IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

RODNEY MCKEE,

Defendant-Appellant.

MSC No: 157646
COA No: 333720
Trial Ct No. 15-002788-FC
Jackson County Circuit Court

______________________________________/

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DEFENDANT-APPELLANT'S BRIEF ON APPEAL
FILED UNDER AO 2019-6

*****ORAL ARGUMENT REQUESTED*****

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STATEMENT OF QUESTION PRESENTED

I. WHETHERIT WAS AN ABUSE OF DISCRETION AND CLEAR ERROR TO DENY DEFENDANT-APPELLANT'S MOTION FOR A MISTRIAL WHERE SUBSTANTIAL RIGHTS WERE IMPAIRED BY ADMISSION OF AN IMPROPERLY REDACTED CODEFENDANT'S STATEMENT THAT WAS ALSO PREJUDICIAL, NON-AUTHENTICATED INADMISSIBLE HEARSAY USED AS SUBSTANTIVE EVIDENCE ?

Defendant-Appellant answers "Yes".

STATEMENT OF JURISDICTION

On October 28, 2020, after considering the Application for Leave to Appeal the February 27, 2018 Michigan Court of Appeals Opinion and Order affirming convictions and sentences from Jackson County Circuit Court, which had been held in abeyance, this Court entered an Order directing supplemental briefing and oral argument limited to the issues addressed herein. This Court extended the time for fling of this Brief and Appendix until February 23, 2021. This Brief on Appeal is filed pursuant to MCR 7.305(H) and MCR 7.312(E).

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STATEMENT OF CASE

Statement of Proceedings:

Defendant-Appellant, Rodney McKee, was convicted, after jury trial of solicitation to murder, (MCL 750.157B2), conspiracy to murder, premeditated first degree, (MCL 750.316A), and home invasion, first degree, (MCL 750.110A2), being sentenced on March 26, 2016 to respective terms of life, life, and 12 to 20 years.

A claim of appeal was filed and the Michigan Court of Appeals consolidated the appeal with the appeals of co-defendants Clifford McKee and Cortez Butler. On February 27, 2018, Defendant-Appellant's convictions were affirmed in an unpublished opinion. (App, A-1). Defendant-Appellant sought leave from this Court to appeal. On October 28, 2020, after considering the Application for Leave to Appeal the February 27, 2018 Michigan Court of Appeals Opinion and Order affirming convictions and sentences from Jackson County Circuit Court, which had been held in abeyance, this Court entered an Order directing supplemental briefing and oral argument limited to the issues addressed herein. (App, A-19). This Brief is filed pursuant to MCR 7.305(H) and MCR 7.312(E).

Statement of Facts:

On August 10, 2014, Francis Craig was found unresponsive by authorities in her bedroom at home on Timbercreek Trail. (T II, 124; App, A-29). Cause of death was blood loss after being stabbed 20 times. (T II, 206, 209; App, A-30 A-31). The scene of the crime was analyzed by Michigan State Police technicians, as well as the manner of death; the evidence did not permit any conclusion that there may have been defensive wounds. (T III, 19; App A-32).

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The crime scene was processed for prints, impressions and fluids including from the zip ties and scarf used to confine and gag Francis Craig. (T III, 68-70; App A-33–35). There was DNA from an unidentified male donor found on one of the zip ties, and sent for comparison with CODIS. (T III, 101-102; App A-36-37). CODIS generated a report that it matched Cortez Butler. (T III, 104; App A-38). Detective Sullivan visited Butler on 12/16/2014 and collected DNA from Butler. (T III, 107; App A-39; App A-40).

Phones were seized from all the defendants and analyzed by Paul Gonyeau, a Michigan State Police technical services expert of cellular forensic and historical placement of cell phone using service provider records. (T III, 125; App A-40).

Cortez Butler's phone was located in Jackson, Michigan on August, 6, August 8, and August 10, 2014. (T III, 127; App A-41). A phone belonging to Dorito Johnson, aka Clifford McKee, appeared to travel with Butler phone on August 6 and August 8, 2014, and again on October 24, 2014. (T III 130; App A-42). The Butler phone called the Clifford McKee phone on August 8, 2014. (T III 130; App A-42).

On December 11, 2014, the Clifford McKee phone was tracked to the Westwood Mall in Jackson, and the police arrested Clifford McKee and seized his phones. (T III 135-136; App A-43-44). There was contact between Clifford McKee associated phones and phones associated with Cortez Butler. (T III, 177-178; App A-47-48). There was contact between phones associated with Clifford McKee and phones associated with Rodney McKee. (T III, 158, 174; App A-45, A-46).

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When looking at Rodney McKee's phones, it was determined that Rodney McKee's phones never contacted, and was never contacted by any phones owned by Cortez Butler. (T III, 191-192; App A-49-50; T IV, 25; App A-55).

Text messages were admitted from the phones associated with Cortez Butler and Clifford McKee. (T III, 198; App A-51). There were references to waiting for someone to show up, and waiting at a house. (T IV, 65-68; App A-56-59).

Between Rodney McKee and Clifford McKee, the messages make reference to lawn care services and gardening. (T IV, 19-20; App A-52-53). Further references were to the need to pay a mechanic for brakes. (T IV, 20-21; App A-53-54).

Deputy Fire Chief David Wooden was qualified as a fire cause and origin expert in connection with responding to a fire at 705 Steward Avenue on March 4, 2014. (T IV, 137; App A-60). The structure was a 2 ½ story house split up into 4 apartments. (T IV, 138; App A-61; T V, 15). Firefighters tried to enter the structure but it was unsafe due to 480 volts electricity present, so they withdrew to spray water from the perimeter. (T IV, 140; App A-62). There was a gas valve that was attempted to be shut off, but the valve broke away and additional fire damage resulted from the natural gas. (T IV, 151-152; App A-64-65). The house declared unsafe and was demolished. (T IV 141; App A-63).

There were no samples taken from the fire debris to look for accelerants, and a trained canine was brought in, but was unable to detect the presence of any accelerant. (T IV, 159-160; App A-67-68).

The expert opinion provided was that "fire was set at the back of the house and that there was a flammable involved". (T IV, 155; App A-66).

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This opinion was based in part on what Donna and Ryan Marshall had told him. (T IV, 160; App A-68). The expert also admitted that there could have been other causes of the fire. (T IV, 160; App A-68).

Ryan Marshall had lived with his mother Donna Marshall in an apartment located at 705 Steward Avenue. (T V, 12; App A-69). His mother Donna has a drug problem involving heroin. (T V, 12-13; App A-69 - 70). Ryan used to have a problem also with opiates, but claims he has been 6 years sober. (T V, 13; App A-70). Ryan is estranged from his mother currently, as she still uses drugs. (T V, 40; App A-81).

Ryan knows Rodney McKee through his mother, Donna, and referred to him as a "drug runner, drug dealer". (T V, 13; App A-70). Donna Marshall sold heroin for Rodney McKee. (T V, 14; App A-71). On March 3, 2014, the day before his house burned up, Ryan claims Rodney McKee had threatened his mother and the police were called; Ryan did not see the threat, he was told about the threat by Donna Marshall. (T V, 14; App A-71).

On March 4, 2014, Ryan claims his mother received a threatening text message from Rodney McKee – "Good morning". (T V, 16; App A-73). Later he claims he saw Rodney McKee "sneaking around the house', walking with something in his hands, like a McDonald's cup, watches Rodney McKee bend down, get up and leave; at that point Ryan sees flames and calls 911. (T V, 17-20; App A-74 - 77).

Ryan claims it was hot in the apartment so the windows were open, and he could smell the gasoline. (T V, 19; App A-76). At a prior proceeding, Ryan had said Rodney McKee was with his partner at the time of the fire. (T V, 34; App A- 80).

Ryan said that here was enough time for everyone to get out of the apartments and he and Donna were able to step over the fire and leave. (T V, 47-48).

After the fire, Eric Wolfe offered his house, (which he shared with Francis Craig and their children), to Ryan, and Ryan stayed there for 4 months; then Wolfe moved into a new house and Ryan did not move in with them at the new house on Timbercreek Trail. (T V, 22-23; App A-78 - 79). Instead, Ryan moved in with another friend, Josh, until he was able to get his own place. (T V, 53; App A-82).

Jackson Police Officer Craig Edmondson was dispatched to complaints made on March 3, 2014 by Ryan and Donna Marshall. (T V, 61; App A-83) He also responded the next day, when the fire was reported and spoke again with the Marshalls, and looked at text messages on Donna Marshall's phone. (T V, 64; App A-84). The messages refer to selling and or paying back $80.00 sent from a phone identified as "neffue". (T V, 65-67; App A-85 - 87).

Jackson Police Officer Simpson encountered Defendant Rodney McKee at a traffic stop, where Rodney McKee was in a white SUV and also present was another car owned by Rodney McKee and driven by a Ms. Jackson. (T V, 77-78; App A-88-89). The vehicle driven by Ms. Jackson was a truck which had a gas can which had been in the back for some time, being covered with snow 2/3rds of the way. (T V, 78; App A-89).

Items were taken from the white SUV, (cushion, lighter, lighter leash), along with the boots and coat of Rodney McKee and were sent for analysis by Troy Ernst, a trace evidence analyst. (T V, 96-97; App A-90 - 91). There were traces of gasoline on the boots, coat and from the cushion. (T V, 101-102; App A-92 - 93).

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Donna Marshall knows Rodney McKee from selling heroin from the apartment, though she denied be currently addicted to heroin. (T V, 109-111; App A-94 - 96). Donna claimed she wanted to stop but Rodney McKee would not let her, and would send people over to see her, and would continue to provide her with drugs to sell and use. (T V, 112; App A-97). On March 3, 2014, she was outside her apartment and claimed Rodney McKee wanted her to get into his vehicle and take the drugs with her to sell. Donna did not want to get into the vehicle, claiming she felt threatened, and instead called the police to complain that Rodney McKee had threatened her. (T V, 113; App A-98).

The next day, March 4, 2014, Donna Marshall says he opened the door and saw Rodney McKee walking back to his truck after setting her house on fire. (T V, 116-117; App A-99 - 100). Donna Marshall stayed elsewhere after the fire for 6 months and then moved into Reed Manor. (T V, 153; App A-101).

Rose Hall, Jackson Police Department, while investigating the fire, did confirm that on the day of the fire, people at a nearby apartment complex were with Rodney McKee shortly after the fire started, and Rodney McKee did not smell of any gasoline. (T V, 174; App A-102).

Dale Morgan told the jury that he was with Cortez Butler in Detroit and during a conversation, Cortez Butler told him to shut up because he, Butler, knew what he was doing as he chopped up a woman in Jackson. (T V, 191; App A-103).

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The last two prosecution witnesses were Detectives Merritt and Sullivan, both who related Cortez Butler's confession. (T VI, 44; App A-110). The confession included how he was paid to kill Ryan Marshall. (T VI, 96-97; App A-113 - 114).

After motions for directed verdict were denied, Cortez Butler testified. (T VII, 17; App A-123). Cortez Butler denied killing Francis Craig; he had come to Jackson, as he often did, to sell marijuana and "run a few girls". (T VII, 24-25; App A-124).

Mr. Butler denied waiving any rights on December 16, 2014, and did not make any statements to Merritt or Sullivan. (T VII, 28-30; App A-125 -127). Sullivan and Merritt offered Butler to give his truck back (which had been seized) if he would confess. (T VII, 34; App A-18). Butler says Sullivan and Merritt are lying about his alleged confession. (T VII, 54; App A-134).

Cortez Butler denied making any such statements to Dale Morgan. (T VII, 36; App A-129). On August 10, 2014, Dale Morgan was using Cortez Butler's vehicle and phone. (T VII, 37, 40; App A-130, A-133). Morgan had a bad transmission and borrowed Butler's car. (T VII, 66; App A-139). Cortez Butler is asked about the Detroit murder case he was involved with by the prosecutor and tells the jury about this conviction, and of his earlier 1992 murder conviction. (T VII, 39-40, 63-64; App A-132 – 133, A-137 - 138).

Cortez Butler had never met Rodney McKee before, and was not asked by Clifford McKee to kill anyone. (T VII, 68; App A-140).

Clifford McKee, lives in Detroit, is a stay at home grandfather who is self-employed, and travels to Jackson, Michigan. (T VII, 77; App A-141). One time, when he

was shopping at the Westwood Mall, he was arrested and asked about Cortez Butler. (T VII, 77-78; App A-141). Rodney McKee is his nephew. (T VII, 80; App A-142).

Clifford McKee knows Cortez Butler as Coco; he was not aware of Mr. Butler's 1992 murder conviction. (T VII, 81-82; App A-143 - 144).

Det. Sullivan was called as a rebuttal witness and told the jury Butler and Dale Morgan shot someone in a vehicle. (T VII, 89; App A-145). Det. Sullivan then told the jury about a triple homicide that Cortez Butler was involved with, but had not been charged; indicated that Butler referred to himself as being a "hired gun", a "hit man". (T VII, 91, 110; App A-146 - 147). The next day, the trial court told the jury it was not a triple homicide, but a double homicide and someone had pled to the charge already. (T VIII, 8; App A-148).

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ARGUMENT

I. IT WAS AN ABUSE OF DISCRETION AND CLEAR ERROR TO DENY DEFENDANT-APPELLANT'S MOTION FOR A MISTRIAL WHERE SUBSTANTIAL RIGHTS WERE IMPAIRED BY ADMISSION OF AN IMPROPERLY REDACTED CODEFENDANT'S STATEMENT THAT WAS ALSO PREJUDICIAL, NON-AUTHENTICATED INADMISSIBLE HEARSAY USED AS SUBSTANTIVE EVIDENCE.

Standard of Review:

The issue framed by this Court implicates several standards of review. "We review for an abuse of discretion a trial court's decision to admit or exclude evidence," but preliminary legal questions of admissibility are reviewed de novo, *People v Mann*, 288 Mich.App. 114, 117; 792 N.W.2d 53 (2010), including whether a statement constitutes inadmissible hearsay, *People v McDaniel,* 469 Mich. 409, 412; 670 N.W.2d 659 (2003).

Reversal of a criminal conviction on the basis of a trial court's erroneous evidentiary ruling is only necessary where the error prejudiced the defendant and resulted in a miscarriage of justice. MCL 769.26; *People v Snyder (After Remand),* 301 Mich.App. 99, 111; 835 N.W.2d 608 (2013). A defendant seeking reversal "has the burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error." *People v Knapp*, 244 Mich.App. 361, 378; 624 N.W.2d 227 (2001).

"[T]he grant or denial of a motion for mistrial rests in the trial court's sound discretion, and an abuse will be found only where denial of the motion deprived the defendant of a fair and impartial trial. *People v. Watson*, 307 Mich. 596, 12 N.W.2d 476 (1943)." *People v. Manning*, 434 Mich. 1, 450 N.W.2d 534, (1990). A trial court "abuses

its discretion when it makes an error of law" *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006) (citation and quotations omitted).

Introduction

The prosecution indicated that they would introduce an oral statement[1] taken by police officers Merritt and Sullivan from codefendant Butler, (in which he confesses to murder and implicates codefendants), while in custodial detention, as substantive evidence against all defendants. The statement was offered as a both a confession against Butler, and as substantive evidence against Defendant-Appellant Rodney McKee. Counsel contested the admissibility against Defendant-Appellant and pointed out the prejudice from introduction of the statement and lack of confrontation. The trial court ruled there was no constitutional error and ruled the statement was admissible as it was taken during an ongoing emergency satisfying both confrontation and hearsay concerns.

As trial progressed, the threatened prejudice from a joint trial manifested, and each time, a mistrial was requested and denied. These denials and failures denied a fair trial as the constitutional rights of presumption of innocence, right to present a defense and right to confront witnesses were compromised and impinged. The Court ordered supplement briefs be filed on the issue of "whether the trial court erred in failing to grant

[1] MCL 763.8 required the statement be recorded, or any objection be noted in the manner provided by statute. "Any failure to record a statement as required under [MCL 763.8] or to preserve a recorded statement does not prevent any law enforcement official present during the taking of the statement from testifying in court as to the circumstances and content of the individual's statement if the court determines that the statement is otherwise admissible. However, unless the individual objected to having the interrogation recorded and that objection was properly documented under [MCL 763.8(3)], the jury shall be instructed that it is the law of this state to record statements of an individual in custodial detention who is under interrogation for a major felony and that the jury may consider the absence of a recording in evaluating the evidence relating to the individual's statement." MCL 763.9. The jury was never so instructed.

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the appellants' motion for a mistrial because their substantial rights were impaired by the admission of a codefendant's statement to the police. See *Zafiro v United States*, 506 US 534, 539 (1993), and *People v Hana,* 447 Mich 325, 345-346 (1994)".

Defendant-Appellant submits that the rulings and the reasoning behind the rulings were faulty and the failure to order separate trial, or at least juries, and the denial of mistrial motions denied due process and a fair trial. We submit that the trial court and the Michigan Court of Appeals acted unreasonably in allowing Butler's out of court confession as substantive evidence and finding no prejudice from its introduction. The findings of fact were objectively unreasonable in light of the record, and the rulings were objectively unreasonable application of established Michigan and federal case law.

The Michigan Court of Appeals summarized the substance of Butler's statement as related to the jury by the detectives:

> "After being assured that his interview was not being recorded, Butler confessed to the detectives that "Dorito Johnson" [Clifford McKee] had contacted him to "perform a hit" on a person who was going to testify against Rodney (Butler used a street name for Rodney and described him as a "very, very large man, 6'6", 6'7" and about 400 pounds") in an upcoming criminal case. Butler told detectives that he had traveled with Dorito Johnson from Detroit to Jackson and that Rodney who driving a white SUV, paid $5,000 of the agreed $10,000 fee up front." (MCA Opinion, 3; App A-3).

Adding to complexity of the issues implicated by the Butler confession is that the Michigan Court of Appeals found the confession to be involuntary "[b]ecause Butler's December 16 statement was obtain in violation of Miranda, it was not admissible against

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him at trial as substantive evidence. See [*People v*] *Elliot*, 494 Mich [292] at 301 [(2013)]." (MCA Opinion, 16; App A-16).

The Michigan Court of Appeals did not address whether the admission of the statement was prejudicial to Defendant-Appellant Rodney McKee. Instead the appellate court considered the DNA evidence, statements made by Butler to Morgan, Butler asking the detective if he would admit to the killing on the record, and cell phone records showing Butler was in Jackson on August 10th and held:

> "any error in admitting his December 16 confession as substantive evidence against Butler was harmless beyond a reasonable doubt given the untainted evidence of Butler's guilt." (MCA Opinion, 16; App A-16).

The Michigan Court of Appeals found the trial court erred when admitting the statement as being obtained during an on-going emergency and ruled Butler's statement to be inadmissible as it was involuntary and violated *Miranda*. Despite identifying the impermissible conduct of the detectives application of an exclusionary rule was not considered and the only issue decided by the Michigan Court of Appeals was whether the admission of the statement was prejudicial to Butler, and Butler alone.

The findings made by Michigan Court of Appeals concerning Butler's prejudice have no bearing upon, and provides no guidance, as to the prejudice to codefendants by admission of the statement.

Butler's confession to police was inadmissible

The statements were not given during an emergency. The record demonstrates that before the statement was given, Eric Wolfe was no longer considered culpable or a

suspect; Butler and Clifford McKee were already in custody; law enforcement already had 200 texts between Clifford and Butler; and Butler's DNA was already compared and identified. Before the alleged emergency on December 16, the police had already interviewed Dale Morgan and had issued an arrest warrant for Clifford on December 11th, 5 days before Butler statement and some four months after the child had already been staying with her grandmother.

During the Walker hearings it was established that: by November 18th, all investigators were focused solely on Butler, (Hrng 2/19/2016, 76; App A-24); nothing further had been done to investigate Wolfe since September, (Hrng 2/19/2016, 73; App A-23); and, the only purpose for interviewing Butler in December "to get a statement from him reference our homicide and ask him relevant questions including some questions about his device being in Jackson…" (Hrng 2/19/2016, 38; App A-22). Simply put, there was no ongoing emergency.

The statements were not made during an on-going emergency and were obtained with the purpose of establishing past events to use in later prosecution and therefore testimonial in nature. *Ohio v. Clark*, 135 S. Ct. 2173 (2015) clarifying *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The trial court finding of an on-going emergency was clear error and admission of the statement was an abuse of discretion. Because of the erroneous ruling, the trial court erroneously also held the statements were non-testimonial and admissible as substantive evidence against Defendant-Appellant Rodney McKee. (Hrng, 2/29/2016, 14; App A-26).

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The general rule is that "prior unsworn statements of a witness are mere hearsay and are generally inadmissible as substantive evidence." *People v Lundy,* 467 Mich. 254, 257; 650 N.W.2d 332 (2002). "Extrinsic evidence of a prior inconsistent statement can be used to impeach but it cannot be used to prove the truth of the matter asserted, unless, of course, it falls within a hearsay exception." *People v Jenkins,* 450 Mich. 249, 273; 537 N.W.2d 828 (1995).

Adding to the inherently unreliability of the alleged statement is that declarant Butler denied making the statement so there was no authentication of the statement that was offered. Not only was the alleged confession inadmissible hearsay, it also violated confrontation rights.

Here the statement was offered as substantive evidence for the jury to rely upon when deliberating the fate of Defendant-Appellant Rodney McKee. That circumstance is relevant because it meant that the jury was not properly instructed to use the statement only against Butler and not against codefendants.

Statement violated Bruton when offered

The statement was offered as direct evidence, part of the prosecutor's case without making Butler available for cross-examination. While it is true that Butler did testify in his defense, this occurred after a motion for directed verdict had been denied. When he did testify, he denied making the statement.

A similar situation, that of codefendant's statement being introduced and then that codefendant declarant testifying at trial and denied making the statement, arose in *Nelson v. O'Neil,* 402 U.S. 622, 91 S.Ct. 1723, (1971) where that court concluded: "that,

where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments." Supra at 630.

The factual distinction between *O'Neil* and Defendant-Appellant's case is that Butler denied making the statement, but did not testify favorably for Defendant-Appellant. To the contrary, Butler said it was Morgan who went to the Jackson area, using Butler's car and cellphone to commit the murder. His defense did not deny that McKee was involved with the murder, rather the defense was that Morgan had been communicating with Clifford McKee and dealt with Rodney McKee, using Butler's car and telephone. That distinction does not remove the confrontation violation. Here the prosecutor used evidence admissible only against Butler and evidence admitted by Butler to wrongfully obtain a conviction against McKee. This forced Defendant-Appellant Rodney McKee to defend against Butler's accusations while simultaneously having to also defend against the prosecutor's accusations.

The patent unfairness from this situation is referred to as the subtle effect of joining defendants who have asserted antagonizing defenses because "[a]ll evidence having the effect of exonerating one defendant implicitly indicts the other. The defendant must not only contend with the effects of the government's case against him, but he must also confront the negate effects of the codefendant's case." *United States v Tootick*, 952 F2d 1078, 1083 (9th Cir, 1991).

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The Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that a defendant's confrontation rights are violated when a court admits in a joint trial the confession of a non-testifying codefendant that implicates the defendant. Supra, at 126. The Court also held that a limiting instruction could not cure such a violation, as "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Supra, at 135. Accordingly, *Bruton* carved a narrow exception to the general rule that "juries are presumed to follow their instructions." *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).[2]

In *Marsh*, the Court distinguished the confession in *Bruton*, which "expressly implicat[ed]" the defendant, from confessions that are not incriminating on the face, but "bec[ome] so only when linked with evidenced introduce later at trial." *Marsh*, 481 U.S. at 201; *Mason v. Yarborough* 447 F.3d 693, 695 (9th Cir. 2006) (*Marsh* "specifically exempts [from the *Bruton* rule] a statement, not incriminating on its face, that implicates the defendant only in connection to other admitted evidence."). "Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." *Marsh*, 481 U.S. at 208. "On the other hand, the

[2] The trial court, however, gave no such limiting instruction, and the jury received the statement; instructions given before deliberation were to treat the statement as substantive evidence.

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mere removal of a codefendant's name from a statement that obviously refers to the defendant, does not insulate the statement from *Bruton* scrutiny." *Yarborough*, F.3d at 695 (citing *Gray v. Maryland*, 523 U.S. 185, 193–196 (1998)). A statement is facially incriminating when it has a "devastating" or "powerful" inculpatory impact. *United States v. Mikhel*, 889 F.3d 1003, 1044 (9th Cir. 2018).

The Court of Appeals found that Rodney was not implicated in Butler's confession. This is clearly erroneous and an unreasonable determination of facts. While it is true Butler never said 'Rodney McKee', he was clearly implicated in Butler's confession and the prejudice manifest as the sole source of incriminating evidence against Rodney McKee came from officers Sullivan and Merritt relating Butler's confession to the jury during which Merritt notes the suspect is a very large man 6'6-6'7, 400 pounds who drives a white SUV and Sullivan tells Merritt he knows everyone Butler referred to in the confession and then told the jury the same. (T VI, 30-31, 34, 38, 57, 89, 141, 216; App A-105 - 108, A- 111 – 112, A-117, A-122).

Under these circumstances the statement from Butler should have been excluded pursuant to *Bruton v United States*, 391 U.S. 123 (1968). That the confession did not specifically say Rodney McKee does not remove the *Bruton* violation. See *Hodges v Rose*, 570 F.2d 643 (6th Cir, 1978) ("circumstances of the case and other evidence admitted virtually compel the inference". Supra, at 647).

The critical importance is that Butler's statements to Merritt and Sullivan were the only source of information relied upon to identify Defendant-Appellant Rodney McKee. That statement was the only source that led to the witnesses McMillan, Marshalls and only

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with those witnesses could the prosecutor also bring the arson charges. Here the Michigan Court of Appeals ruled Butler's statement was obtained in violation of Miranda, yet was objectively unreasonable in not further ruling the statements were wholly inadmissible against Rodney McKee.

The unique, deliberate and dishonest actions of the detective coerced the statement from Butler and presents to this Court an opportunity to invoke drastic measures of excluding the statement and all evidence derived from the statement.

The Michigan Court of Appeals in *People v Robinsion,* 48 Mich App 253 (1973) addressed a similar situation wherein incriminating evidence was obtained directly as a result of illegally obtaining a confession. The Court in Robinson ruled that not only the illegal statement is suppressed, but also any evidence obtained or secured as result of the illegal statement:

> Any witness whose identity was discovered as a result of those statements, or any physical evidence developed therefrom, may not be admitted upon defendant's trial. Upon his trial, the prosecution will have the affirmative burden of demonstrating that all evidence which it seeks to introduce was in fact developed from a source wholly independent of defendant's involuntary statements. *Robinson*, supra, at 260.

The information connecting Rodney McKee case exclusively from the involuntary statement of Butler and the prosecutor has not demonstrated and independent source for the information and therefore testimony implicating Rodney McKee was not "obtained 'by means sufficiently distinguishable' from the underlying illegality 'to be purged of the primary taint.' *Wong Sun v. United States*, 371 U.S. 471, 488." *Harrison v United States*, 392 U.S. 219, 226 (1968).

This Court considered the circumstances when exclusion is appropriate in *People v. Frazier,* 478 Mich. 231 (2007):

> The suppression of evidence should be used only as a last resort. *Hudson v. Michigan,* --- U.S. ----, 126 S.Ct. 2159, 2163, 165 L.Ed.2d 56 (2006). "[T]he exclusionary rule is 'a harsh remedy designed to sanction and deter police misconduct where it has resulted in a violation of constitutional rights ....' " *People v. Anstey,* 476 Mich. 436, 447-448, 719 N.W.2d 579 (2006), quoting *People v. Hawkins*, 468 Mich. 488, 512-513, 668 N.W.2d 602 (2003) (emphasis deleted); see also *Michigan v. Tucker*, 417 U.S. 433, 446, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), quoting *United States v. Calandra*, 414 U.S. 338, 347, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) ("[T]he exclusionary rule's 'prime purpose is to deter future unlawful police conduct ....' "). " 'The rule is calculated to prevent, not to repair. Its purpose is to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it.' " Id., quoting *Elkins v. United States, 364* U.S. 206, 217, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960). [18] The judicially created rule is not designed to act as a personal constitutional right of the aggrieved party. *Calandra*, supra at 348, 94 S.Ct. 613.

The Michigan Court of Appeals found the police acted illegally, intentionally seeking to violate known law and coerce a confession. Here the implementation of the exclusionary rule would remedy and deter the identified police misconduct that violated constitutional rights and such conduct merits sanction. *People v. Anstey*, 476 Mich. 436, 447-448, 719 N.W.2d 579 (2006).

Introduction of Statement was Prejudicial

"The inquiry into prejudice focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence." *People v Smith,* 456 Mich. 543, 555; 581 N.W.2d 654 (1998) (quotation marks and citation omitted).

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The statement in question incriminated Defendant-Appellant Rodney McKee in several ways. In the statement as related to the jury by detectives Merritt and Sullivan, Butler directly implicated Defendant-Appellant when it was said "he was paid by Rodney McKee" (T VI, 38; App A-108); that McKee was "very very large, 6'6"-6'7", 400 pounds" (T VI, 31; App A-106); that he had been "hired by and paid $5000 by Rodney McKee" (T VI, 84).

The statement then indicates Butler was "hired to perform a hit on an individual" (T VI, 29; App A-104); for which "Butler explains he was contracted and paid" (T VI, 37); and had "met with McKee again to collect $2,500 toward active hit on Ryan Marshall" (T VI, 89; App A-112); "after he committed homicide of Frances Craig for them" (T VI, 89; App A-112); "there was a hit on Ryan Marshall from Rodney McKee's case and he's supposed to kill him" (T VI 99-100; App A-115 - 116); Butler "discussed the wrong person being killed and receiving $2500 more from McKee's to kill Ryan Marshall" (T VI, 143; App A-118).

Butler's statement continues adding more incriminating detail: "it was the day they had traveled there together. That was the day they had traveled there together. That was the day he was introduced to Rodney McKee was the day he and Clifford traveled from Detroit to Jackson. Clifford introduced butter to Rodney McKee" (T VI, 38; App A-108);

"he had turned his phone off prior to arriving at the Timbercrest residence where he committed the murder of Frances Craig" he turned his phone back on his way back to Detroit" (T VI, 37); Butler is claimed to have said that he "came to Jackson and met

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McKee's at a factory where he was paid by Rodney McKee who was driving a white SUV" (T VI, 31; App A-106).

The Butler statement then provided incriminating context relating that "there was a hit on Ryan Marshall who lived with the decedent at a former address 6 weeks prior. Butler was there to get info on Ryan's whereabouts because Ryan Marshall was a witness in Rodney McKee's arson case" (T VI, 29; App A-104); Butler "indicated to us that he damn near cut the bitch's head off". (T VI, 41; App A-109).

Rodney McKee's identity, motive, price of the alleged "hit", the day Rodney McKee paid Butler 5,000.00 down payment at the Westwood Mall in Jackson Michigan on August 6, 2014, for said "hit", which coincidentally was the only time Rodney McKee was alleged to have met up with Mr. Butler or had any contact with him ever.

When Butler denied his involvement, he did not exculpate Defendant-Appellant Rodney McKee, instead he incriminated Morgan and the McKee's, testifying that Morgan used Butler's phone and car that day, and it was Morgan who was in Jackson meeting with Rodney McKee and texting with Clifford McKee.

When the statement is removed and the remaining evidence presented by the prosecutor is considered, this was an extremely weak case against Defendant-Appellant Rodney McKee. Without the statement the prosecution cannot independently provide a factual basis to established the necessary elements of the charged offenses.

The only other evidence implicating Defendant-Appellant Rodney McKee in Frances Craig's demise are a few text messages between Clifford McKee and Rodney McKee with references to a landscaper and a mechanic, evidence that Rodney McKee

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received money and that as a resident of Jackson his phone placed him at all relevant times as being in Jackson near or at his home. Any incriminating inference is speculative and specious.

There was no other evidence to connect Rodney McKee with the death of Ms. Craig. Other evidence was introduced at trial pertaining to a charge of arson, not homicide. Butler's statement was the only evidence a juror could rely upon to render a guilty verdict. At a minimum Butler's codefendants were entitled to separate juries as the only means to permit evaluation of properly admissible evidence against each codefendant. *Hana*, supra, at 360.

Defendant-Appellant Rodney McKee's constitutional rights were impaired by: introduction of prejudicial hearsay denying the 6th and 14th Amendment right to a fair trial and that denied confrontation.

Severance and Mistrial

In *Zafiro v United States*, 506 US 534; 113 S Ct 933; 122 L Ed 2d 317, 325 (1993), citing to *United States v Benton*, 852 F2d 1456 (CA 6, 1988), the Court held that a joint trial is constitutional error when prejudicial. Under *Zafiro*, when separate trials or at least separate juries are required when "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." See also *Coffin v United States*, 156 US 432; 15 S Ct 394; 39 L Ed 481 (1885); *People v Hurst*, 396 Mich 1 (1976).

The need for separate trials or juries reflect an understanding of jurors as elucidated by the United States Supreme Court in *Bruton*, supra:

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> "A jury cannot segregate evidence into separate intellectual boxes, it cannot determine that a confession is true in so far as it admits that A has omitted criminals acts with B and at the same time effectively ignore the inevitable conclusions that B has committed those same acts with A", *Bruton*, at 131-132.

Originally, Defendant-Appellant Rodney McKee was charged in a separate case for arson which was set for trial. The prosecutor filed a motion for joinder of the arson case with the homicide case brought against Butler, Clifford McKee and Rodney McKee. Judge Wilson denied the prosecutor's Motion for Joinder finding "it would be too prejudicial to the other case". (Hrng, 12/1/15, 9; App A-21). Defendant-Appellant Rodney McKee filed a Motion to Sever which was denied. (Hrng., 3/2/2016, 32; App A-28).

In this case, the trial court forced Defendant-Appellant to be tried by a single jury for all three defendants. The Michigan Supreme Court in *Hana* was clear that when the issue of prejudice from a joint trial is raised, the trial court was obligated to consider severance, as well as other alternatives, including a separate jury:

> "The risk of prejudice may not only be allayed by proper instructions, but by the use of dual juries as well. This procedure has been successfully used in Michigan. See, e.g., *People v Greenberg, supra; People v Jeffrey Kramer, supra*, pp 754-755; *People v Brooks*, 92 Mich. App. 393, 396-397; 285 N.W.2d 307 (1979). See, generally, anno: *Propriety of use of multiple juries at joint trial of multiple defendants in state criminal prosecution*, 41 ALR4th 1189; anno: *Propriety of use of multiple juries at joint trial of multiple defendants in federal criminal case*, 72 ALR Fed 875. See also ABA Standards for Criminal Justice (2d ed), Joinder and Severance, Standard 13-3.2(c), commentary, p 13-38. The use of separate juries is a partial form of severance to be evaluated under the standard, set forth above, applicable to motions for separate trials. *United States v Rowan*, 518 F.2d 685, 690 (CA 6, 1975); *Kramer, supra.* The dual-jury procedure should be scrutinized with the same concern in mind that tempers a

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> severance motion, i.e., whether it has prejudiced the substantial rights of the defendant. (*Hanna*, supra, 351-352).

The trial court did not grant or consider separate juries despite having acknowledged the prejudice to Rodney McKee in pretrial rulings regarding statements allegedly made by codefendant Cortez Butler to Dale Morgan and to officers Sullivan and Merritt.

In this case, the trial judge had previously and consistently ruled in pretrial proceedings that references to other homicides involving Butler was inherently prejudicial and would deny a fair trial.

Consider the trial court's own findings and rulings made concerning admissibility of evidence, the trial court ruled that a statement by Butler made to Dale Morgan about cutting someone up was allowed, but the "fact that [Butler] was involved in a homicide in Detroit isn't coming in. Another homicide afterwards that I think would be too prejudicial." (Hrng, 3/2/2016, 20; App A-27).

Another example is where, while considering the admissibility and prejudice from a 2014 Detroit homicide involving Butler during a Walker hearing, Judge Wilson stated "this stuff's never gonna come near going it at trial. What's being discussed here is not coming in at any trial." (Hrng. 2/26/2016, 94; App A-25).

During the trial, Judge Wilson acknowledged the inherent prejudice of allowing evidence of Butler's involvement in prior murders to be heard by the jury deliberating Defendant-Appellant's guilt or innocence:

> The Court: 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 McKee's. It has nothing to do with their involvement in this particular case. It's not an admission adopted by either one of them...... But we get—because of the McKees being involved in the trial I think it creates an un – or creates too much of a prejudicial influence against the McKees to allow these array of other murders that been raised to come in. (T VI, 175-176; App A-119 - 120)

The trial court clarified the ruling of insurmountable prejudice should statements regarding Butler's other homicides be introduced at trial against Defendant-Appellant McKee agreeing that "those statements are, probably prejudices us to the point we can't get a fair and impartial trial." (T VI, 178; App A-121).

Despite the rulings and acknowledgement of prejudice, the prosecutor interjected those statements at trial by an accidental or deliberate misinterpretation of Butler's testimony seized upon during cross-examination.

Butler had been convicted of homicide in 1992, and as a prior conviction was admissible as to Butler and Det. Sullivan related statements made by Butler concerning the 1992 conviction. (T VII, 61-63; App A-135 - 136). Butler testified that he told police they could not hook him with the charged murder; the prosecutor began cross-examination asking what murders was he involved with other then the 1992 homicide and then introduced the exact statements previously ruled prejudicially inadmissible. (T VII, 38-40; App A-131 - 133). Once interjected by the prosecutor, it became impossible for Defendant-Appellant to have a fair trial.

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The United States Supreme Court in *Zafiro v United States*, 506 US 534; 113 S Ct 933; 122 L Ed 2d 317, 325 (1993), identified the factors that would lead a jurist to reasonably concluded that separate juries may be needed in a multiple defendant case, such as Defendant-Appellant's, where:

> "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. Such a risk might occur when evidence that the jury should not consider against a defendant, and that would not be admissible if a defendant were tried alone, is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened. See *Kotteakos* v. *United States*, 328 U.S. 750, 774-775 (1946). Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice. See *Bruton* v. *United States*, 391 U.S. 123 (1968). Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. See, *e.g., Tifford* v. *Wainwright*, 588 F.2d 954 (CA5 1979) (*per curiam*)."

In *People v Breidenbach*, 489 Mich 1 (2011), the Michigan Supreme Court commented on the granting of separate juries and noted that "the 'potential for confusion or prejudice' in particular may provide a sufficient basis for a trial court's exercise of its discretion to order separate juries". Defendant-Appellant submits he was denied a fair trial where the prosecutor introduced over a dozen witnesses to testify to prior bad acts of the codefendants, where none of the alleged acts involved Defendant-Appellant, and

where his constitutional rights of presumption of innocence, right to present a defense and right to confront witnesses was restricted.

The Michigan Court of Appeals ruled there was no prejudice shown as the same witnesses and testimony would have been produced had these trials been held separately. (Op., 4-5; App A-4 - 5). This position is clear error. The statement of codefendant Butler was admissible against Butler only and where declarant denied making the statement, was admissible only as impeachment evidence and therefore never admissible in a separate trial. The Court of Appeals holding was an objectively unreasonable application of established law, *Zafiro v United States*, 506 US 534; 113 S Ct 933; 122 L Ed 2d 317, 325 (1993), and *People v Hana*, 447 Mich 325 (1994).

It was an abuse of discretion where the trial court failed to grant a mistrial where previously identified prejudice when seeking to prevent the prosecutor from introducing Cortez Butler's statement at the joint trial, actually inured to Defendant-Appellant Rodney McKee. Under *Hana* and *Furline*, there are two parts of this inquiry. First, is what prejudice was identified before trial as a basis for separate trials, and, second, did the predicted prejudice actually occur. When the prejudice actually occurred and a Motion for Mistrial made, it was an abuse of discretion not to grant the motion.

Relief is required for a constitutional error if the error "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Ruelas v. Wolfenbarger,* 580 F.3d 403, 411 (6th Cir. 2009) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)). To determine whether a Confrontation Clause violation is harmless, we consider "the importance of the witness' testimony in the prosecution's case, whether the testimony was

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cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, . . . and, of course, the overall strength of the prosecution's case." *Fulcher v. Motley,* 444 F.3d 791, 809 (6th Cir. 2006) (quoting *Delaware v. Van Arsdall,* 475 U.S.673, 684 (1986)). Severance was the only means to avoid this prejudice, and when not granted, it was an abuse of discretion for the trial court not to later have granted a mistrial.

New Trial is Required

The trial court's grant or denial of a mistrial will not be reversed on appeal in the absence of an abuse of discretion. *People v. McAlister*, 203 Mich.App. 495, 503, 513 N.W.2d 431 (1994); *People v. Vettese*, 195 Mich.App. 235, 245-246, 489 N.W.2d 514 (1992). A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, *People v. Siler*, 171 Mich.App. 246, 256, 429 N.W.2d 865 (1988), and impairs his ability to get a fair trial, *People v. Barker*, 161 Mich.App. 296, 305, 409 N.W.2d 813 (1987).

"A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant . . . and impairs his ability to get a fair trial." *People v Alter,* 255 Mich.App. 194, 205; 659 N.W.2d 667, 674 (2003) (quotation marks and citation omitted). A mistrial is appropriate and will not bar retrial where manifest necessity exists. *People v Lett,* 466 Mich. 206, 215; 644 N.W.2d 743 (2002). Manifest necessity refers to "the existence of sufficiently compelling circumstances that would otherwise deprive the defendant of a fair trial or make its completion impossible." *People v Rutherford,* 208

Mich.App. 198, 202; 526 N.W.2d 620 (1994). "Determining whether manifest necessity exists to justify the declaration of a mistrial requires a balancing of competing concerns: the defendant's interest in completing his trial in a single proceeding before a particular tribunal versus the strength of the justification of a mistrial." *People v Hicks,* 447 Mich. 819, 830; 528 N.W.2d 136 (1994).

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RELIEF REQUESTED

WHEREFORE, Defendant-Appellant requests this Court find Defendant-Appellant's constitutional rights were violated by the refusal to sever trials and the admission of an improperly redacted codefendant statement, other bad acts, restriction on cross-examination and presentation of evidence denying due process and a fair trial and reverse the Michigan Court of Appeals, vacate the convictions and sentences and remand with instructions for a new trial.

Respectfully submitted by:

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CERTIFICATE OF COMPLIANCE

Pursuant to Administrative Order 2019-6, the undersigned does certify that the word count for this Defendant-Appellant's Brief on Appeal, including footnotes, is 7,903 words, which is within the 16,000 word limit provided for briefs on appeal.

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