[J-178-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 371 CAP
	:	
Appellee	:	
	:	Appeal from the Judgment of Sentence
	:	entered on 2/1/02 in the Court of Common
v.	:	Pleas, Criminal Division, Cumberland
	:	County at No. 01-0245
	:	
BETH ANN MARKMAN,	:	
	:	
Appellant	:	SUBMITTED: November 21, 2006

DISSENTING OPINION

MR. JUSTICE EAKIN **DECIDED: February 21, 2007**

I am constrained to disagree with the majority on three points.

First, the majority concludes the trial court committed reversible error by allowing the jury to listen to a redacted audiotape of Housman's statement to the police, which implicated appellant in the murder. It was apparent the tape was redacted; the phrase "the other person" was dubbed, in a different voice, over each of Housman's references to "Beth," "Markman," and each feminine pronoun. I agree it was error to allow the jury to hear this tape; as redacted, it violated Bruton v. United States, 391 U.S. 123 (1968). However, the United States Supreme Court has rejected the notion that the erroneous admission of an incriminating statement by a co-defendant at a joint trial automatically requires reversal of a conviction. See Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967). On several occasions, the Court has deemed violations of confrontation rights to be harmless error. See Brown v. United States, 411 U.S. 223 (1973) (violation of confrontation rights harmless beyond

reasonable doubt where improper evidence merely cumulative of overwhelming evidence of guilt); Schneble v. Florida, 405 U.S. 427 (1972) (Bruton violation harmless beyond reasonable doubt since overwhelming evidence of guilt outweighed comparative insignificance of confession); Harrington, supra (overwhelming evidence of guilt and relatively insignificant prejudicial impact of co-defendant's statement rendered Bruton violation harmless). Here, despite the Bruton violation, I find admission of the improperly redacted confession was harmless in light of the overwhelming properly admitted evidence establishing appellant's guilt.

The majority cites Commonwealth v. Young, 748 A.2d 166, 193 (Pa. 1999), in support of its conclusion that the prejudicial effect of Housman's statement was not harmless. Majority Slip Op., at 21 (citing Young, at 193). In that case, Young and three others were under investigation for their involvement in a fraud scheme. A co-conspirator agreed to testify against Young and the others, but a few days before the scheduled testimony, he was murdered; Young and the others were charged with murder as co-defendants.

At trial, Young denied any involvement in planning or executing the murder, and presented an alibi and other evidence in support of that claim. The Commonwealth presented the statements of Young's two non-testifying co-defendants, which alleged Young planned and committed the murder. We concluded the admission of these statements violated the Confrontation Clause, then examined whether the error was harmless. We found it was not:

> It is beyond cavil that this case does not present a situation where the erroneously admitted evidence was not prejudicial to [Young]. [The co-defendants'] statements specifically identified [Young] as [the victim's] murderer. It is difficult to imagine any evidence more prejudicial to a defendant than that which identifies [him] as a perpetrator of a capital crime.

Young, at 193 (emphasis added).

In Young, the identity of the killer was not known, and Young denied having any role in either the planning of the murder or the murder itself. His co-defendants' statements completely and directly contradicted every aspect of Young's testimony. In the present case, however, there was no question about the identity of the killers; Housman and appellant both admitted they murdered White. The reasoning from Young that the majority cites is not determinative.

We must remember appellant took the stand and identified herself as the perpetrator of a capital crime; any prejudice to her from the introduction of Housman's improperly redacted confession is qualitatively distinct from the prejudice caused by the statements in Young. This comports with the United States Supreme Court's analysis of the prejudicial impact of a co-defendant's statement in a joint trial where, as here, the defendant has confessed to involvement in the crime:

> [T]he incriminating statements of a co-defendant will seldom, if ever, be of the "devastating" character referred to in Bruton when the incriminated defendant has admitted his own guilt. The right protected by Bruton—the "consititutional right of cross-examination," … has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence. Successfully impeaching a co-defendant's confession on cross-examination would likely yield small advantage to the defendant whose own admission of guilt stands before the jury unchallenged.

Parker v. Randolph, 442 U.S. 62, 73 (1979) (plurality opinion), abrogated by Cruz v. New York, 481 U.S. 186 (1987).

We must also be mindful that it was not the admission of the statement itself that was error -- it was the ineffectual means of redaction that alone created error. We must assess the harm not of the statement, but of the improper redaction. This redaction produced a tape with obvious deletions and alterations, which the United States

Supreme Court has held is the equivalent of naming the defendant.[1] Thus it was error, pursuant to Bruton, to admit Housman's confession as redacted; it would not have constituted error if the confession had merely been read into evidence, or redacted in a way that did not produce obvious alterations.

This error had little impact since the prejudice caused by admission of the improperly redacted confession is no more than the prejudice that would have resulted from a properly redacted confession.[2] Appellant and Housman were the only two people charged with the murder, they were tried together at a joint trial, and the jury listened as appellant testified that she and Housman killed White, fled to Virginia together, and were subsequently arrested. Under the circumstances, the jury would surely be aware who "the other person" was, no matter how obvious or discrete the redaction. This error caused little prejudice beyond the prejudice of the statement itself, and admitting that statement (properly redacted) was not error.

The majority concludes the admission of Housman's improperly redacted confession caused substantial prejudice to appellant since it was the only proof directly contradicting her claim she was forced to participate. Majority Slip Op., at 21. However, the majority bases its analysis on the prejudicial impact of Housman's confession as a whole, rather than focusing on the prejudice caused by the error—i.e., the method of redaction. Had there been appropriate redaction, this statement would have been admissible. Under the circumstances, I find the prejudicial impact of the error was de minimis.

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[1] See Gray v. Maryland, 523 U.S. 185, 195-97 (1998).

[2] Indeed, at a joint retrial, one must assume a properly redacted statement would be admitted, and there would be no Bruton violation.

In addition, there was overwhelming evidence of guilt, and the relatively insignificant prejudicial impact of Housman's statement rendered the Bruton violation harmless. The evidence showed appellant made threats to third parties that she would kill White. She said she would "kick her ass" if they ever met. She called White at work to harass her. Appellant drove Housman to the Sheetz store to lure White back to the trailer. She waited for White to arrive, knowing White was coming under false pretenses. She hid quietly in the bedroom until she emerged and blocked the front door. She tied White's hands and feet together. She shoved a rag into her throat and gagged her. She accompanied Housman outside to smoke a cigarette and plan their next move. She held the victim's body while Housman strangled her; when she was arrested, she had scratches on her neck which she admitted were caused by White in the struggle. After White was dead, appellant left the trailer alone and returned with a tent in which to hide the body.

Appellant followed Housman all the way to Virginia, driving a separate vehicle and continuing to forgo the constant opportunity to flee or seek help. In Virginia, she helped hide White's body and dispose of her personal effects. Appellant told Nina Jo Fields, a friend they visited in Virginia, that Housman had been cheating on her, but that she "[didn't] have to worry about the damn bitch anymore, [because she] took care of it." N.T. Trial, 10/26/01, at 322. In one of the pictures taken with White's camera a few days after the murder, appellant is laughing while Housman pretends to choke her.

The circumstances of this case are more akin to those in Commonwealth v. Groff, 514 A.2d 1382 (Pa. Super. 1986), wherein the Superior Court found the erroneous admission of a tape-recorded emergency telephone call made to police was harmless error. The court stated:

> The undisputed facts…provide overwhelming evidence of an intentional killing. Murder of the first degree is an "intentional killing," … one that is

> "willful, deliberate and premeditated." … The appellant's preparation, lying in wait and entering the house with a loaded weapon are events which, even individually considered, are evidence of premeditation and, taken together, are overwhelming proof of appellant's intent to take the life of his estranged wife.
>
> The only evidence to support appellant's theory of "heat of passion" was his own self-serving testimony that he shot his wife after she started "screaming and hollering."

Id., at 1385 (citations omitted). Similar to the appellant in Groff, the only evidence to support appellant's defense is her own self-serving testimony that she was coerced into participating in the killing. Appellant's actions and her failures to act provided the jury with overwhelming proof to the contrary and shows that she intended to take the life of her boyfriend's mistress, thereby eliminating the source of the problems in their relationship. Any prejudice caused by the method of redaction of Housman's statement was insignificant in comparison, and I would hold the error in admitting it was harmless.

Next, while I agree with the majority's determination that duress is available in Pennsylvania as a defense to first degree murder, I disagree with the majority's conclusion that the trial court erred in refusing to instruct the jury on duress in this case.

Duress is a statutory defense, set forth at 18 Pa.C.S. § 309:

> (a) General rule. – It is a defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.
>
> (b) Exception. – The defense provided by subsection (a) of this section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress.

Id.

The exception under § 309(b) applies if the actor recklessly places himself in a situation where duress is likely. The trial court stated even if appellant's proffered evidence was sufficient to establish the elements of duress—and the court determined it

was not—appellant was nevertheless precluded from asserting that defense since even accepting her self-serving testimony, the only evidence thereof, it was clear she recklessly and repeatedly placed herself in a situation where any actual duress was likely.

An appellate court will only affirm a trial court's removal of the duress issue from the jury on the basis of § 309(b) in a case where there can be no reasonable dispute that this exception applies. Commonwealth v. DeMarco, 809 A.2d 256, 261 (Pa. 2002). I would hold this is such a case. For purposes of determining whether a defendant "recklessly" placed himself in a situation where duress was probable, the Crimes Code provides:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

18 Pa.C.S. § 302(b)(3).

Here, appellant claimed Housman cut her and kept her hostage inside the trailer for two days prior to the murder. However, when Debbie Baker, her friend and neighbor, knocked on the door the day before the murder, appellant freely left the trailer to speak with her. The two walked to Baker's home and talked on the porch for about two hours. N.T. Trial, 10/30/01, at 859-60. Baker testified appellant told her Housman had been "terrorizing" her inside the trailer, but when Baker urged appellant to stay with her, appellant stated she wanted to return to the trailer; she got up and walked to the trailer and went back inside. Id.; N.T. Trial, 10/31/01, at 990-95.

The next day, appellant drove Housman to the Sheetz store and stood beside him as he placed the deceptive phone call to White. She was in a public place, yet she

made no attempt to escape from Housman or leave him behind. Instead, she got back into the car with him and drove him back to the trailer to meet White. When they turned into the trailer park, appellant drove past Sandra Kautz, the park manager; she did not attempt to get Kautz's attention or seek help. Ms. Kautz testified she raised her hand to wave to the couple, but neither of them acknowledged her. N.T. Trial, 10/25/01, at 167-68. Appellant parked the car and reentered the trailer with Housman.

When White arrived, appellant hid in the bedroom with the door closed; she did not try to escape through the back door, nor did she yell or make noise to alert White of her presence in the trailer. Appellant remained quietly concealed in the bedroom until she emerged and sat by the front door. She left the trailer with Housman to smoke, but she never cried out to her neighbors or made any attempt to flee. Instead, she stayed at Housman's side and reentered the trailer with him to complete the murder. She did not flee when Housman was busy strangling White, despite being less than five feet from the door.

After White died, appellant left the trailer, once again alone, to get the tent; instead of taking that opportunity to run from Housman or to get help, she returned to the trailer with the tent and helped Housman hide the body and cover up the crime. Housman drove the Jeep to Virginia with White's body in the trunk, and appellant followed him for the entire five-hour drive in her own vehicle; not once did she attempt to lose Housman or call the police. When asked at trial why she never tried to escape on the way to Virginia, appellant tellingly replied, it "never crossed my mind." N.T. Trial, 10/31/01, at 1021. When she was being questioned by the officer who was investigating the missing persons report, appellant again forwent an opportunity to confess the crime and escape Housman's control. I would hold the above evidence is sufficient to establish, without question, appellant acted recklessly at the very least.

The only direct evidence that appellant acted under duress was her own testimony. To corroborate this testimony, appellant presented the testimony of Debbie Baker and two other witnesses who testified they saw appellant sitting on the porch with Baker the day before the murder, and that it was apparent appellant had been crying.

On appeal, this Court must view the evidence in the light most favorable to the verdict winner. Commonwealth v. Watkins, 843 A.2d 1203, 1211 (Pa. 2003). The majority fails to abide by this principle, and places an inordinate amount of weight on the testimony of Debbie Baker, appellant's lifelong friend and neighbor. In accordance with our standard and scope of review, Baker's testimony should be granted little credit on appeal since the Commonwealth directly challenged Baker's credibility and veracity at trial. See N.T. Trial, 11/1/01, at 107-09, 120-21. The testimony from the other two witnesses who testified they saw appellant crying on Baker's front porch is of little relevance to the issue of duress, and the same is true of the evidence that Housman had disabled appellant's vehicle. See Majority Slip Op., at 28, 31. Considering the nature and intent of appellant's conduct and the circumstances known to her, the above testimony is insufficient to overcome the consistent evidence that appellant acted recklessly.

When viewed in the light most favorable to the Commonwealth as verdict winner, the evidence leaves no question that, even if Housman threatened her, appellant acted recklessly and repeatedly placed herself in situations where it was probable she would be subjected to duress. I would hold that as a matter of law, the defense of duress was not available to appellant pursuant to § 309(b), and therefore, it was proper for the trial court to refuse to charge the jury on duress.

Finally, I disagree with the majority's determination that the trial court erred in refusing to provide the jury with a Lassiter[3] instruction. In that case, we held the subsection (6) aggravator is inapplicable "to accomplices such as [Lassiter]," i.e., defendants who are not the causal agent directly responsible for performing the murder. Id. However, appellant is not an "accomplice such as Lassiter" since she and Housman were both directly responsible for performing the murder. A closer reading of Lassiter shows our holding did not turn on Lassiter's status as an accomplice, but was instead premised on the fact that the Commonwealth's theory of the case was that Carter, not Lassiter, shot the victim. We held the subsection (6) aggravator was thus inapplicable to Lassiter since she was not one who "committed" a killing. Thus, the critical inquiry is not whether the jury's verdict was based on accomplice or principal liability, but rather, whether the defendant "committed" the murder.

Here, the jury did not indicate whether its verdict was based on accomplice or principal liability, but when viewed in the light most favorable to the Commonwealth as verdict winner, the evidence clearly establishes appellant is not a mere non-committing accomplice "such as Lassiter;" the Commonwealth's theory at the guilt phase was that appellant and Housman committed the killing together. Lassiter may have been criminally responsible for the murder, but she did not "commit" the act which killed the victim. We held § 9711(d)(6) may not be applied to an accomplice who does not commit the killing in the sense of bringing it to completion. Lassiter, at 661.

[3] Commonwealth v. Lassiter, 722 A.2d 657, 661-62 (Pa. 1998), held the aggravating circumstance at § 9711(d)(6) is inapplicable to one who is found guilty of first degree murder as an accomplice, but not as the actual killer.

However, our holding did not address an accomplice who does commit the killing. Lassiter noted the distinction between "one who commits a killing" and "an accomplice to murder," but it did not hold those two designations are mutually exclusive.

The basis for the jury's conviction of first degree murder is irrelevant to the Commonwealth's burden of proof at the guilt phase. Whether principal or accomplice, the Commonwealth had to prove the actual commission of the killing, not merely accomplice liability. The court clearly instructed the jury that it was the Commonwealth's burden to prove the aggravating circumstance beyond a reasonable doubt, which includes a finding that appellant committed the killing.[4] Where the Commonwealth proves at the penalty phase that the defendant committed a killing by performing an act that directly caused the victim's death, the defendant is not immune from application of the subsection (6) aggravating circumstance, regardless of whether the guilt phase verdict is based on accomplice or principal liability.

For the foregoing reasons, I respectfully dissent.

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[4] The court stated, "[i]n this case, in each verdict, under the sentencing code, only the following matters, if proven to your satisfaction beyond a reasonable doubt, can be considered aggravating circumstances. That circumstance would be the same in [both appellant's and her co-defendant's] case. That the defendant committed a killing while in the perpetration of a felony, in this case, kidnapping." N.T. Sentencing, 11/5/01, at 1442 (emphasis added). "In deciding whether aggravating or mitigating circumstances exist …you should consider the evidence and the arguments offered by both the Commonwealth and each defendant. This includes the evidence that you heard during the earlier trial, and any statements [at the penalty phase]." Id., at 1444. "When voting on the general findings, you are to regard a particular aggravating circumstance as present only if you all agree that it is present." Id., at 1446. "Remember, the Commonwealth must prove any aggravating circumstance beyond a reasonable doubt." Id., at 1447 (emphasis added).