Order

Michigan Supreme Court
Lansing, Michigan

April 22, 2022

Bridget M. McCormack,
Chief Justice

157581
157646

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 157581
COA: 336598
Jackson CC: 15-002787-FC

CLIFFORD DURELL McKEE,
Defendant-Appellant.

_____/

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 157646
COA: 333720
Jackson CC: 15-002788-FC

RODNEY JAMAR McKEE,
Defendant-Appellant.

_____/

Following oral argument on the applications for leave to appeal the February 27, 2018 judgment of the Court of Appeals, the parties were directed to file supplemental briefs by order of November 23, 2021. The supplemental briefs having been received, the applications are again considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH, J. (*dissenting*).

I respectfully dissent from the Court's order denying leave to appeal. These defendants objected to being tried jointly with their codefendant, but the trial court joined the trials on the condition that the codefendant's other acts and statements made to the police would be excluded. As the trial played out, the trial court violated its own condition for joinder by allowing the other acts and statements into evidence, and it denied the defendants' motion for mistrial and severance. While I acknowledge that there are preservation issues in this case, I would reverse and remand for a new trial.

Defendants Clifford McKee and Rodney McKee[1] were tried jointly with Cortez Butler for the death of Frances Craig. Clifford and Rodney were both convicted of solicitation of first-degree murder, first-degree murder, conspiracy to commit first-degree murder, and first-degree home invasion. Butler was convicted of first-degree murder, conspiracy to commit first-degree murder, and first-degree home invasion. All three received sentences of life without parole, as well as concurrent lesser sentences.

Craig was found dead in the bedroom of the Jackson home she shared with her fiancé, Eric Wolfe. Wolfe was initially the police's primary suspect but Wolfe had a strong alibi. The focus of the investigation shifted when two plastic zip ties taken from Craig's body were swabbed for DNA, and a database search returned a hit for Butler. Butler's DNA was on file because he was on parole and had a criminal history that included a second-degree-murder conviction.

During the investigation into Craig's death, Butler was jailed in Detroit in connection with an unrelated murder. Police investigating Craig's death spoke to Butler on several occasions. On one occasion, an investigator told Butler that they did not intend to use his statements against him, and Butler admitted to killing Craig. Butler told the investigator that he had been hired to carry out a hit on Ryan Marshall,[2] and Butler believed that Marshall lived at Craig's home. Marshall and his mother had lived with Craig and Wolfe at one point, but were no longer living there at the time of Craig's death. Craig happened to be home when Butler arrived. Butler identified one of the men who hired him as "Dorito Johnson," a man he knew from prison. Butler identified the other as a very big man, approximately 6 feet 6 inches tall and 400 pounds. Clifford went by the name "Dorito Johnson" and had a phone registered under that name. Rodney is 6 feet 6 inches tall and heavyset.

The police obtained Butler's cellphone records, and those records showed several calls between Butler and Clifford. The records also showed that, in the days surrounding the killing, Butler was present in the area of Jackson where Clifford lived. The prosecution's theory was that Clifford acted as a middleman between Rodney and Butler in a plan to murder Marshall because Marshall was a witness against Rodney in a pending arson case. Aside from the evidence of the arson, the prosecution's case centered on phone records and the statements Butler made to the police.

Before trial, Butler moved to suppress the statements he made to the police. Prior to the interrogation, the police had assured Butler that their conversations were not being

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[1] For ease of reference, defendants will be referred to as "Clifford" and "Rodney" respectively.

[2] Marshall was a witness against Rodney in an arson case.

recorded and that they were not intending to use anything he said against him. Butler argued that the statements were obtained in violation of *Miranda v Arizona*, 384 US 436 (1966), which holds that criminal defendants have a right to be informed, among other things, that their statements may be used against them. The trial court denied Butler's motion. The prosecutor moved to admit Butler's statement against Clifford and Rodney, arguing that it was admissible under MRE 804(b)(3). Clifford moved to sever his trial and opposed the prosecution's motion to admit Butler's statement against him. The trial court ruled that Butler's statement was given during an ongoing emergency, so it was not testimonial for purposes of the Sixth Amendment's Confrontation Clause and was admissible. There was also pretrial discussion about Butler's connection to other murders in Detroit. The court held that evidence of other murders could not come in, and the defense motion to sever was denied. The joint trial commenced.

Before Butler testified, the specter of *Bruton v United States*, 391 US 123 (1968), loomed large. Under *Bruton*, the confession of a nontestifying codefendant cannot be admitted, because doing so would violate a defendant's right to confront witnesses against them. But the trial court ruled that Butler's confession was not testimonial for Confrontation Clause purposes and was therefore admissible.

Ultimately, Butler elected to testify, creating the possibility that Butler's involvement in homicides unrelated to Clifford and Rodney would be put before the jury. Clifford's trial counsel argued that if that happened, it would "probably prejudice[] us to a point we can't get a fair and impartial jury." The trial court agreed:

> *The Court*: I agree with you.
>
> [*Defense Counsel*]: And so if we're that far down the road I am assuming—
>
> *The Court*: That's why I barred it in the—or that was a factor in barring it—
>
> [*Defense Counsel*]: I understand.
>
> *The Court*: —in the first place.
>
> [*Defense Counsel*]: Exactly.
>
> *The Court*: Right.
>
> [*Defense Counsel*]: Exactly. But now we're left with the very thing the court was trying not to . . .

The court also stated:

> Oh, boy. This creates quite a dilemma in the sense that if your client gets up there and as part of cross-examination it's clear that there was—well, based on the testimony we've heard so far, that there were admissions about bodies in various counties, the problem is, allowing that statement to come in is too prejudicial, at least in the court's opinion, against the McKees. It has nothing to do with their involvement in this particular case. It's not an admission adopted by either one of them. And you don't know what your client's gonna testify to, right?

As anticipated by the trial court, Butler's testimony did trigger admission of evidence of other homicides, and Clifford's trial counsel subsequently moved for a mistrial on the basis that the evidence was inadmissible against him and that prejudice could not be cured with a limiting instruction. Counsel for Rodney joined the motion. The court denied the motion, concluding that an instruction would be sufficient to remedy the harm to Clifford and Rodney. The court instructed the jury as follows:

> Certain information has been presented to you showing that Cortez Butler may have been involved in certain crimes in the past. Because this evidence has nothing to do with either Rodney or Clifford McKee you are not to consider it against either of them.
>
> Now, the defendants[']statements can be used against the other defendants if their statement mentions the other defendants. If the statement does not mention the other defendants it should be—it should not be used against them.

As described earlier, both Clifford and Rodney were convicted along with Butler. The Court of Appeals affirmed the convictions of all three defendants. With regard to Butler's confession, the Court of Appeals disagreed with the trial court's conclusion that Butler's confession was involuntary, concluding that it was given based on false assurances that it would not be used against him. While the Court of Appeals concluded that the confession should not have been admitted, it held that the error was harmless in light of the other evidence of Butler's guilt. With regard to Clifford and Rodney, the Court of Appeals held that the limiting instruction cured any problem that might have arisen with regard to Butler's other acts. As to the admission of Butler's statement, the Court of Appeals noted that Clifford conceded he could not challenge the admission of Butler's statement, in part because he could not assert Butler's constitutional rights.

We ordered argument on the applications of Clifford and Rodney, and after oral argument ordered supplemental briefing to address:

> (1) whether the trial court reversibly erred in denying defendants' motion for mistrial after the admission of evidence of Cortez Butler's other acts; (2) whether the trial court reversibly erred in failing to grant defendants' motion for separate trials based on Butler's confession, see *Zafiro v United States*, 506 US 534, 539 (1993), and *People v Hana*, 447 Mich 325, 346-347 (1994); and (3) whether Butler's confession was obtained in violation of *Miranda v Arizona*, 384 US 436 (1966), and whether defendants may challenge the admission of Butler's confession against them as third parties, see *People v Wood*, 447 Mich 80, 89 (1994). [*People v McKee*, 508 Mich 982 (2021).]

The situation now is difficult to sort out. There is no need to evaluate whether the trial court was correct about Butler's statement being testimonial, as the Confrontation Clause was satisfied when Butler testified. Therefore, there is no *Bruton* problem. But I believe the trial court, in attempting to cure its possible error regarding the testimonial nature of Butler's confession, committed another error regarding joinder.

In this procedural context, Clifford and Rodney were as entitled to the suppression of the statement as Butler was because of the *Miranda* violation. I recognize that generally a defendant may not suppress evidence by invoking someone else's right. *Wood*, 447 Mich at 89. In *Wood*, the defendant sought to invoke his daughter's statutory right to confidentiality in her statements to a social worker. The rationale there was clear—the daughter's statutory right to confidentiality was for her benefit, not the defendant's. But the same is not true here. Involuntary statements have long been inadmissible because they are simply unreliable. In *Hopt v Utah*, 110 US 574, 585 (1884), the United States Supreme Court said:

> But the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.

The right that is at stake for Clifford and Rodney is not Butler's right, but their own right to not have an unreliable, involuntary statement considered by their fact-

finders. This argument was not raised below and might have been affirmatively waived.[3] Still, this casts a dark shadow on the legitimacy of the verdict.

The trial court's handling of Butler's other criminal involvement is also troubling. Both before and during trial, the trial court described on the record its belief that this evidence was unfairly prejudicial to Clifford and Rodney, and that a fair trial would be impossible if the jury were to consider it. However, the court allowed the evidence to be presented to the jury and then, after the fact, concluded that a limiting instruction was somehow sufficient to remedy the harm. I tend to agree with Clifford that the trial court erred by treating the presumption that jurors follow their instructions as absolute instead of recognizing this as a situation in which prejudice is so great that a limiting instruction is patently insufficient. We have recently acknowledged that sometimes "evidence is too compelling for a jury to ignore even with a limiting instruction." *People v Bruner*, 501 Mich 220, 228 (2018).

The joinder of these trials resulted in a cascade of overlapping errors. It is true that Clifford and Rodney may not have made the precisely correct objections at the precisely correct times. But that is a high standard to hold them to, given the trial court's role in creating a significant portion of these problems. For these reasons, I believe a new trial is warranted, and I respectfully dissent from the order denying leave to appeal.

BERNSTEIN, J., joins the statement of CAVANAGH, J.

[3] In either event, given the Court's decision to deny leave to appeal, Clifford and Rodney may be able to challenge counsel's effectiveness in a motion for relief from judgment.