IN THE SUPREME COURT OF THE STATE OF NEVADA

RENEE R. ROSS A/K/A RENE R. ROSS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40981

FILED

DEC 23 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit burglary, burglary with the use of a deadly weapon, conspiracy to commit robbery, robbery with the use of a deadly weapon, first-degree kidnapping and attempted murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

Appellant Renee Ross was tried before a jury, along with his co-defendant, Avery Church. Both were convicted. On appeal, Ross contends that the district court committed reversible error by admitting taped conversations and that the district court abused its discretion when it denied his motion for severance of his trial from Church's. Because we agree with Ross, we order the convictions reversed and remanded. We need not address, therefore, Ross's cumulative error argument.[1]

[1]We reject Ross's contention that insufficient evidence supports the attempted murder conviction and his contention that the kidnapping was incidental to the robbery.

04-23406

Taped conversations

Ross contends that the district court's admission of taped conversations[2] violated the Confrontation Clause of the Sixth Amendment and Bruton v. United States.[3] We agree.

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[2]The recorded conversations were taken from three telephone calls made on the same day.

Tracks One and Two are part of the same call. The first conversation is between Annette Manso and Church. In Track Two, Nicole (last name unknown) joins in the call.

Track One:

> Annette: By the way, she's like, she's like, and "I know, I know about the necklace." She's like, "I know what you did for them. I know."
>
> Church: Be quiet.
>
> Annette: Yeah, well

Track Two:

> Church: Yeah there is nothing to worry about Nicole.
>
> Nicole: You're the one stressing over there.
>
> Church: But when you're, when you're talking over the phone and you f**king a . . .
>
> Nicole: You're the one stressing.
>
> Annette: Nicole, and you're talking about some shit I did for AJ (referring to Church), AJ and Renee [referring to appellant]. Dude, you can't be repeating that shit. Nicole.
>
> Nicole: Oh, well.
>
> Annette: What do you mean, "Oh, well?"

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. . . continued

> Church: Oh, well? And Nicole you know if you don't.
>
> Nicole: I can repeat what I want to repeat, OK.
>
> Annette: Whatever, f**k you Nicole. F**k you, bitch, go to hell . . . hello . . . F**k that little bitch. F**k that little cunt. Cuz I'm going to f**k her up when I see her.
>
> Track Three is the second phone call, taking place about three minutes after the first phone call. The conversation is between Annette and Church.

Track Three:

> Church: I don't know why you even had to say anything about that thing she was talking about. I don't know why you even talk about anything Annette. Do you understand how f**king paranoid I am about these telephones? Do you understand that if they record something off these telephones . . .
>
> Annette: Oh, so, so repeat that. That's great.
>
> Church: What? Listen to me dude.
>
> Annette: So you say that?
>
> Church: Do you understand . . .
>
> Annette: So they definitely, so they definitely know something is going on.
>
> Church: Annette would you shut your f**king mouth.

Track Four takes place on the same day and occurs about eight calls after Track One (about five hours later). This is the only phone call in which Ross participated.

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The Sixth Amendment provides every criminal defendant with the right to confront the witnesses against him,[4] and assures a criminal defendant the right to cross-examine witnesses presented against him.[5]

. . . *continued*

Track Four:

> Nicole: Ever since I left that on her machine. I was like . . . .
>
> Ross: He told me.
>
> Nicole: And I was like, f**king . . . something I said (inaudible) I know you're the one that pawned the necklace.
>
> Ross: Heh.
>
> Nicole: Right, that's what I said.
>
> Ross: Right and he f**king started crying. And he started crying about that shit, "Oh, what the f**k." You know he's, he's the one that f**king . . . who told you this? You know who went, who went and told you about our case? Huh, babe? Hello.
>
> Nicole: About the necklace?
>
> Ross: No! Dude. About our case period. Don't, I'm not talking about nothing. All right dude. Let's just drop it.

[3]391 U.S. 123 (1968).

[4]U.S. Const. amend. VI. The Sixth Amendment guarantees are applicable to the state through the Fourteenth Amendment. Daniel v. State, 119 Nev. 498, 517, 78 P.3d 890, 903 (2003).

[5]Bruton, 391 U.S. at 126.

The Confrontation Clause also restricts the State's use of hearsay evidence when a hearsay declarant does not testify at trial.[6]

After completion of the its case in chief, the State moved to admit four taped conversations gleaned from three phone calls, arguing that the defendants had opened the door to the admission of these statements into evidence and that the statements were in furtherance of a conspiracy.[7] During the State's presentation of its case in chief, Ross's co-defendant, Church, had cross-examined the victim about whether he had ever pawned personal items. He also questioned the victim about whether he had ever pawned items to individuals rather than pawnshops. Church then questioned the victim about whether he had pawned the necklace that was allegedly stolen. Additionally, while cross-examining a detective who had investigated the case, Church asked if the detective was aware of people pawning personal items for either drugs or money. Ross did not question either of these witnesses concerning either the pawning of the victim's necklace or the victim's experience in pawning.

The four taped conversations, although confusing and ambiguous, appear to involve discussions about the possession of the stolen necklace. While the State conceded that it had previously agreed with the defendants not to offer the taped conversations into evidence, the State nevertheless argued to the district court that Church's actions opened the door to the issue of whether the victim had pawned the

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[6]Wood v. State, 115 Nev. 344, 348, 990 P.2d 786, 789 (1999).

[7]See NRS 51.035(3)(e) (stating that hearsay is "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").

necklace in question; the State became convinced during presentation of its case in chief that it was necessary to admit the taped conversations in order to impeach the inferences that might have been drawn by the jury from Church's cross-examinations of the victim and the detective. The State argued that the conversations were admissible, first, as statements in furtherance of a conspiracy, second, that the conversations were reliable, and finally, that the door to the evidence had been opened by the defense. While Ross had not raised the issue of whether the victim might have pawned the necklace, the State argued that the taped conversations were also admissible against Ross because Ross had failed to object to Church's cross-examination.

Over the defendants' objections, the district court ruled the tapes admissible on two grounds: (1) the door had been opened as to the admissibility of the taped conversations as evidence of Ross's possession of the necklace,[8] and (2) as evidence in furtherance of a conspiracy. The court found that the taped conversations themselves demonstrated indicia of reliability. We conclude that, as to Ross, the district court erred in admitting these taped conversations for several reasons.

First, the district court erred when it concluded that the door had been opened to admit the taped conversations as evidence concerning Ross's possession of the necklace. The district court determined that the tapes were specifically admissible against Ross because Ross had failed to object to Church's cross-examination. We disagree with this justification

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[8]We note that the issues that Church raised in his appeal are separate from Ross's appellate issues. We also recognize that the analysis of the admission of certain evidence at trial differs in each defendant's case, and therefore, we consider Ross's appeal separately from Church's appeal.

for admission. In Church's separate appeal in this court,[9] we determined that the district court had committed reversible error when it concluded that Church had opened the door to the taped conversations through his cross-examinations of the victim and the detective. Thus, if the district court erred in admitting the taped conversations against Church, then Ross's failure to object to Church's cross-examinations does not constitute a waiver of the objectionable nature of the taped conversations' admissibility as to Ross. The district court erred in concluding that Ross "opened the door" for the conversations to come into evidence against Ross through Church's cross-examinations of the victim and the detective. We also note that if tapes were admissible for impeachment purposes at all, they were admissible on the "opened door" justification solely against Church who was after all the only person who arguably opened the door. Of particular concern to this court, the State never proposed and the jury was never instructed that the tapes were to be considered only against Church. This is significant to our analysis since Ross did not open any door. The jury was never told to consider the tapes solely against Church and not against Ross.

As to the district court's determination that the tapes are also admissible as evidence in furtherance of a conspiracy per NRS 51.035(3)(e), we have held that, before an out-of-court statement by an alleged co-conspirator may be admitted into evidence against an accused, the State must establish, by independent evidence, both the existence of a conspiracy and that the co-conspirator made the statement during the

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[9]Church v. State, Docket No. 41036 (Order of Reversal, August 25, 2004), rehearing denied, (Order Denying Rehearing, December 1, 2004).

course of and in furtherance of the conspiracy.[10] A conspiracy "continues until its aim has been achieved"[11]; it "is not limited to the commission of the principal crime, but can continue during the period when coconspirators perform affirmative acts of concealment."[12] Here, the State did not meet this burden. Annette and Nicole were never charged as co-conspirators of Church and Ross. Annette and Nicole never testified at the trial. The State presented no evidence, independent tenuous conclusions that the State argued could have drawn from the tapes, that Annette and Nicole were involved in the conspiracy. The State had not shown in any fashion how the conversations were in furtherance of a conspiracy. When the tapes were made, the alleged criminal activity, including the concealment phase, was completed, and therefore the conversations themselves were not made in furtherance of the conspiracy. The district court erred in concluding that the tape-recorded statements qualified as non-hearsay statements made during the course of and in furtherance of a conspiracy.

Most of the taped conversations are nonsensical and are not prejudicial to Ross, but taken as a whole, the conversations might have conveyed to the jury that Church planned and carried out a plot to dispose of a necklace that, from the victim's testimony, the jury may have concluded Ross had stolen from the victim. Track two of the

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[10]Wood, 115 Nev. at 349, 990 P.2d at 789.

[11]Goldsmith v. Sheriff, 85 Nev. 295, 306, 454 P.2d 86, 93 (1969).

[12]Foss v. State, 92 Nev. 163, 167, 547 P.2d 688, 691 (1976); see also Crew v. State, 100 Nev. 38, 46, 675 P.2d 986, 991 (1984) (stating that the coconspirator's plan to move the bodies after the murder "was in furtherance of the conspiracy to commit the crime and to 'get away with it'").

conversations, in which Ross did not participate, implicates Ross. Ross only takes part in the conversation on Track Four,[13] and although his comments are at worst ambiguous and at best exculpatory, it is within the realm of conjecture that the jury could, in light of the other evidence that was presented, interpret Ross's remarks as an adoption of Nicole's statements. These statements and the inferences possibly drawn there from were impermissibly prejudicial to Ross as he was unable to test, through cross-examination of Nicole, her statements on Track Four as well as on the other tapes. The State sought the admission of these taped conversations to prove that Annette had pawned the necklace, and to corroborate the victim's testimony that Ross had stolen the necklace from him, and to prove that Ross knew of its disposal. Thus, the State sought to use these out-of-court testimonial statements specifically to prove the truth of the matters asserted. Ross was entitled to cross-examine Nicole, Annette and Church, whose statements were heard by the jury.[14] We conclude that Ross was unfairly prejudiced by the admission of these four taped conversations, without the concurrent opportunity to test them through cross-examination of the speakers. Accordingly, we conclude that the district court erred when it admitted the tapes.

Ross also argues that the admission of the taped conversations violates Bruton.[15] In Bruton, the United States Supreme Court held that the admission in a joint trial of a non-testifying codefendant's confession or statement inculpating the other defendant violated the Confrontation

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[13]Track Four is likely admissible pursuant to NRS 51.035(3)(a).

[14]See Crawford v. Washington, 541 U.S. 36, 24 S. Ct. 1354 (2004).

[15]391 U.S. 123.

Clause and that this violation could not be overcome by an instruction to the jury to disregard the statement.[16] As stated above, Church's conversations with Annette and Nicole implicate Ross by connecting him to the stolen necklace, the only other evidence connecting him to the stolen item being the victim's testimony. These taped conversations, though laden with ambiguity and devoid of context except in conjunction with the other evidence the jury heard, conceivably implicate Ross in the crimes.[17] Church chose not to testify, and therefore, Ross was unable to test his out-of-court statements through cross-examination. Moreover, the district court failed to instruct the jury that they were not to consider Church's statements as they pertained to Ross's guilt. Accordingly, the admission of the taped conversations also violated Bruton.[18]

Harmless error

The State argues that any error relating to the admission of the taped conversations was harmless. We have previously subjected hearsay errors and Confrontation Clause violations to harmless error

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[16]Id. at 135-37.

[17]See Rodriguez v. State, 117 Nev. 800, 809, 32 P.3d 773, 779 (2001) (holding that defendant's Bruton claim fails because codefendant's "statement did not facially or expressly implicate anyone in the murder other than [the codefendant]").

[18]While we dispose of this case on other grounds, we also note that the Supreme Court's recent decision in Crawford, 541 U.S. 36, 124 S. Ct. 1354, lends further support to our decision here. Crawford held that, in order to admit a testimonial statement, the Sixth Amendment mandates that the witness be unavailable and that the defendant have had a prior opportunity for cross-examination. Id. at ___, 124 S. Ct. at 1374. In the instant case, the district court admitted the taped statements even though two of the witnesses were available and Ross did not have a prior opportunity for cross-examination.

analysis.[19] Although we are not required to reverse a conviction due to error in admitting hearsay evidence or Confrontation Clause and Bruton violations, reversal is warranted when "it is not clear beyond a reasonable doubt that the improper use of the confession was harmless error."[20] As we noted above, taken as a whole, the Bruton violation is clear. Church's statements tended to connect Ross to the stolen necklace and, therefore, to the crimes, yet the jury received no instruction limiting the use of Church's statements to Church. The conversations corroborate the victim's testimony that Ross stole the necklace from him. Without the taped conversations, the jury had only the victim's testimony to consider when considering Ross's guilt, which testimony they were free to believe or disbelieve. The victim's credibility was undeniably strengthened by admission of the tapes for use by the jury against Ross. The admission of Church's taped conversations with Annette and Nicole exposed the jury to highly prejudicial evidence as to Ross, yet Church, Annette and Nicole were not available for cross-examination. Because it is not clear that the jury would have found Ross guilty beyond a reasonable doubt absent its consideration of the taped conversations, we cannot say that the Bruton and Confrontation Clause violations constituted harmless error. On the contrary, we conclude these errors justify reversal.

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[19]Wood, 115 Nev. at 350, 990 P.2d at 790; Rodriguez, 117 Nev. at 809-10, 32 P.3d at 779 (citing United States v. Vejar-Urias, 165 F.3d 337, 340-41 (5th Cir. 1999) ("Bruton error may be harmless where, disregarding the co-defendant's statement, there is otherwise ample evidence against a defendant")).

[20]Ducksworth v. State, 113 Nev. 780, 795, 942 P.2d 157, 167 (1997).

Severance

Ross contends that the district court abused its discretion when it denied his motion for severance.

"NRS 174.165(1) permits the district court to sever a joint trial '[i]f it appears that a defendant . . . is prejudiced by a joinder of . . . defendants . . . for trial together.'"[21] We have cautioned that a district court must also consider potential prejudice to the State resulting from two trials.[22] "A district court should grant a severance 'only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'"[23] "[M]isjoinder requires reversal only if it has a substantial and injurious effect on the verdict."[24]

In Ducksworth v. State, the State tried defendants Ducksworth and Martin together.[25] The district court permitted several witnesses to testify concerning statements made by Ducksworth, which implied that Ducksworth had acted with an accomplice. Even though the trial court instructed the jury that the testimony was only to be considered as to Ducksworth, we determined that the admission of the statements, where Ducksworth was an unavailable witness, violated Martin's right to cross-examine a witness testifying against him, in violation of the

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[21]Rodriguez, 117 Nev. at 808, 32 P.3d at 778 (alteration in original) (quoting NRS 174.165(1)).

[22]Id. at 808, 32 P.3d at 778-79.

[23]Marshall v. State, 118 Nev. 642, 647, 56 P.3d 376, 379 (2002) (quoting Zafiro v. United States, 506 U.S. 534, 539 (1993)).

[24]Id.

[25]113 Nev. 780, 942 P.2d 157.

Confrontation Clause.[26] We held that the trial court's failure to sever the joint trial prejudiced Martin, and we reversed Martin's conviction, remanding for a new trial.[27]

Likewise, even if Church's statements had been admissible against Church himself, in a joint trial against both Church and Ross and where Church did not testify, the admission of Church's statements directly violated Ross's right to confront Church and constituted a Bruton error. Although Ross waited until the end of the State's case in chief to move for severance, we conclude that a motion for severance before this time was not only premature but could not have been anticipated. Because the State initially represented that it would not offer the taped conversations into evidence, Ross was entitled to believe that a pre-trial motion to sever was unnecessary. However, once the district court granted the State's motion to admit the tapes, Ross timely sought severance. Despite the obvious logistical issues involved when a motion to sever is made in the middle of trial, the district court was aware that Ross's request for severance was based on the State's decision to renege on its previous promise and instead seek admission, in the middle of trial, of the taped conversations. The district court knew that Church, not Ross, violated the agreement with the State concerning the admission of the taped conversations.[28] Finally, the record reflects that Ross had no opportunity to cross-examine Church, Annette and Nicole. Based upon

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[26]Id. at 795, 942 P.2d at 167.

[27]Id.

[28]From the record we know that the State had agreed not to offer the taped statements unless the defendants raised the issue of whether the victim had pawned the necklace.

this record, the district court should, at the very least, have given the jury a limiting instruction cautioning the jury that it could consider the taped conversations solely against Church. At best, the motion should have been granted. Because the district court's admission of the taped conversations exposed the jury to statements that were not scrutinized through the probing test of cross-examination, the jury was prevented from making a reliable judgment concerning the strength of the State's case against Ross. Accordingly, we conclude that the district court abused its discretion when it denied Ross's motion for severance.

Accordingly, we

ORDER the judgment of convictions REVERSED and REMAND for a new trial.

_______________, J.
Agosti

_______________, J.
Gibbons

BECKER, J., concurring in part and dissenting in part:

I concur with all as stated by the majority, except I would vacate the kidnapping conviction as incidental to the robbery.

_______________, J.
Becker

cc: Hon. Joseph T. Bonaventure, District Judge
Christopher R. Oram
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk