in which Thomas was arrested; (3) an envelope addressed to Schwandt's homeowners' association with Salas and Schwandt listed as the return addressees and found in Thomas's car; (4) a notebook page with "Home  
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without considering Thomas's confession, there was insufficient evidence to demonstrate a conspiracy.

NRS 51.035(3)(e) provides that “[h]earsay’ means a statement offered in evidence to prove the truth of the matter asserted unless . . . [t]he statement is offered against a party and is . . . [a] statement by a coconspirator of a party during the course and in furtherance of the conspiracy.” For NRS 51.035(3)(e) to apply, the State must establish by “slight evidence” that a conspiracy exists. McDowell v. State, 103 Nev. 527, 529, 746 P.2d 149, 150 (1987). This court has defined a conspiracy as “an agreement between two or more persons for an unlawful purpose.” Nunnery v. Dist. Ct., 124 Nev. \_\_\_\_, \_\_\_\_, 186 P.3d 886, 888 (2008) (quoting Bolden v. State, 121 Nev. 908, 912, 124 P.3d 191, 194 (2005), receded from on other grounds by Cortinas v. State, 124 Nev. \_\_\_\_, \_\_\_\_, 195 P.3d 315, 324 (2008)).

Based on the evidence previously discussed, we determine that the State presented at least “slight evidence,” see McDowell, 103 Nev. at 529, 746 P.2d at 150, that Thomas and Salas agreed to rob and kill McClain. Therefore, we conclude that the district court did not err by admitting the writings drafted by Thomas, against Salas, as a coconspirator.<sup>5</sup>

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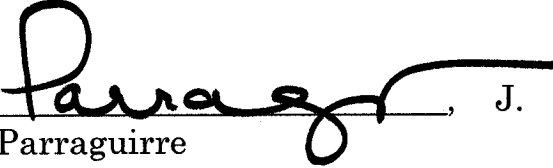
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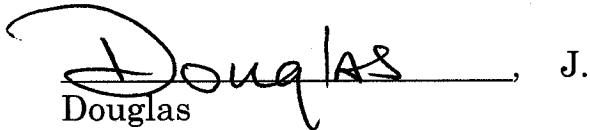
boy: Joey Lee Salas, Washington ID,” which was also discovered in Thomas's car; and (5) a note purportedly drafted by Thomas that provided instructions to Salas if the police came to the house, which was discovered in a trash bin at Schwandt's house.

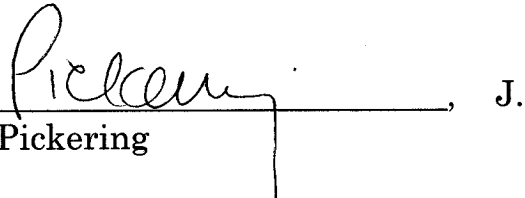
<sup>5</sup>Even if these writings did not fall within the hearsay exception for a coconspirator's statements, we conclude that they were admissible  
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Having considered Salas's contentions and concluded that they are without merit,<sup>6</sup> we

ORDER the judgment of the district court AFFIRMED.

  
Parraguirre, J.

  
Douglas, J.

  
Pickering, J.

cc: Hon. Valerie Adair, District Judge  
Susan D. Burke  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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because they were nonhearsay, as they were not being offered for their veracity as defined in NRS 51.035(3).

<sup>6</sup>Salas raises the following additional arguments on appeal: his convictions were not supported by sufficient evidence, the district court erred by failing to give the jury adequate instructions that supported Salas's theory of the case, and the district court erred by rejecting Salas's proffered reasonable doubt instruction. After careful consideration of these arguments, we conclude that they lack merit.