Circuit Court for Baltimore County
Case No. C-03-CR-21-004233

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 870

September Term, 2023

KYREE GREGORY

v.

STATE OF MARYLAND

Reed,
Tang,
Raker, Irma S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: April 22, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

On February 22, 2023, a jury sitting in the Circuit Court for Baltimore County convicted two brothers, Kyree Gregory ("Appellant") and Malik Rashad Gregory[1] (collectively "Defendants"), of first-degree felony murder, robbery with a dangerous weapon, first-degree assault, and use of a firearm in a crime of violence. The charges stem from the fatal shooting of Deras Washington ("Washington") on the afternoon of July 22, 2021. During the investigation of the shooting, it was determined that Malik had arranged to purchase a small quantity of marijuana from Washington. On July 30, 2021, Malik was arrested and interrogated by Detective Schrott (the "Interview"). In the recorded Interview, Malik implicates Appellant as being present during the drug deal and eventually identifies Appellant as the shooter. Only select portions of the Interview would later be presented at trial. Appellant was subsequently arrested, and the Defendants were tried together following a motion by the State for joinder. Defendants opposed the joinder and attempted to sever at trial. During the trial, and following multiple objections by the Defendants, redacted portions of the Interview were presented at trial. Appellant presents the following question for our review:

> I. Did the circuit court violate Appellant's right to confront his accusers by admitting portions of a redacted video in which his co-defendant indirectly implicated Appellant in the shooting of Deras Washington?[2]

[1] For clarity, this Opinion will refer to Kyree Gregory and Malik Rashad Gregory by their first names. No disrespect is intended.

[2] Appellant's question as originally phrased was "[d]id the circuit court violate Kyree Gregory's right to confront his accusers by admitting an inadequately redacted video in which his co-defendant unmistakably implicated him in the shooting of Deras Washington?"

For the following reasons, we affirm the trial court's ruling.

FACTUAL & PROCEDURAL BACKGROUND

This appeal comes from the joinder of two brothers, Kyree Gregory ("Appellant") and Malik Rashad Gregory (collectively "Defendants"), in a trial for first-degree felony murder, robbery with a dangerous weapon, first-degree assault, and use of a firearm in a crime of violence. The charges stem from the fatal shooting of Deras Washington ("Washington") on the afternoon of July 22, 2021.

Sometime between 4:30 pm and 4:45 pm on July 22, 2021, a resident of an apartment witnessed from her balcony an oddly parked car revving its engine and then heard what sounded like an engine backfiring. Quickly thereafter, she saw two "black males between . . . 16 and 25," one of whom was getting out of the vehicle and another who was already running. The vehicle continued rolling forward until it hit a curb and a nearby tree. Believing she had just witnessed "kids . . . abandoning a stolen vehicle," she called the police non-emergency line.

When police arrived at the scene, they found Washington "slumped over" the passenger seat of the vehicle and clearly deceased. The medical examiner concluded that Washington had been fatally shot in the right ear from a distance of two to three feet. The shooting likely occurred at approximately 4:38 pm.

A. Initial Investigation

During the investigation into the shooting, Washington's roommate would confirm that Washington sold "small quantities" of marijuana and that he suspected that Washington had left to sell marijuana the day he was shot. The roommate would confirm

further that Washington had a Louis Vuitton satchel, comprising of three detachable parts, where he kept the drugs and that he was wearing the day he was shot. One of the small pieces and a broken strap of the satchel were found on the floor of Washington's vehicle. The two larger pieces were not recovered Cell phones belonging to Washington, a scale, as well as "green and brown vegetable matter," were found scattered in the vehicle.

It was determined from reviewing Washington's phone that Malik had arranged over text to purchase a small quantity of marijuana from Washington on the day of the shooting. Part of the text message exchange was regarding the method of payment. Malik asked to pay via Cash App; however, Washington clarified that he only accepted payment via Apple Pay. At 4:20 pm, Washington texted Malik "I'm here across from da pool." At 4:26 pm, Malik texted back "Im rey [sic] get cash[.]"[3]

B. Collection of Other Evidence

The apartment building where the Defendants lived and the neighboring apartment complex where the shooting occurred have several cameras throughout the properties. Appellant's apartment is approximately a two-and-a-half-minute walk from the scene of the shooting. The State presented a number of clips from these cameras during the trial; however, none of them captured the shooting or Washington's vehicle during the incident. Investigators also collected historical cellphone location data from the Defendant's phones which placed both of their phones within the apartment complexes from 4:00 pm to 4:52 pm. A timeline of the events with this evidence is summarized as follows:

[3] In this text, "rey" is likely local vernacular for "ready to do something."

- **4:19 pm** – Two individuals are seen on camera exiting the Defendant's apartment. Detective Schrott identified one of the individuals as Malik during trial. Detective Schrott did not identify the other individual as Appellant until later in testimony.
- **4:20 pm** - Washington texted Malik "I'm here across from da pool."
- **4:26 pm** – Malik texted Washington "Im rey [sic] get cash[.]"
- **4:28 pm** – The same two individuals are seen on camera walking back toward the Defendant's apartment, with Malik entering the apartment.
- **4:30 pm** – Malik is seen on camera walking back towards the crime scene.
- **4:38 pm** – The fatal shooting of Washington.
- **4:40 pm** – The two individuals return to the Defendants' apartment, approximately 30 seconds apart.
- **5:28 pm** – The two individuals are seen in the lobby of Defendants' apartment building along with the Defendants' younger brother and his girlfriend. Detective Schrott confirmed the identity of all three brothers in this clip, including Appellant, during the trial.

Other physical evidence presented included Malik's fingerprints, which were present on the front door and passenger window frame of Washington's car. Appellant's fingerprints were not found on the car. Defendants' apartment was also searched, and nothing of significance was identified.

C. Arrest & Interview

On July 30, 2021, Malik was arrested and interrogated by Detective Schrott. The entirety of the Interview was recorded. At first, Malik denies knowing Washington or that a shooting had taken place. As the questioning continued, Malik eventually admitted that he had arranged to buy marijuana from Washington on the day of the shooting.

Subsequently, he admitted to Detective Schrott that "I was going to go meet him. And when I went to go meet him . . . it was just me and [redacted audio] just walking." The quote represents a portion of the video played for the jury during the trial. The redacted portion contains no audio, including any background noise in the room, however, Malik can be seen speaking. The unaltered version of the video that was not presented to the jury confirms that the missing audio is "[Kyree]," Appellant's first name.

As the Interview continues, Malik states that he went to Washington's car to meet him. Once meeting Washington, Malik told him that his phone did not work and would need to leave to connect to Wi-Fi to pay via Apple Pay. Washington told Malik that he would not hand over the marijuana until Malik made the payment from his phone. Malik then returned to his apartment to make the payment and then left to return to Washington's car while his phone was loading and about to send the payment. As he walked back to the car, he claimed he heard a gunshot. Malik modified his story as the Interview continued, claiming he was standing in the nearby parking garage and was on his phone while Appellant finished the transaction.

Malik maintained throughout the Interview that he was not the shooter, and at one point, he stated he "kn[e]w who did it," but he did not specify who. When asked by Detective Schrott if Washington was trying to keep the money and not give Malik the marijuana, he said, "Yes." In segments of the Interview not presented to the jury, Malik then implicates Appellant as being present during the drug deal and eventually identifies Appellant as the shooter.

D. Procedural Background

Appellant was arrested following Malik's Interview. Appellant and Malik were tried together as accomplices to felony murder based upon the underlying robbery of the Louis Vuitton bag. The State's theory of the case was that Appellant and Malik had an altercation with Washington, committed a robbery by taking the Louis Vuitton bag, and fatally shot Washington during the struggle.

On February 15, 2022, the State filed a motion for a joinder for Malik's case to join Appellant's. On March 3, 2022, Appellant filed an opposition to the joinder, claiming that it would be "prejudicial." On March 30, 2022, the court held a hearing on the State's joinder motion. The primary issue discussed was "the *Bruton* problem," a reference to the U.S. Supreme Court's decision in *Bruton v. United States*, 391 U.S. 123 (1968), and its holding regarding the admissibility of a co-defendant's Interview in the context of a joint trial. The State argued that it had been thorough and "very carefully" redacted statements to remove "all unfair prejudice by way of these defendants." Appellant countered that further redaction is needed to "get rid of any reference that there is even another person." Malik further contested that multiple statements in the Interview reference two people and that it would not be difficult for the jury to conclude the other person was Appellant. On April 4, 2022, the trial court granted the State's motion to join and found that the submitted redacted portions of the Interview were done "so as to negate even a remote potential for prejudicial joinder."

Subsequently, on January 25, 2023, Appellant filed a motion to sever the cases. In the motion, Appellant argues that there remain instances where the recording "inferentially implicate[s] [Appellant]" with terms such as "us," "him," and "we" when combined with

other evidence to be presented at trial. The State filed an opposition, stating that these "linkage[s]" are permissible when linked with the evidence presented later in the trial. On January 31, 2023, a hearing on the motion took place. The following day, the court issued a written order denying the motion to sever but ordered the State "to redact from [Malik's] statement all references to [Appellant's] name and to his 'existence'," and failure to do so will prevent it from being admitted at trial against either Appellant.

The motion to sever was then renewed again by the Defendants at the beginning of the trial. Malik argued that the high level of redaction limits his ability to show that another person, who could have been the shooter, was present. Appellant stated he was content with the level of redaction but was concerned about the issues it posed for Malik. The motion was again denied. However, the following day, Appellant objected to the video again, arguing that, upon review, the latest version still contains three instances where he believes it implies the presence of another person. The objection was overruled, and the trial court concluded that "all appropriate redactions have been made[.]"

Prior to the Interview being played for the jury, Appellant objected, citing the following sections as problematic:[4]

> [I]t was just me and [audio redacted] just walking . . . I . . . was actually walking back to the car and that's when he got shot . . . I believed that it was a firework . . . I know a gunshot when I hear one.
>
> I went back to my house to send it, sent it, came back and heard the shot and went back home. . . . I'm just sitting there on my phone and the next thing I hear is a shot.

[4] The record includes Appellant's paraphrasing of the relevant section during trial. The cited text is the Interview transcript of the specific sections Appellant was referencing.

Appellant's objection was overruled. Invoking their Fifth Amendment Rights, neither of the Defendants testified during the trial. During the jury charge, the court instructed the following:

> You must consider this recorded statement only as it relates to [Malik], the Defendant against whom it was admitted as I told you during the trial . . . edits have been done so that personal information and other irrelevant information is not submitted to the jury. You must not speculate as to what is in the gaps or the muted portions and the edits must not be considered by you in any way or even discussed by you.

On February 22, 2023, the jury found Malik and Appellant guilty of first-degree felony murder, robbery with a dangerous weapon, first-degree assault, and use of a firearm in a crime of violence. On June 29, 2023, the court sentenced Appellant to life imprisonment for the first-degree felony murder charge, and twenty years for the use of a firearm in a crime of violence charge, with the first five years without the possibility of parole to run consecutive to the life sentence. Appellant then filed his timely appeal on June 30, 2023.

DISCUSSION

I. Did the circuit court violate Appellant's right to confront his accusers by admitting portions of a redacted video in which his co-defendant indirectly implicated Appellant in the shooting of Deras Washington?

A. Standard of Review

We review the ultimate question of whether the admission of evidence violated a defendant's constitutional rights without deference to the trial court's ruling. *Taylor v. State*, 226 Md. App. 317, 332 (2016) (citing *Hailes v. State,* 442 Md. 488, 506 (2015)) (applying a *de novo* standard of review to an appeal based on a claimed Confrontation

Clause violation). "A trial court must exercise its discretion in accordance with correct legal standards." *Jackson v. Sollie*, 449 Md. 165, 196 (2016) (quoting *Alston v. Alston*, 331 Md. 496, 504 (1993)) (brackets omitted). Where a trial court fails to do so, it abuses its discretion. *See Faulkner v. State*, 468 Md. 418, 460 (2020) (quoting *Wilson-X v. Dep't of Hum. Res.*, 403 Md. 667, 675 (2008)) ("[T]rial judges do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature."); *see also Matter of Dory*, 244 Md. App. 177, 203 (2019) (explaining that "a trial court's discretion is always tempered by the requirement that the court correctly apply the law applicable to the case. Indeed, trial courts do not have discretion to apply incorrect legal standards and a failure to consider the proper legal standard in reaching a decision constitutes an abuse of discretion.") (citations omitted) (cleaned up).

B. Parties' Contentions

Neither party disputes that the joinder of Malik's and Appellant's trials presented a *Bruton* issue that limited the scope of evidence that could be presented at trial. Under *Bruton v. United States*, out-of-court statements by a defendant that implicate the co-defendant are not permissible against the co-defendant, and if the statements are "powerfully incriminating" of the co-defendant, they are not curable by a jury instruction. 391 U.S. 123, 135–37 (1968). Further, the parties also agree that Malik's statements during the Interview qualify as testimonial statements covered by *Bruton* and that a thorough redaction of a defendant's statements can cure *Bruton* violations. However, the parties do dispute how directly incriminating a statement needs to be under *Bruton* for it to be

inadmissible, regardless of whether a limiting instruction is provided to the jury.

i. Appellant's Contentions

Appellant takes a narrower view than the State of what statements can be presented at trial. Relying on *Gray v. Maryland*, 523 U.S. 185 (1998), Appellant argues that any reference to a co-defendant must be removed. In *Gray*, the United States Supreme Court found that statements are inadmissible when "despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Id.* at 196. In the present case, Appellant argues that the statements made by Malik in the interview are analogous to those contemplated in *Grey*. They contend that when Malik states, "it was just me and [redacted] just walking" to meet with Washington, the redaction was so obvious to the jury that they would make the connection that the redaction referred to the co-defendant. Appellant contends that the statement, having been presented to the jury, could not be cured by a jury instruction.

Additionally, Appellant claims that the nature of the crimes charged at trial and the limited evidence presented makes the identification of Appellant by his co-defendant a vital piece of evidence that led to his conviction. In the present case, the Defendants were charged under a theory of accomplice liability for felony murder, supported by the alleged theft and shooting. Appellant argues that Malik's statements are the only evidence that places Appellant as the other individual at Washington's car and that without the evidence, the case against Appellant would have been highly circumstantial. As a result, Appellant concludes that the error was not harmless because Malik's recorded statements were the

only evidence linking Appellant to the crime scene, and that vital link was critical to conviction under accomplice liability.

ii. State's Contentions

The State contends that Appellant's reading of the case law incorrectly limits the type of statements that can be introduced at trial. The State relies on the United States Supreme Court's decision in *Samia v. United States*, 599 U.S. 635 (2023), and argues that *Bruton* applies only to directly accusatory incriminating statements, rather than statements that do not refer directly to the defendants and become incriminating only when linked with evidence introduced later at trial. In the State's view, even if it was clear that the statement referred to Appellant, identifying him as walking to Washington's car prior to the shooting is insufficient on its own to implicate Appellant in the crimes at trial. Although there is no directly relevant Maryland precedent, the State points to several other jurisdictions that have applied a narrow interpretation of "directly accusatory incriminating statements."

Additionally, the State maintains that the order in which the evidence is presented is important. Pointing to *Richardson* and *Gray*, the State argues that when a statement on its own isn't directly incriminating and is only made incriminating by the introduction of later evidence, the statement is not subject to *Bruton*. On this point, Appellant counters that statements that "obviously refer . . . [to] the defendant" are inadmissible even if it is "the very first item introduced at trial[,]" as in the present case, citing *Gray*, 523 U.S. at 196. Appellant also maintains that the State's reference to *Richardson* is wrong because *Richardson* concerns statements that do not directly implicate the co-defendant.

C. Analysis

In cases where co-defendants are tried together and testimonial statements such as confessions are introduced into evidence, a conflict between one defendant's Fifth Amendment right not to testify and the other co-defendants' Sixth Amendment right to cross-examination can emerge. A criminal defendant has the constitutional right "to be confronted with the witnesses against him." U.S. Const. amend. VI; Md. Decl. of Rts., art. 21.[5] Beyond witnesses presented at trial, this right also allows the defendant to challenge extrajudicial statements provided in prior testimony and confessions. *Clark v. State*, 188 Md. App. 110, 121 (2009) (quoting *Crawford v. Washington*, 541 U.S. 36, 50–51 (2004)). A defendant also has the right not to testify against themselves in a criminal trial. U.S. Const. amend. V.[6] Such a conflict prevents the defendant from challenging the veracity of their co-defendant's statements implicating them in the crime, as the co-defendant has made themselves unavailable for cross-examination. *Samia*, 599 U.S. at 647.

I. The Evolution of *Bruton*

To address this conflict while still allowing the efficiency achieved from jointly

[5] The United States Constitution states "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. The Maryland Declaration of Rights states similarly "[t]hat in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath . . . ." Md. Decl. of Rts., art. 21.

[6] The Fifth Amendment to the United States Constitution states "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Maryland Declaration of Rights states "[t]hat no man ought to be compelled to give evidence against himself in a criminal case." Md. Decl. of Rts., art. 22.

prosecuting defendants accused of jointly committing a crime, the courts have created exceptions and limitations on the type of statements that can be introduced. Decades ago, the common approach to address this issue had been to allow incriminating statements by a co-defendant so long as clear jury instructions were given that a co-defendant's statements could only be considered against that same co-defendant. *Delli Paoli v. United States*, 352 U.S. 232, 243 (1957), *overruled by Bruton v. United States*, 391 U.S. 123 (1968). The Supreme Court then challenged *Delli Paoli*'s reasoning in *Bruton v. United States*. 391 U.S. 123 (1968). The Court disagreed with the ability of a jury to compartmentalize a co-defendant's statements so as to not influence their judgment against other co-defendants. *Id.* at 135. The Court wrote: "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." *Id.* at 135. In overruling *Delli Paoli*, the Court found that even with "concededly clear instructions to the jury to disregard . . . inadmissible hearsay evidence inculpating [a co-defendant] . . . we cannot accept limiting instructions as an adequate substitute for [defendant's] constitutional right of cross-examination. The effect is the same as if there had been no instruction at all." *Id*. at 137. This ruling has subsequently been clarified in *Richardson v. Marsh*, 481 U.S. 200 (1987), *Gray v. Maryland*, 523 U.S. 185 (1998), and *Samia v. United States*, 599 U.S. 635 (2023).

In *Richardson v. Marsh*, the Court analyzed the implications of an indirect incrimination of a co-defendant. 481 U.S. at 202–04. Richardson was tried jointly with one co-defendant and convicted of felony murder and assault to commit murder that resulted

from an armed robbery. *Id.* at 202. A third charged individual was a fugitive at the time of the trial. *Id.* During trial, the co-defendant's confession was presented to the jury. *Id.* at 203–04. The confession corroborated a surviving witness's account of most of the committed crimes and also described a conversation between the co-defendant and the fugitive where the fugitive said they would need to kill the victims after the robbery. *Id.* at 203–04. All references to Richardson were redacted to the point that there was no indication in the confession that a third person was involved. *Id.* at 203. Richardson then took the stand, confessing to being present in the car during the discussion but claiming she was unable to hear the conversation of the two other defendants over the car's radio. *Id.* at 204. She also claimed that she was not an active participant in the robbery or murder and had no prior knowledge or any intention of being involved in the incident. *Id*. A limiting instruction was given to the jury, directing them to consider the confession only as it concerned the co-defendant. *Id.* at 204.

The Supreme Court held that limiting instructions are sufficient remedies to a potential Confrontation Clause violation when redactions to a non-testifying co-defendant's confession "eliminate not only the defendant's name, but any reference to his or her existence." *Id.* at 211. The Court distinguished *Richardson* from *Bruton*, describing how the redacted confession was properly admitted because it "was not incriminating on its face, and became so only when linked with evidence introduced later at trial." *Id.* at 208. The Court reasoned that the jury is more likely to disregard the evidence as directed by the jury instruction when it is not incriminating on its face as opposed to a more harmful statement that is incriminating on its own, like the statement in *Bruton*. *Id.*

Maryland courts attempted compliance with the findings in *Richardson* in the case of *Gray v. Maryland*,[7] before that case made its way to the United States Supreme Court. 523 U.S. at 189. *Gray* involved the beating and murder of Stacey William by three individuals. *Id*. at 188. One of the suspects died prior to trial, resulting in the prosecution of Gray and one co-defendant. *Id*. The co-defendant confessed to police, implicating Gray in the murder. *Id*. During trial, the redacted confession was read out verbatim by a police detective:

> Question: Who was in the group that beat Stacey?
>
> Answer: Me, deleted, deleted, and a few other guys.

Id. at 196. The Court held that confessions with "substituted blanks and the word 'delete' for the petitioner's proper name [fall] within the class of statements to which *Bruton*'s protections apply." *Id.* at 197. "[C]onsidered as a class, redactions that replace a proper name with an obvious blank, the word 'delete,' a symbol, or similarly notify the jury that a name has been deleted are similar enough to *Bruton*'s unredacted confessions as to warrant the same legal results." *Id.* at 195. This is because "obvious deletion may well call the juror's attention specifically to the removed name . . . encouraging the jury to speculate

[7] At the trial court level, the jury convicted both defendants, Bell and Gray, for murder. 523 U.S. at 189. When Gray appealed his conviction to the then-named Court of Special Appeals, this Court held that because Bell's confession was ineffectively redacted, *Bruton* prohibited its use at trial, and we set aside Gray's conviction. *Gray v. State*, 107 Md. App. 311, 330 (1995). The State then appealed to the then-named Court of Appeals of Maryland, who reversed the lower court. *State v. Gray*, 344 Md. 417, 434 (1997). The Court held that the omitted references in the confession could have been to numerous individuals beyond Grey and therefore the instructions telling the jury not to use the confession as evidence against Gray was a sufficient remedy. *Id.* at 433–34.

about the reference." *Id.* at 193. Maryland courts have since applied this standard where references to a defendant are clear despite attempted redactions. *See, e.g.*, *Butler v. State*, 231 Md. App. 533, 554 (2017) (finding a *Bruton* violation when a detective's testimony made it clear that a redacted phone conversation still involved the defendant).

The Court in *Gray* also provided further clarity in interpreting *Richardson*. The category of statements *Gray* found inadmissible are those statements that, "despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Gray*, 523 U.S. at 196. It found that "*Richardson* must depend in significant part upon the *kind* of, not the simple *fact* of, inference. *Richardson*'s inferences involved statements that did not refer directly to the defendant himself and which became incriminating 'only when linked with evidence introduced later at trial.'"[8] *Id.* (quoting *Richardson*, 481 U.S. at 208) (emphasis in original). The issue of inference is related to the identity of the defendant, not inferring culpability of the charged crime. *See id.* at 195 ("*Richardson* placed outside the scope of *Bruton*'s rule those statements that incriminate inferentially").

The United States Supreme Court recently clarified this standard further in *Samia v. United States*, 599 U.S. 635 (2023). The case involved defendant Samia who, along with two other individuals, was charged related to a murder-for-hire scheme against a real estate

[8] The Court gave examples such as nicknames and unique identifiers as the kinds of material that require inferences to identify the defendant but still fall under *Bruton*. *Gray*, 523 U.S. at 195.

agent on the orders of a crime lord in the Philippines. *Id.* at 640. One of Samia's accomplices became a cooperative witness and gave a confession, claiming he was only the driver of the van where the murder occurred and that Samia had actually shot the victim. *Id.* at 640–41. The third defendant arranged but was not present for the shooting. *Id.* During the joint trial of all three defendants, a DEA agent testified about the co-defendant's confession that implicated Samia:

> [Question]. Did [the confessing co-defendant] say where [the victim] was when she was killed?
>
> [Answer]. Yes, He described a time when the *other person* he was with pulled the trigger on that woman in a van that he and [the confessing co-defendant] was driving.

Id. at 641–42. (emphasis in original). The trial court instructed the jury that this testimony was admissible only against the confessing co-defendant and should not be used against Samia or the third co-defendant. *Id.* at 642. Samia appealed, arguing that despite the limiting instruction that the testimony could only be used against his co-defendant, the statement, combined with other evidence presented at trial that connected the confessing co-defendant and Samia, made it obvious that Samia was the other person. *Id.*

The Court held that *Bruton* and its progeny are narrow exceptions to instances where jury instruction is insufficient to cure an obvious and directly accusatory statement by the co-defendant. *Id.* at 647, 651. In doing so, they also clarified that the focus of *Bruton* is to prevent only the introduction of confessions that *directly* implicate the other defendant. *Id.* at 648 ("[T]he Court's precedents distinguish between confessions that directly implicate a defendant and those that do so indirectly."). Regarding the defendant Samia, the Court

highlighted the need for the efficiency offered by joint trials and held that the use of "other persons" in the testimony was proper. *Id*. at 653–55. The Court found the redacted testimony entered into evidence was an appropriate balance to avoid the use of the defendant's name while also ensuring that the testimony accurately represented that the co-defendant was not alone in the vehicle. *Id*.

II. *Crawford* after *Samia*

Whether or not a statement falls within the scope of *Bruton*, Appellant argues, there is a separate issue of whether the statement is testimonial and falls within the Confrontation Clause under *Crawford v. Washington,* 541 U.S. 36 (2004). Appellant relies on *State v. Payne*, which cited cases from multiple Federal circuits that asserted that *Bruton* does not apply to nontestimonial hearsay statements, since there is no application of the Confrontation Clause. 440 Md. 680, 717 (2014) (collecting cases). However, in *Samia*, the Court clarified that *Crawford's* applicability is narrow.

Quoting *Crawford*, the Court in *Samia* stated the Confrontation Clause "applies only to witnesses against the accused." *Samia*, 599 U.S. at 644 (quoting *Crawford,* 541 U.S. at 50 (internal quotes omitted). They continue that "[o]rdinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a co-defendant." *Id.* (quoting *Richardson*, 541 U.S. at 206). The court continued that "[t]his general rule is consistent with the text of the [Confrontation] Clause, historical practice, and the law's reliance on limiting instructions in other contexts." *Id.* Testimony of a co-defendant is not considered against the defendant if a limiting instruction to that effect is provided, such as in the

present case. As a result of that limiting instruction, *Bruton* and its progeny are the primary sources for analyzing this case.[9]

III. Whether the Interview Directly Implicated Appellant

The present case is not directly analogous to the precedent of the United States Supreme Court or Maryland. Rather, it combines the transparent censoring of *Gray* and the indirect accusation of *Richardson.* At no point in the segments of Malik's Interview presented to the jury did he place a weapon in Appellant's hand, Appellant explicitly in or at Washington's car at the time of the shooting, or directly accuse him of being the shooter.[10] Had the Interview accused Appellant in that manner, those statements would likely be inadmissible under *Bruton* and *Gray* and would not be presented to the jury.

We agree with Appellant that although the statement was redacted to remove Appellant's name, a reasonable member of the jury could conclude the redaction was Appellant's name. There was an obvious blank left in the video that resembles the confession in *Gray*. *Gray*, 523 U.S. at 195. This kind of obvious deletion would "encourag[e] the jury to speculate about the reference." *Id.* at 193. The Defendants were the only two individuals on trial for the alleged crime, the statement was regarding actions

[9] Additionally, under *Crawford*'s framework, the testimony at issue here was testimonial. As the Supreme Court wrote in *Crawford*, "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." 541 U.S. at 52; *see also Samia*, 599 U.S. at 644 (citing same). Here, Malik's statements were from a formalized police interview and would therefore be testimonial and fall under the Confrontation Clause, though as we explained above, the Confrontation Clause does not apply when the testimony is only to be considered against that co-defendant.

[10] Although Malik does allege in his Interview that Appellant was the shooter, that portion of the Interview was not presented to the jury.

taken shortly before the shooting, and references to a different person named Keon were brief and discredited later in the Interview. Complete removal of that portion of the Interview would have been needed to prevent a reasonable person from inferring the other person was Appellant. However, such a redaction was not needed in this instance because even if a statement implicates another defendant, the implication still needs to be direct.

Bruton and its progeny require a statement to "directly implicate" the co-defendant for it to be uncurable by a jury instruction. *Samia*, 599 U.S. at 648. Other Federal courts have interpreted the phrase "directly implicating" as requiring statements that alone show criminal conduct. *See United States v. Joyner,* 899 F.3d 1199, 1207 (11th Cir. 2018) (stating that for *Bruton* to apply, the statement "must be clearly inculpatory standing alone") (citation omitted); *see also United States v. Angwin*, 271 F.3d 786, 796 (9th Cir. 2001), *overruled on other grounds by United States v. Lopez*, 484 F.3d 1186 (9th Cir. 2007) (defining a *Bruton* violation as when the statement from a non-testifying co-defendant "facially, expressly, clearly, or powerfully implicates the defendant"). It is not enough for the statement to identify the defendant, "it must also have a sufficiently devastating or powerful incriminating impact to be incriminatory on its face." *Angwin*, 271 F.3d at 796 (citation and internal quotations removed).

Under this requirement, the testimony from the Interview did not "directly implicate" Appellant because it was not clearly incriminating Appellant on its own. Malik's statements only place Appellant as walking towards the crime scene with Malik approximately twenty minutes prior to the shooting. The statement to Detective Schrott was that "I was going to go meet him. And when I went to go meet him . . . it was just me

and [redacted audio] just walking." The surveillance camera footage and Detective Schrott's later testimony corroborated Malik's statement for the jury. After this statement, Malik described how he returned home to send the electronic payment and only when he was coming back minutes later did he claim to have heard a gunshot. As a result, this statement was the kind that "bec[a]me incriminating only when linked with evidence introduced later at trial." *Samia*, 599 U.S. at 653 (quoting *Gray*, 523 U.S. at 194).

In the *United States v. Joyner* case cited above, there was a joint trial for Joyner, Sturgis, and a third co-defendant for allegations of robbing several drugstores. 899 F.3d at 1202. At trial, the State introduced testimony from Sturgis about the night of their arrest, with statements that "they had left the apartment," "went to go see his son for a little while," and "then they drove to the CVS in Marietta . . . " but not statements about a stop at a different CVS that led to the police's suspicions of the group. *Id.* at 1206. Joyner had argued that these statements about their movements were "a link in the chain of evidence" and therefore implicated Joyner by showing he was with Sturgis. *Id.* at 1206–07. The United States Court of Appeals for the Eleventh Circuit disagreed and said that the statements were not "clearly inculpatory standing alone." *Id.* at 1207. The "link in the chain" argument was the kind of statement that did not pose a *Bruton* problem. *Id.* Instead, the statement describing their movements was a "facially innocent account" of their whereabouts leading up to the arrest. *Id.* Similarly here, the description of "just walking" with someone leading up to the events at issue did not directly implicate Appellant, but was instead a "facially innocent account" of their whereabouts. The statement required inferences to implicate Appellant in any manner.

Despite this, Appellant highlighted how the nature of felony murder and accomplice liability in the current case alters how incriminating any evidence of association would be. He argues that the exchange in the Interview makes it clear that whoever was walking with Malik was doing so to purchase drugs from the victim, and that connection supports the inference that Appellant was involved in the charged crimes. However, Appellant's argument shows that in order to directly implicate Appellant, there was a required inference. This inference distinguishes the case from *Bruton* and shows how the statements presented to the jury alone are not directly incriminating.

The statements also do not directly incriminate Appellant as an accomplice. The jury instruction properly summarized accomplice liability:

> [T]he State must prove that the crime occurred and that the Defendant, with the intent to make the crime happen, knowingly aided, counseled, commanded, or encouraged the commission of the crime or communicated to a participant in the crime that he was ready, willing and able to lend support if needed.

See Sweeney v. State, 242 Md. App. 160, 174 (2019) (quoting similar jury instructions on accomplice liability, which the court said, "stated the law of accomplice liability properly" in the context of a second-degree burglary or theft charge). Malik's statements do not demonstrate any conduct or conversations showing that either of the Defendants "aided, counseled, commanded, or encouraged the commission" of the alleged crimes or were ready to provide support. Concluding from the statements that Appellant was involved in the charged crimes or discussed involvement requires inference. The Supreme Court has been clear that when such an inference is required, the danger under the Confrontation Clause is properly cured by the jury's instruction.

In the present case, the statements presented by Malik cannot be interpreted as directly implicating Appellant. Even if the members of the jury had made the inference that the redacted name was Appellant's name, the statements alone do not describe criminal conduct. Further, the jury was required to follow the direction of the judge not to consider that evidence as against Appellant, and since the statement was not directly implicating Appellant, it does not fall under *Bruton*. In this instance, the jury instruction was appropriate and sufficient.

CONCLUSION

Accordingly, we hold that the trial court did not err in allowing the introduction of the redacted Interview to the jury. The presented statements did not include any statements that directly implicated Appellant in the charged crimes. Any portions of the statements that could have been interpreted as referencing Appellant were properly cured by the trial court's jury instruction as permitted by the Sixth Amendment's Confrontation Clause.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.