

Russell M. Adams
CLERK SUPERIOR COURT

IN THE SUPERIOR COURT OF GLYNN COUNTY

STATE OF GEORGIA

STATE OF GEORGIA

*

V.

*

Indictment:

*

CR 2000433

*

GREG MCMICHAEL

*

TRAVIS MCMICHAEL

*

WILLIAM R. BRYAN

*

4.51 STATE'S MOTION AND BRIEF REGARDING BRUTON ISSUES

COMES NOW, the State of Georgia, by and through the undersigned District Attorney Pro Tempore, and files this motion and brief regarding potential *Bruton* issues. The State has spoken with the defendants' counsel, and they indicated that they will not waive any Bruton issue within any other co-defendant's statement.

The State seeks a ruling on its intended process for tendering relevant, non-*Bruton* statements of the defendants (a.k.a. admissions of party opponents under O.C.G.A. § 24-8-801 (d) (2)), in its case-in-chief, along with an order, requiring the defendants to provide the State with the specifics, from each co-defendant's statement, that they are seeking to have excluded under *Bruton*.

What Statements are at Issue:

All three defendants made non-testimonial statements to the police immediately after the homicide of Ahmaud Arbery. These statements were captured on Glynn County Police Department officer body-cams. They are non-testimonial statements, as the primary purpose was NOT to establish evidence that could be used in a future prosecution, but simply for the police to investigate and determine what had taken place. *McCord v. State*, 305 Ga. 318, 322-323 (2019).

All three defendants then made non-custodial, testimonial statements to the police at the Glynn County Police Department on February 23, 2020, approximately three hours after the homicide. They were all read their Miranda rights and agreed to speak freely and voluntarily with the police. None of the defendants were placed under arrest and all left the police station after making their statements. These statements were captured on video.

Defendant Bryan then made three additional voluntary, testimonial statements to S.A. Seacrist of the Georgia Bureau of Investigation in May of 2020. His lawyer Kevin Gough was present during the three interviews.

The defendant's statements have been in the possession of the defendants since the initial discovery was filed on July 29, 2020. The State also provided the defendants with transcripts of these statements on June 23, 2021.

The State seeks an order requiring the defendants to provide the State with the specifics from each co-defendant's statement that they are seeking to have excluded under *Bruton*, so that the State understands their objection, and if the State disagrees, the State may wish to make argument as to specific statements.¹ This may be done by highlighting, crossing-through or notating copies of the provided transcripts with the specific *Bruton* objections per transcript.

When Does Bruton Apply?

In *Carcamo v. State*, 348 Ga. App. 383, 388-391 (2019), the Georgia Court of Appeals recognized the well settled precedent the United States Supreme Court's holding established in *Bruton v. United States*, 391 U.S. 123 (1968) and by the Georgia Supreme Court in *Thomas v. State*, 300 Ga. 433, 439-440 (2017) and *Favors*

¹ Example: Defendant Bryan, in his second May 13, 2020 statement to S.A. Seacrist, does not mention the McMichaels specifically by name, but does mention seeing the white truck and noting where the white truck was located and which way it went. The State contends that this does not violate *Bruton* and Defendant Bryan's statement about the white truck should be allowed. But at this time, the State does not even know if the McMichael defendants object to this statement.

v. *State*, 296 Ga. 842, 845 (2015). In doing so, the Georgia Court of Appeals observed:

Under *Bruton*, a defendant is deprived of his rights under the Confrontation Clause to the Sixth Amendment when the defendant is tried jointly with a co-defendant who elects not to testify, and the co-defendant's out-of-court testimonial statement directly implicating the defendant as a participant in the crime is introduced into evidence. *Carcamo* at 388.

The Court of Appeals, citing to *Simpkins v. State*, 303 Ga. 752, 755-756 (2018), went on to elaborate:

Bruton excludes only the statement of a non[-]testifying co-defendant **that standing alone directly inculcates the defendant**. By contrast, **Bruton is not violated if a co-defendant's statement does not incriminate the defendant on its face** and only becomes incriminating when linked with other evidence introduced at trial. (Emphasis added.) *Carcamo* at 389.²

The Georgia Supreme Court has held that “*Bruton* “does not apply to non-testimonial out-of-court statements made by such a [non-testifying] co-defendant.”” (Emphasis in original.) *Thomas v. State*, 300 Ga. 433, 439 (2017) (citing to *Billings*

² See also *Pender v. State*, 311 Ga. 98, 106-107 (2021) (“A defendant's Sixth Amendment right to be confronted by the witnesses against him is violated under *Bruton* when co-defendants are tried jointly and the testimonial statement of a co-defendant who does not testify at trial is used to implicate [another] co-defendant in the crime.” (Citation and punctuation omitted.) *Floyd v. State*, 307 Ga. 789, 797 (2) (837 SE2d 790) (2020). However, “*Bruton* excludes only the statement of a non-testifying co-defendant **that standing alone directly inculcates the defendant**.” (Emphasis added. Citation and punctuation omitted.) *McLean v. State*, 291 Ga. 873, 875 (3) (738 SE2d 267) (2012). “**Bruton is not violated if a co-defendant's statement does not incriminate the defendant on its face** and only becomes incriminating when linked with other evidence introduced at trial.” (Emphasis added. Citation and punctuation omitted.) *Taylor v. State*, 304 Ga. 41, 45 (2) (816 SE2d 17) (2018)).

v. State, 293 Ga. 99, 103-104 (2013)). The Court of Appeals then discussed what it means for a statement to be “testimonial:”

Additionally, “*Bruton* ... applies only to out-of-court statements by non-testifying co-defendants that are ‘testimonial’ in nature. A statement is testimonial if its primary purpose was to establish evidence that could be used in a future prosecution.” (Citations and punctuation omitted.) *Favors*, 296 Ga. at 845 (2). Testimonial statements include “affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.” *Crawford v. Washington*, 541 U. S. 36, 51 (III) (A) (124 SCt 1354, 158 LE2d 177) (2004). *Carcamo* at 390-391.

The Court of Appeals in *Carcamo* determined that a co-defendant’s text message, addressed to an acquaintance, using a generic “we’re” in it, does not violate *Bruton* as it did not directly implicate the defendant nor was it testimonial.

In a multi-defendant case where more than one defendant makes testimonial statements, the State must always safeguard against *Bruton* violations during the presentation of its case-in-chief. In these instances, the law permits the State to introduce “portions of a defendant’s statement as the admission of a party-opponent”³ so long as those portions do not otherwise violate *Bruton* and do not undermine other evidentiary provisions set forth in the Georgia Code. *Wilson v. State*, 285 Ga. 224, 230 (2009) (“when the State introduces the inculpatory portions of a defendant's statement as the admission of a party-opponent, the trial court correctly defuses a non-testifying defendant's attempt to use OCGA § 24-[8-822] [Rule of Completeness] to gain admission into evidence of the remainder of the

³ O.C.G.A. § 24-8-801 (d) (2) states, “Admissions shall not be excluded by the hearsay rule. An admission is a statement offered against a party which is: (A) The party's own statement, in either an individual or representative capacity.”

defendant's statement which includes a portion that directly inculcates his co-defendant in the crime.”)⁴

The Process

A review of the defendants’ statements reveals that, while each defendant talks about their own actions and intentions on February 23, 2020, each defendant’s statement is also heavily intertwined with descriptions, speculations and assumptions about the other two co-defendants. The statements are intertwined in such a way that the State is unable to simply play coherent portions of the videotaped statements.

In addition, the statements are replete with hearsay from the other two co-defendants and third parties, along with some material that is wholly irrelevant. Thus, the State intends to ask the law enforcement officers, who interviewed the defendants, what was said by that defendant, about himself, on specific, narrowly tailored topics. In order to avoid inadvertent *Bruton* issues, the State may find it necessary to propound leading questions at this juncture.

This process will avoid any *Bruton* issue in the State’s case-in-chief, per the request of the defendants. The admission of specific, narrowly focused statements at a joint trial does not otherwise violate the restrictions set forth under *Bruton* and/or violate any of the Defendants’ constitutional rights.

⁴ There are no antagonistic defenses in this case. The defenses in this case are affirmative defenses. The defense in *Wilson* was that he had rejected his co-defendant’s plan to rob the victim. Thus, the Georgia Supreme Court in *Wilson* at 230, noted that when “the portion of the defendant's statement that directly inculcates his co-defendant also contains evidence of the defendant's defense, that portion of the defendant's statement must be admitted, and the State's ability to try defendants jointly must yield.” We do not have any instances where a portion of a defendant’s statement contains his defense (citizen’s arrest and/or self-defense) and he directly inculcates a co-defendant (such as with a defense of coercion or that the co-defendant is really the guilty party). This is based upon *Bowe v. State*, 288 Ga. App. 376 (2007) (error to deny motion to sever where portion of defendant's statement implicating co-defendant also contained evidence of defendant's antagonistic defense to that of the co-defendant (that he had been coerced by co-defendant into committing the crime)).

In support of this process, the State shows the following:

a. Rule of Completeness

When only a portion of a defendant's statement is tendered into evidence, the State avoids any *Bruton* violations and satisfies any concerns under *Wilson*. Moreover, pursuant to *Wilson*, the defendants would not be permitted to then play the entire video-taped statements because none of the portions the State is excluding can be seen as antagonistic defenses, such as coercion or repudiation of a co-defendant's plan.

Instead, a defendant may ask cross-examination questions of the officer to bring out any additional statement relevant to that point, if it is necessary to qualify, explain, or place into context the portion already introduced. See *Jackson v. State*, 301 Ga. 866, 869 (2017) (holding that it was not error to exclude the portion of defendant's conversation with his mother, where he said he did not do anything wrong, as it was unrelated to their conversation about a witness). See also *Morales v. State*, 337 Ga. App. 614, 619 (2016) (holding that a defendant may require the introduction of any other part of the statement which, in fairness, should be considered contemporaneously with the tendered statements by the State, when it is relevant as to that fact).

The defendants would also not be permitted to play portions of their statements that are irrelevant.⁵ *Allaben v. State*, 299 Ga. 253, 256 (2016) (finding that O.C.G.A. § 24-8-822⁶ does not make admissible parts of a statement that are irrelevant to the case); see also *Edwards v. State*, 308 Ga. 176, 182-183 (2020). This is because the Rule of Completeness only permits introduction of additional material

⁵ An example of an irrelevant statement is when Greg McMichael tells the story of his .357 Magnum handgun and how it was originally his handgun issued to him years ago when he was a Glynn County Police Officer and he later located it at a pawn shop.

⁶ O.C.G.A. § 24-8-822 (“When an admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence.”)

that is relevant and is necessary to qualify, explain, or place into context the portion already introduced.

b. Requested Limiting Instruction

Since the State has elected to only tender in select statements of each defendant, about that defendant's specific actions and intentions, under O.C.G.A. § 24-8-801 (d) (2), the State will also be seeking a limiting instruction during the jury charge. *Flournoy v. State*, 294 Ga. 741, 748 (2014) (“The trial court properly instructed the jury that an out-of-court statement made by one of the defendants after the alleged criminal acts have ended is admissible only against the person who made the statement and that they should consider such a statement only as against the defendant who made it”).

Conclusion

The State seeks a ruling on its intended process for tendering relevant, non-*Bruton* statements of the defendants (a.k.a. admissions of party opponents under O.C.G.A. § 24-8-801 (d) (2)), in its case-in-chief, along with an order, requiring the defendants to provide the State with the specifics, from each co-defendant's statement(s), that they are seeking to have excluded under *Bruton*.

In order to facilitate the Court's ruling, the State would provide copies of the nine video statements, and the corresponding transcripts (with the defendant's *Burton* notations) to this Court for an in camera review.

This the 7th day of July, 2021.

/S/ Linda J. Dunikoski
Linda J. Dunikoski
State Bar # 233887
Senior Assistant District Attorney
District Attorney Pro Tempore
Cobb Judicial Circuit

/S/ Larissa Ollivierre

Larissa Ollivierre
State Bar # 743602
Senior Assistant District Attorney
District Attorney Pro Tempore
Cobb Judicial Circuit

/S/ Paul Camarillo

Paul Camarillo
State Bar # 215044
Senior Assistant District Attorney
District Attorney Pro Tempore
Cobb Judicial Circuit

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served opposing counsel with a true and correct copy of the above 4.51 STATE’S MOTION AND BRIEF REGARDING BRUTON ISSUES via the Odyssey E-File System to:

Mr. Robert G. Rubin
Mr. Jason Sheffield
Peters Rubin Sheffield & Hodges, PA
2786 North Decatur Road, Suite 245
Decatur, GA 30033
robertrubin@justiceingeorgia.com
jasonsheffieldattorney@gmail.com
(404) 296-5300

Laura and Frank Hogue
Hogue & Hogue LLP
341 Third Street
PO Box 1795
Macon, GA 31202-1795
(478) 750-8040
laura@hogueandhogue.com
frank@hogueandhogue.com

Mr. Kevin Robert Gough
Ms. Jessica Burton
Kevin Gough Firm LLC
PO Box 898
Brunswick, GA 31521
kevingough.firm@gmail.com
jessica@justice.law
(912) 242-5114

This the 7th day of July, 2021.

/S/ Linda J. Dunikoski
Linda J. Dunikoski
Senior Assistant District Attorney
State Bar # 233887
District Attorney Pro Tempore
Cobb Judicial Circuit
70 Haynes Street, Marietta, GA 30090
Tel. (770) 528-3080
Linda.Dunikoski@CobbCounty.org