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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 96

BRANDON WILLIAMS,

Appellant.

20 Eagle Street
Albany, New York
October 16, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v. Williams.

3 MR. BERKO: Good afternoon, Your Honors. May it
4 please the court. My name is Steven Berko, and I represent
5 Appellant, Brandon Williams, on behalf of the Legal Aid
6 Society. With the court's permission, I'd like to reserve
7 five minutes of my time for rebuttal.

8 CHIEF JUDGE WILSON: Yes, sir.

9 MR. BERKO: Your Honors, the Appellate Division's
10 affirmance of Mr. Williams' convictions, despite a finding
11 of a clear Bruton violation, raises two straightforward
12 questions for this court to resolve. One, was Mr.
13 Williams' fundamental right to a fair trial prejudiced by
14 the Bruton violation; and two, should traditional, harmless
15 error analysis even apply?

16 JUDGE CANNATARO: What was the Bruton violation
17 that occurred?

18 MR. BERKO: The Bruton violation was his co-
19 defendants' identification of my client as the bouncer of
20 the nightclub and describing a familial relationship with
21 him. As the Appellate Division found, that supplied
22 motive.

23 JUDGE CANNATARO: Is - - - is motive an element
24 of any of the crimes charged in this indictment?

25 MR. BERKO: Well, Your Honor, motive isn't per se

1 an element. But as this court held in *People v. Fitzgerald*
2 back in 1898, the investigation of all charges of a crime -
3 - - in the investigation of all charges of a crime, it is
4 competent to prove motive on the part of the accused for
5 the commission of the criminal act.

6 In this case, motive was essentially the glue
7 that held the prosecution's case against my client
8 together. Without it, the jury wouldn't have known who was
9 the bouncer. It would be hard to understand. It would
10 raise a reasonable doubt in the juror's mind why a bouncer
11 would go out and vindicate the robbery of, say, some random
12 patron of the nightclub. Why he would be so motivated to
13 do that, as opposed to he himself was robbed, and it was
14 the nightclub owned by his cousin.

15 JUDGE SINGAS: Well, in the statement, does it
16 say that the bouncer got robbed?

17 MR. BERKO: What it says, Your Honor - - - the -
18 - - the - - - excuse me, Your Honor.

19 JUDGE SINGAS: It's okay.

20 CHIEF JUDGE WILSON: Something like he violated
21 my peeps.

22 MR. BERKO: Yes, exactly. He said he violated my
23 peoples, my cousin, where I lay my head down at night. He
24 acknowledged - - - he acknowledged to the interrogating
25 detective to the question of, are you saying was it the

1 keeper of the gate who was robbed, the one who takes money?
2 The answer to that was, yes - - - who - - - not yes. Who
3 else?

4 JUDGE SINGAS: Right. But I think he took great
5 pains not to say anything, if I'm - - - the way I read the
6 statement. I don't know if there's another way to read it.
7 He doesn't give the defendant's name, correct? He doesn't
8 say there was even a second shooter. He doesn't say that
9 the defendant was his bouncer. And I don't think he says
10 that the bouncer got robbed. So I - - - I - - - I think
11 that we're way outside the scope of Bruton, either under
12 the Constitution or under our State Constitution. Why - -
13 - why am I wrong about that?

14 MR. BERKO: Well - - - well, Your Honor, what I
15 would first do is what I - - - what - - - the way I would
16 first respond to that is to cite this court to its own
17 standard of how to determine whether a Bruton error
18 occurred. This court says in Cedenó, and the Appellate
19 Division here adopted that standard. The Bruton rule
20 applies to statements that obviously directly refer to
21 someone, often, obviously the defendant, and which involve
22 inferences that a jury can make immediately, even if the
23 confession were the very first item introduced at trial.
24 It - - -

25 JUDGE CANNATARO: But doesn't Cedenó also require

1 a facially incriminating statement?

2 MR. BERKO: Well, Your Honor, there is no way - -
3 - there is no other way to interpret the answer, who else,
4 other than, yes, he was a bouncer, and I would - - - I
5 would draw this court's - - -

6 JUDGE RIVERA: Wait. Can we revisit the Bruton
7 violation?

8 MR. BERKO: Excuse me, Your Honor.

9 JUDGE RIVERA: Can we revisit that determination
10 by the AD that there was a Bruton violation? I thought
11 your point was that what's before us is - - - is what are
12 the consequences of the violation?

13 MR. BERKO: That is my point. I mean, we did
14 offer argumentation that People against LaFontaine bars
15 this court from addressing that question on grounds that it
16 - - - a nonappealing party is seeking affirmative relief.
17 But I will answer - - - of course, answer any of the
18 questions because the questions as it relates - - -

19 JUDGE RIVERA: But just to be clear, that's your
20 first position?

21 MR. BERKO: That is my first.

22 JUDGE RIVERA: But if the court disagrees with
23 you - - -

24 MR. BERKO: Right. And - - -

25 JUDGE RIVERA: - - - you're arguing that there



1 was a Bruton violation?

2 MR. BERKO: - - - and - - - and I think it's very
3 important to consider whether there was a violation or not.
4 Well, put it this way, I think it's important to understand
5 the incriminating effect of the violation.

6 JUDGE GARCIA: Doesn't it go to harmless error as
7 well? I mean, put aside LaFontaine for a second. If it
8 really isn't much of a Bruton violation, wouldn't that go
9 to whether or not it's harmless?

10 MR. BERKO: Well, Your Honor I wouldn't agree
11 with that characterization of - - -

12 JUDGE GARCIA: What would be different in
13 harmless error - - -

14 MR. BERKO: - - - the level of incrimination
15 here.

16 JUDGE GARCIA: I mean, if he had said he had the
17 - - - the guy was with me and we shot him and he gives the
18 name, then you'd have a much different harmless error
19 analysis, wouldn't you?

20 MR. BERKO: In effect, he did that. I mean, this
21 Court - - -

22 JUDGE GARCIA: Make a few inferences. And I
23 mean, I - - - you were citing our case. We could agree or
24 dis - - -

25 MR. BERKO: But these are not - - -



1 JUDGE GARCIA: I'm sorry. We could agree or
2 disagree on - - - on what that case says, but clearly you
3 have to make a few inferences, right?

4 MR. BERKO: I would think that where my client
5 was sitting with only one other defendant at counsel table,
6 and the prosecutor opened on summation - - - on opening
7 statements, said that you will hear the victim robbed one
8 of his people - - - peoples. So instead of calling the
9 police, these two defendants decided that Donald Reed had
10 to die, and they meted out their own version of street
11 justice. That essentially meets the standard - - -

12 JUDGE GARCIA: That seems to me to indicate that
13 the peoples is not one of those two, the way that's
14 phrased.

15 MR. BERKO: Well, the way that's - - - but the
16 logic of it is - - - when - - - when you consider the
17 answer to the question - - - to the interrogating
18 detective's question of was it - - - was it the bouncer?
19 Well, who else? The logic of it is - - -

20 CHIEF JUDGE WILSON: I thought you were going to
21 read from the - - -

22 MR. BERKO: - - - of - - - of course. It was.

23 CHIEF JUDGE WILSON: - - - I thought you were
24 going to read from the summation, actually, where - - - I
25 don't have it in front of me - - - but the prosecutor, I

1 think, said something to the effect of, you know, the
2 reason that he didn't tell you the name is because this is
3 his cousin.

4 MR. BERKO: Right. And in fact, I'll read it for
5 you - - -

6 CHIEF JUDGE WILSON: And that's the only
7 inference you can draw from the fact that - - -

8 MR. BERKO: - - - I'll - - - I'll read it for the
9 court.

10 CHIEF JUDGE WILSON: That seemed a little
11 stronger.

12 MR. BERKO: On - - - on summation, the prosecutor
13 reinforced that as soon as confession referred to the
14 defendant, stating that a Osouna admitted that his cousin
15 was a person who worked the door that night, and that
16 Osouna made the decision to grab the sidekick bouncer who
17 told him he got robbed, and they went out together, and
18 they set upon tactically this victim by running and
19 shooting before a word was said.

20 There - - - it would make - - - actually, it
21 would introduce a serious doubt that a bouncer would - - -
22 having - - - would go out and shoot someone having learned
23 that some random patron of the club got robbed. I mean,
24 most rational people, even working as a bouncer in that
25 situation, would say, can I get you a beer? Here's my

1 phone, call 911. Not, I'm going to go out and kill the guy
2 who did that to you. I mean, that - - - that itself is
3 something that really made the People's case.

4 JUDGE SINGAS: But aren't you really asking for a
5 rule if there's an alleged crime with several defendants,
6 and a few of them are on trial, and one defendant makes a
7 statement, that you're automatically assuming that the
8 other people at the table are the people that are referred
9 to in the statement, without reference specifically to that
10 person, or without any strong inferences that it's that
11 person? I don't see how, if we adopt what you're saying,
12 there could ever be an introduction of a co-defendant's
13 statement with more than one person sitting at the table.

14 MR. BERKO: Well, Your Honor, I mean that really
15 - - - that's a question this court has decided in cases of
16 interlocking confessions. And I'm relying on this court's
17 precedent in both Ceden and Wheeler. In Wheeler, there
18 were only two people sitting at the table. Wheeler can be
19 found at 62 N.Y.2d at 867. There were only two people
20 sitting at the table. And that was a factor that this
21 court considered in - - - in determining whether the
22 statement was incriminating of - - - of the defendant - - -

23 JUDGE SINGAS: Right. In addition to the
24 specificity of that statement. And so now, are you arguing
25 under the State Constitution, or are you still arguing

1 under Bruton? Because if you're arguing under Bruton, how
2 do you reconcile the Supreme Court's decision in Samia?

3 MR. BERKO: Well, in the first instance - - -
4 your question has two parts, Your Honor.

5 JUDGE SINGAS: Yeah.

6 MR. BERKO: Of course, I - - - I'd like to - - -
7 I'd like to ask this court to base its ruling under the
8 State Constitution. Samia, I think is a case that augurs -
9 - - that it - - - that supports us. Samia had to do with
10 the adequacy of a placeholder instead of a co-defendant's
11 name. But Samia specifically said if there's no redaction
12 and no instruction, then there is a Bruton violation. I
13 mean, the logical corollary to Samia, where there was
14 redaction and was instruction, is that in a case like this
15 where neither of those things have taken place, then there
16 is a Bruton violation.

17 JUDGE GARCIA: Would this have been a violation
18 if the statement came in as is and the instruction was
19 given?

20 MR. BERKO: Well, Your Honor, that - - - assuming
21 - - - assuming the statement can be characterized as - - -

22 JUDGE GARCIA: Came in as is - - - as it came in,
23 but there was an instruction given, Bruton - - -

24 MR. BERKO: Well, but then you wouldn't have a
25 complete violation of the Sixth Amendment. I mean, Your

1 Honor, you know, with all due respect, that sort of if my -
2 - - that's a hypothetical along the lines of if my
3 grandmother had wheels, would she be a trolley car?

4 JUDGE GARCIA: Because I'm going to ask you
5 another trolley car question, perhaps. So if that's the
6 case, what's the effect of not asking for the instruction?

7 MR. BERKO: Well, Your Honor, there was no - - -
8 there was no necessity for counsel to ask for an
9 instruction here. This case has been completely preserved
10 by counsel's motion to sever.

11 JUDGE GARCIA: And then you never have to ask for
12 an instruction when you lose that motion. That's a
13 standing request for the charge.

14 MR. BERKO: I wouldn't characterize it like that.
15 I - - - the way I would characterize it is in just the same
16 way that the onus is upon the prosecutor to have asked for
17 a redaction in the Bruton context, it's also - - - the onus
18 is upon them. They're seeking the evidence to be admitted
19 to ask for the instruction.

20 JUDGE GARCIA: Do you think there might be a
21 reason why you don't want that instruction?

22 MR. BERKO: That - - - that really has nothing to
23 do with whether they are allowed to admit this evidence in
24 its form without an instruction - - -

25 JUDGE GARCIA: So you think once you get this

1 ruling, the judge has to give the Bruton instruction unless
2 otherwise directed?

3 MR. BERKO: Well, Your Honor, the ruling properly
4 should have been this evidence should have been excluded
5 entirely. And that's another reason - - -

6 JUDGE GARCIA: But - - - I'm sorry. We're
7 merging things here. So once you got this ruling, what's
8 the effect on the charge? So the - - - then you have to
9 give the charge unless the defendant objects to the charge?

10 MR. BERKO: I - - - the way I would contextualize
11 it is this, Your Honor, just to go back for a minute to
12 your question about whether counsel had an obligation to
13 ask for the instruction. Counsel's position was the
14 evidence should be excluded entirely because it was
15 directly incriminating.

16 JUDGE GARCIA: Understood.

17 MR. BERKO: If - - - if you put the burden on
18 counsel to ask for an instruction, you're - - -

19 JUDGE GARCIA: So I'm asking what would the rule
20 be then? So the burden isn't on counsel to ask for the
21 instruction. So the default is error not to give the
22 instruction if you've admitted the statement. That's the
23 rule you'd like us to say.

24 MR. BERKO: Well, the rule is there's an error
25 not to give an instruction - - - directly incriminating

1 evidence can't come in ever under Bruton. But if it's
2 indirectly incriminating, then yes. If there's no
3 instruction, there's error. I mean, this - - - this court
4 has said as much - - -

5 JUDGE RIVERA: What if defense - - - what if
6 defense counsel said I don't want the charge?

7 MR. BERKO: Well, then there would be - - - I - -
8 - I suppose it would be a waiver, but that wasn't the case.
9 I'd like to draw this court's attention to its own decision
10 in People against Adams, 21 N.Y.2d at - - -

11 JUDGE RIVERA: I'm sorry. You have a red light.
12 You want to take thirty seconds just to address the
13 harmless error. I - - - I'd like to hear your view as to
14 why it's not harmless, given the witness identification.

15 MR. BERKO: Why - - - why - - -

16 JUDGE RIVERA: Why it's not harmless - - -

17 MR. BERKO: Well - - -

18 JUDGE RIVERA: Right. Your position is it's not
19 harmless error, and I'm asking you, given the witness ID,
20 why is it not harmless?

21 MR. BERKO: As I said before, it was the glue
22 that held the prosecution's case together against
23 appellant. Osouna, implicated appellant by identifying him
24 as the bouncer, described a familial relationship with
25 appellant. The prosecutor used the - - - that

1 identification - - -

2 JUDGE RIVERA: Okay.

3 MR. BERKO: - - - to bolster the testimony of the
4 witnesses. The - - - this court - - - in engaging its
5 harmless error analysis, I would ask this court to be
6 mindful of its recent decision in People against Mosley,
7 where this court found that non-lay eyewitness testimony
8 should be excluded because it - - - it's - - - it's of
9 dubious quality, and it may usurp the fact finding
10 functions of the jury.

11 JUDGE RIVERA: But what if all they're doing is
12 being shown a video of someone they know and have observed
13 recently, but also many times in the past and say, yeah,
14 that's them.

15 MR. BERKO: Well, I mean, that - - - for - - -
16 for that to happen under Mosley, there had to be a prior
17 ruling by a trial court - - - by the trial judge - - - a
18 prior ruling of voir dire outside the hearing of the jury
19 as to the nature of the familiarity of the eyewitnesses
20 with the defendant. That didn't happen here.

21 And I would respectfully submit that this is a
22 court of law. And as a court of law, this court is unable
23 to make a finding of fact that the trial court simply
24 didn't do. And so I would ask this court to exclude the
25 eyewitness testimony from its harmless error analysis, in

1 the event that you - - - you don't take - - - you - - - you
2 don't choose to take a per se ruling.

3 But I would also ask the court to consider its
4 own decision in People against Adams, a case that we
5 submitted to the court on our main brief. That's at 21
6 N.Y.2d at 397. In that case, exactly like this, there was
7 a co-defendant's incriminating confession. The prosecutor
8 made use of it on summation, and there was an instruction,
9 but this court held it to be per se error. There is a long
10 history in this court - - -

11 JUDGE GARCIA: Is there an objection - - - I'm
12 sorry - - - was there an objection to the prosecutor's
13 statements?

14 MR. BERKO: I don't - - - I don't - - - I don't
15 believe so - - - I can.

16 JUDGE GARCIA: That's okay. I just - - - it's
17 okay.

18 CHIEF JUDGE WILSON: Thank you.

19 MR. BERKO: Thank you, Your Honors.

20 MR. BLIRA-KOESSLER: Good afternoon, Your Honor.
21 It's Chris Blira-Koessler for the office of Melinda Katz,
22 the Queens County DA, for respondent. Just to address - -
23 -

24 JUDGE TROUTMAN: Whose responsibility - - - once
25 the court says you can have the statement, was the onus on

1 the prosecution or the defense to request a limiting
2 instruction?

3 MR. BLIRA-KOESSLER: Well, I think the onus would
4 be on the defense because normally if you want an
5 instruction, you have to ask for it. I think the ideal
6 situation would be - - -

7 JUDGE TROUTMAN: Why would it not be on the
8 People since they were asking for the use of that
9 statement?

10 MR. BLIRA-KOESSLER: Well, I mean, the statement
11 on its face wasn't incriminatory at all. And all the
12 arguments that we made during summation were mainly based
13 on the trial evidence that showed - - - from - - - from the
14 witnesses and the video which showed that this defendant
15 was involved in the crime.

16 Now, when we got to the part of Mr. Osouna's
17 self-defense claim, that's when we started arguing about
18 motive, because that undermined his self-defense claim. So
19 we were primarily using it in that respect.

20 JUDGE TROUTMAN: If the limiting instruction had
21 been given in this instance, would that have cured - - - if
22 - - - if there was a violation, would that have cured
23 everything?

24 MR. BLIRA-KOESSLER: I - - - I mean, I would have
25 to say - - - I'd like to say yes or no to that, but I would

1 have to say that there was nothing to cure. There - - -
2 there was no direct incrimination, either directly or
3 inferentially, so what - - -

4 JUDGE TROUTMAN: Let's assume it - - - it is
5 viewed that it was incriminating. Would the limiting
6 instruction fix it?

7 MR. BLIRA-KOESSLER: Well, I mean, if it's
8 directly incriminating, Bruton says that that's beyond the
9 power of a limiting instruction to fix. Right. So - - -

10 CHIEF JUDGE WILSON: So - - - so in one of these
11 cases where you have a document, let's say, and it's got a
12 name, you know, redacted a couple times, there's a bunch of
13 cases like that. Right. If in that case, a prosecutor in
14 summation argued, you know, the reason that you see these
15 redactions here is because it names the co-defendant.

16 MR. BLIRA-KOESSLER: Well, the - - -

17 CHIEF JUDGE WILSON: Is that a problem?

18 MR. BLIRA-KOESSLER: In cases like Cedeno and
19 Wheeler, this court determined that that was a problem, but
20 here that's not what we have - - -

21 CHIEF JUDGE WILSON: But I don't - - -

22 MR. BLIRA-KOESSLER: - - - because we don't have
23 the naming or the redaction of anybody's name.

24 CHIEF JUDGE WILSON: Well, you sort of do,
25 because what the prosecutor argued in summation is that's

1 why he didn't want to name the person he was with. He
2 didn't want to tell on his cousin. He said, oh, I gave you
3 enough. I talked about me. I'm not telling you about
4 anybody else. But he admitted that his cousin was the
5 person who worked the door that night. So the - - - the
6 prosecutor seems to me to be using the omission in the
7 statement to argue the reason that he didn't tell you the
8 name is because it's his co-defendant, the same way you
9 might have said, the reason that this document has a name
10 redacted from it is because it's the name of the co-
11 defendant.

12 MR. BLIRA-KOESSLER: I - - - I think this
13 argument needs to be viewed in a different light, because
14 the prosecutor, throughout her summation, emphasized the
15 close relationship between Mr. Osouna and Mr. Williams in
16 order to show that they acted in concert. That close
17 relationship was established by the trial evidence not
18 subject to a Bruton analysis. So over here, I mean, she's
19 literally saying that he didn't name an accomplice, but
20 this is more in the context of they were acting together.
21 They shared a close relationship, not so much to create a
22 Bruton violation or say, yeah, he named somebody. She's
23 literally saying that he did not name anybody.

24 CHIEF JUDGE WILSON: And the reason that he
25 didn't name somebody as the person who was the other person

1 with him is because it was his cousin. That's what she - -
2 - she's using the omission to argue the identity directly.

3 MR. BLIRA-KOESSLER: Well, she - - - it - - -
4 it's not really like she's - - - I - - - I'd still say it's
5 not like she's filling in a blank so as to undo an
6 instruction or to undo a redaction or a blank space. I
7 think when you read this in context, both here and
8 throughout the entire summation, this argument goes more to
9 the close relationship they shared and how that shows the
10 actual concert - - -

11 JUDGE CANNATARO: Can you have a Bruton violation
12 through a comment by counsel, be it proper or improper,
13 during summation?

14 MR. BLIRA-KOESSLER: Well, usually that's when a
15 prosecutor, as - - - as we were discussing, can either
16 undermines an instruction or undoes a redaction or undoes
17 any san - - - a - - - a sanitized statement and says, yeah,
18 that blank that's - - - that's him. This - - -

19 JUDGE RIVERA: Do - - - do we have a LaFontaine
20 issue here? Can we actually revisit this question of
21 whether or not there was a Bruton violation?

22 MR. BLIRA-KOESSLER: Well, yeah, because I think
23 this case is in the same procedural posture as People v.
24 Golo. And Golo, we got a favorable ruling from the trial
25 court that something wasn't an exclusion offense under the

1 DLRA. The Appellate Division reached that issue and said,
2 no, it was not an exclusion offense. And this court
3 reached the issue and said - - - and agreed with the
4 Appellate Division. And here we're respondents - - - and
5 both in Golo and here, we're respondents, so I don't think
6 there's any procedural bar to this court considering the
7 issue when, and just as a practical matter, they're asking
8 - - - their - - - one of their main claims, besides their
9 claim that this is a directly inculpatory statement, is
10 that you need an instruction before you proceed to harmless
11 error, but you also need error before you proceed to
12 harmless error. So it'd be kind of strange to not address
13 the issue on the merits first to the side of this error
14 before you proceed to harmless error.

15 JUDGE RIVERA: Well, not - - - well, sometimes
16 we'll say - - - assuming without deciding there's an error.

17 MR. BLIRA-KOESSLER: Right? I mean - - - right.

18 JUDGE RIVERA: So why - - - why is it not
19 harmless?

20 MR. BLIRA-KOESSLER: Why - - - why is it not harm
21 - - -

22 JUDGE RIVERA: Assuming there's an error, why is
23 it not harmless?

24 MR. BLIRA-KOESSLER: Well, I mean, there's - - -
25 there - - - I mean, first of all, there's no case that says

1 you need an instruction before you proceed to harmless
2 error review. Second of all, this court, as in Ceden, can
3 consider the lack of an instruction in performing harmless
4 error review. Third, given the eyewitness testimony and
5 the video, that provided overwhelming evidence of guilt.

6 Counsel mentioned Mosley. Mosley and this case
7 have entirely different facts, because in Mosley you had a
8 detective who didn't even see the perpetrator on the night
9 of the crime, saw him seven months later for maybe one day
10 inside a precinct, never saw him outside on the street.
11 There was no change in appearance. There was really no
12 need to have that lay testimony here.

13 Here you have two people who were very familiar
14 with this defendant, both on the night of the shooting,
15 many prior occasions. He was wearing a hood at the time of
16 the shooting; whereas, he was not wearing the sweatshirt at
17 the time that they saw him. He grew his hair out. At
18 least that was the argument made at trial, that he grew his
19 hair out between the time of the crime and the time of
20 arrest. So all these factors combined show why this - - -
21 the - - - the admission of this statement, at least as to
22 Mr. Williams, did not create error.

23 I mean, it didn't create any error. It's not
24 incriminating on its face, mentions no defendant. It
25 doesn't mention an accomplice. It doesn't even mention who

1 the bouncer is. There's no explicit statement that the
2 bouncer had motive. There's - - - there's not even a - - -
3 an explicit statement that the bouncer himself was robbed.
4 Because all Mr. Osouna says is, well, there were two or
5 three people in the hallway. One of them - - - you know,
6 one of them got robbed. I wasn't there. I didn't see it.
7 And then when he's pressed on it, he says, well, who else -
8 - - yeah, I would think so. And then ends - - - ends with
9 saying, but I really wasn't there. So he's not even saying
10 that the bouncer was robbed. He's not even saying that
11 this happened to the bouncer.

12 What's also significant is what he says at the
13 beginning of his statement. He says, in general, my house
14 was violated and my people were violated. Right. That can
15 be used to craft a motive argument. And that's not subject
16 to Bruton because he's not talking about anybody. At one
17 point, he's talking about his house. You know, Bruton
18 doesn't apply to an inanimate object. So that's - - -

19 JUDGE SINGAS: I'm going back to what Judge
20 Cannataro, I think, might be getting at, and he can correct
21 me if I'm wrong. Wouldn't this prosecutor's comments on
22 summation go more towards a prosecutorial misconduct claim,
23 rather than being the genesis of a Bruton issue? Like for
24 Bruton, are we specifically looking at a statement? Do you
25 understand what I'm saying? Like if - - -

1 MR. BLIRA-KOESSLER: Yeah. Yeah. Sort of.
2 Yeah. I mean - - -

3 JUDGE SINGAS: - - - if the prosecutor raised an
4 issue - - -

5 MR. BLIRA-KOESSLER: Right.

6 JUDGE SINGAS: - - - at summation, I think it's a
7 prosecutorial misconduct issue.

8 MR. BLIRA-KOESSLER: I mean, she's commenting on
9 something in evidence and fairly so, so I don't - - -

10 JUDGE SINGAS: I - - - I'm not suggesting it is
11 or it isn't - - -

12 MR. BLIRA-KOESSLER: Right.

13 JUDGE SINGAS: - - - but I'm just saying in terms
14 of can we use that - - - like, is that a separate silo,
15 Bruton here, misconduct here, or can the two intertwine?

16 MR. BLIRA-KOESSLER: I mean, I think sometimes
17 they intertwine, again, if the prosecutor says something
18 that runs counter to the limiting instruction, if the
19 prosecutor says something that adds something into the
20 spaces - - - you know, redactions or blank spaces inside a
21 statement. I don't think that's what the prosecutor did
22 here. In fact, that's not what the prosecutor did here.
23 Her main thrust of her argument, again, was look at the
24 trial evidence that's not subject to Bruton. That's why
25 these two are guilty. Her main use of the statement was to

1 show that Mr. Osouna had motive. He went - - -

2 JUDGE HALLIGAN: So you're - - - go ahead.

3 Sorry.

4 MR. BLIRA-KOESSLER: No. No. Go ahead. Sorry.

5 JUDGE HALLIGAN: So your comment about the
6 redactions suggests to me, you think, that the prosecutor,
7 in summation, can make something incriminating even to - -
8 - to fill in a few - - - a few gaps, if you will, for
9 purposes of Bruton that might not be if it was standing
10 alone absent the summation, that it can - - - it can tie
11 those pieces together; is that right?

12 MR. BLIRA-KOESSLER: I mean, some cases have
13 mentioned the prosecutor's remarks - - -

14 JUDGE HALLIGAN: I know you're saying not here,
15 but - - - but you think that's - - - that's relevant.

16 MR. BLIRA-KOESSLER: That - - - I mean, some - -
17 - some cases have - - - have relied upon that. I don't
18 know how totally relevant it is because the prosecutor's
19 comments are not evidence. They have the statement. And
20 you know, here, the prosecutor was mainly relying on the
21 relationship to show motive. And - - - and - - - and I
22 think that's fairly significant because without that
23 relationship, you really can't show motive. If you take
24 out everything about the robbery from the statement, you
25 can still make the argument that, well, that's his friend,

1 his buddy, his sidekick, his cousin, his bouncer, so he
2 went along for the ride, regardless of the reason. She
3 even said during her summation, it doesn't matter whether
4 this robbery actually took place. So it's not so much the
5 robbery or the violation here. It's the relationship.
6 That's what the motive argument is based on. That's not
7 subject to Bruton. That came out in the trial evidence
8 from the testimony of the witnesses who testified at trial.
9 Now, I mean, if you just have the violation and no evidence
10 of the relationship, how - - - how are you going to craft
11 the motive argument then? Then there's no - - - no
12 connection. But without it, you can still craft that
13 argument.

14 And again, the beginning of the statement - - -
15 the beginning of the statement mentioned nobody, no
16 specific person, not even a bouncer, just a violation of a
17 home, robbery of one of his people who could be anybody.
18 That doesn't involve Bruton at all. And that's the first
19 thing that the jury heard. By - - - by hearing that, they
20 can't look to the defense table and say, oh, that's - - -
21 that's got to be the bouncer. Even upon hearing the part
22 about the bouncer, they can't look to the defense table and
23 say, oh, that's - - - that's got to be him - - - him. He -
24 - - he's not named. There's no description.

25 JUDGE CANNATARO: But when you phrase it that

1 way, you kind of wonder what - - - what was the redaction
2 supposed to be from the statement. Because we never
3 actually got a redaction, right?

4 MR. BLIRA-KOESSLER: Right. The statement wasn't
5 redacted.

6 JUDGE CANNATARO: So what would the proposed
7 redaction have been? Did anyone specify what language
8 needed to come out of the statement?

9 MR. BLIRA-KOESSLER: Well, what counsel - - -
10 there - - - there was one exchange. I think it's at 649 to
11 670 of the record. The prosecutor noted that she had asked
12 counsel, what do you want redacted, and he never got back
13 to her about that. And this is before the statement came
14 in, right before the Det. Rodriguez's testimony.

15 JUDGE CANNATARO: I mean, in the classical
16 situation, Bruton redaction paradigm, there's a name in
17 there that you want to take out, and you and you substitute
18 other person or something like that. There is no name in
19 here.

20 MR. BLIRA-KOESSLER: Right.

21 JUDGE CANNATARO: So I'm struggling to understand
22 because I don't think it ever really gets developed in the
23 record. What was supposed to come out of this?

24 MR. BLIRA-KOESSLER: I mean, I'm - - - I'm
25 guessing that my adversary might say the part about the

1 bouncer, but that part is not directly incriminatory. It
2 doesn't make out an element of the crime. It doesn't fall
3 anywhere near what Bruton says is the normal type of thing
4 you take out a statement. Right. It - - - it goes
5 potentially to motive. It doesn't even actually go to
6 motive because Mr. Osouna never said with any definiteness,
7 with - - - with any specificity, that the bouncer actually
8 got robbed. He speculated. He said, I wasn't there. All
9 right. So that part of the statement incriminates nobody.

10 JUDGE TROUTMAN: If that's the only bouncer that
11 worked at the establishment, the defendant was that only
12 person, doesn't that clearly identify him as the potential
13 victim of said robbery?

14 MR. BLIRA-KOESSLER: But even if it does, it's
15 still not identifying him as a participant in the crime.
16 It's still not making an element to the crime - - -

17 JUDGE CANNATARO: Do you know if the word bouncer
18 - - - I'm sorry, Counselor.

19 MR. BLIRA-KOESSLER: Sorry.

20 JUDGE CANNATARO: Do you know if the word bouncer
21 appears in Osouna's statement?

22 MR. BLIRA-KOESSLER: They - - - they - - - they
23 use a different term. They use keeper of the gate, and
24 they use the guy at the door collecting money. So the - -
25 - the term bouncer isn't used. That's used at trial. It's

1 basically the same thing as a bouncer.

2 JUDGE GARCIA: So just so I'm clear, were
3 specific redactions ever requested?

4 MR. BLIRA-KOESSLER: As far as I'm aware, no,
5 there's nothing in the record that counsel ever said,
6 before this comes in, we want this, that, or the other
7 thing redacted. As far as the limiting - - -

8 JUDGE RIVERA: Maybe just on that motive issue,
9 they need not have been a victim, right? That's one
10 motive, sure. Okay. But certainly, the prosecutor is
11 suggesting that part of the motive is also the relationship
12 to the co-defendant whose home and people who were in the
13 home were violated, right?

14 MR. BLIRA-KOESSLER: Right. But - - - but I
15 think that argument is - - - I'm sorry. Excuse me. I
16 think that argument is mainly coming from the relationship
17 because as I said before, you can take out everything about
18 this robbery and you still have a motive argument. Right.
19 If you take out the relationship, how do you have the
20 motive argument? You - - - you - - - you can't forge a
21 link there. Right. It's mainly based on the fact that
22 he's the bouncer and his cousin. So let's say there's - -
23 -

24 JUDGE RIVERA: That's - - - that's - - - that was
25 my point. Right. That - - - that he doesn't have to be a

1 victim of the robbery to have a motive. I think the
2 prosecutor - - -

3 MR. BLIRA-KOESSLER: Right. Right. He doesn't.

4 JUDGE RIVERA: - - - presented that.

5 MR. BLIRA-KOESSLER: Right. And that's - - -
6 that - - - that's a very good point. Just because
7 somebody's ID'd as a - - - that's essentially what he's
8 ID'd here as, as a victim or a potential victim. Being a
9 victim of a crime doesn't make you a criminal. It doesn't
10 make out an element of the crime. It doesn't mean you're
11 involved in the crime. Right. It provides at most, at
12 best, you know, a potential reason for maybe acting, but it
13 doesn't mean that you actually acted. Bruton is about if
14 you actually acted. Were you involved in the crime? Were
15 you one of the perpetrators?

16 JUDGE GARCIA: I'm sorry. I thought that there
17 was a redaction requested. I thought that there was a
18 redaction requested to remove the portion of the statement
19 that indicated that the doorman was the victim of the
20 robbery at 350 to 352.

21 MR. BLIRA-KOESSLER: At 350 to 352.

22 JUDGE GARCIA: Is that not accurate? It's - - -
23 I think it's after - - -

24 MR. BLIRA-KOESSLER: I don't - - -

25 JUDGE GARCIA: - - - the exhibits in but before

1 it's published.

2 MR. BLIRA-KOESSLER: Yeah. I mean the - - - the
3 only part of the record that I remember redaction came up
4 was right before Rodriguez's testimony, because then
5 counsel started talking about Bruton again. And the
6 prosecutor said, I told him to give me any redactions, and
7 he didn't. So maybe it was discussed earlier, but not the
8 specific parts of the statement that should be redacted.
9 Right.

10 Just - - - I see my time is up. I'd just like to
11 talk briefly about the - - - the instruction. You know, I
12 think it's assumed that Bruton requires an instruction
13 because of the language of some of these cases. But if you
14 look at Richardson, you know, Richardson has a lot of
15 language before it gets to the holding where it says an
16 instruction is only more likely to prevent error. It's
17 only more likely to work when you have - - - excuse me - -
18 - inferential incrimination, but that doesn't mean that
19 counsel has to go by that. Just because courts presume
20 that, that doesn't mean that a defense attorney, as a
21 matter of strategy, can't say, well, you know, I don't want
22 this judge pointing out this statement about my client.
23 I'm - - - I'm not going to buy into that. I - - - I don't
24 think it is going to make it more likely. I think it's
25 going to highlight that statement for the jury.

1 Richardson also says that an instruction is a
2 reasonable accommodation. That's all it says about it.
3 It's a reasonable accommodation between the interests of
4 the defendant and the interest of the State. Why shouldn't
5 counsel be able to turn down that reasonable accommodation?
6 I think a big reason why the instruction wasn't given here
7 - - -

8 JUDGE TROUTMAN: Should counsel be required - - -
9 defense counsel be required to fix what they perceive to be
10 a clear error, to the benefit of the People.

11 MR. BLIRA-KOESSLER: Well, a clear error in the -
12 - - the admission of the statement?

13 JUDGE TROUTMAN: If they - - - if in fact it
14 were, they believed it to be an error, is it their
15 responsibility to fix it, or is it the People's
16 responsibility, just in case, to make sure the request is
17 made? Why is it their responsibility in the first
18 instance?

19 MR. BLIRA-KOESSLER: Well, I mean, it's - - -
20 it's sort of a - - - you know, a difference in perception.
21 I mean, we - - - we saw no problem with this statement.

22 JUDGE TROUTMAN: Right. And you asked - - -

23 MR. BLIRA-KOESSLER: There's nothing to request.

24 JUDGE TROUTMAN: - - - for the statement, and you
25 got the statement. So - - -

1 MR. BLIRA-KOESSLER: Right. Right. Exactly.

2 But why - - -

3 JUDGE TROUTMAN: But they objected.

4 MR. BLIRA-KOESSLER: They - - - they - - - they
5 made a - - -

6 JUDGE TROUTMAN: A severance.

7 MR. BLIRA-KOESSLER: - - - motion to - - - a
8 severance motion. They raised Bruton - - -

9 JUDGE TROUTMAN: They made a motion to sever.
10 Yes.

11 MR. BLIRA-KOESSLER: Right. But on its face - -
12 - and this goes to the judge as well - - - the statement
13 didn't incriminate anybody, so it's kind of understandable
14 why the judge didn't bring up an instruction, why counsel
15 didn't ask for it, or it could have just been a matter of
16 strategy. But if it doesn't incriminate anybody on its
17 face and even inferentially - - - even inferentially, it's
18 not incriminating somebody in terms of ID or an element of
19 the crime, then what - - - what do you need the instruction
20 for? What - - - what is the instruction going to do? What
21 is it going to prevent? You know, it - - - it could very
22 well have the opposite effect. Even Gray v. Maryland talks
23 about that. Having an instruction can just turn the jury
24 to that blank space and let them realize that the guy
25 sitting there is the guy in the blank space.

1 CHIEF JUDGE WILSON: Thank you.

2 MR. BLIRA-KOESSLER: Thank you, Judge.

3 MR. BERKO: Your Honors, this is going to the
4 last point about whether the statement was facially
5 incriminating or not. I would like this court - - - I
6 would ask this court to consider its decision in Cedeno and
7 in Johnson, 27 N.Y.3d at 60, that evaluated factors outside
8 the strict statement that was the subject of Bruton and
9 looked at the prosecution's use of the inadmissible hearsay
10 and the context in which it occurred.

11 Here, without even going to summation, the
12 prosecutor framed the case with the testimony. As to the
13 prosecutor's summation, and Your Honor's prior question, in
14 Adams, from what I see, there was no objection. And in
15 Adams, this court actually didn't even engage in harmless
16 error analysis in the reversal. Rather, the court stated,
17 although the evidence in the record is sufficient to
18 support the conviction, this court, as well as others, has
19 refused to announce a doctrine that the fundamentals of a
20 fair trial need not be respective if they're - - -
21 respected if there is proof in the record to persuade us of
22 defendant's guilt. And - - -

23 JUDGE SINGAS: Counsel, can I ask you if you can
24 point us to a case, either federally or state, where
25 there's a Bruton violation found where a defendant's

1 statement doesn't even acknowledge another participant in
2 the crime?

3 MR. BERKO: Well, Your Honor, I mean, here I
4 would respectfully disagree with you. He did acknowledge
5 that he - - - what Osouna acknowledged was that his cousin,
6 his peoples got robbed, and that - - - so in that, he
7 created - - - he informed the jury of a close familial
8 relationship. He gave a personal motive to the bouncer.
9 He himself was a victim. And a family motive to seek
10 retribution. So whatever was missing from the statement
11 was supplied by the prosecutor at opening. And so even
12 before any evidence - - -

13 JUDGE SINGAS: And isn't there a difference
14 between the prosecutor having to prove their case, where
15 they have to prove that two people committed a murder?
16 Right. They have to introduce evidence about two people.
17 I'm saying this statement doesn't even acknowledge the
18 presence of another co-defendant in this murder. So how do
19 we find a Bruton error?

20 MR. BERKO: Well, Your Honor, I mean, I would
21 respectfully disagree with that. The statement - - - the
22 statement basically cannot be taken to be any other way
23 than the guy sitting next to me was the bouncer, and he and
24 I went out to shoot this guy because the bouncer got
25 robbed. I don't think - - - I don't see how any reasonable

1 juror can interpret the statement any differently. I mean,
2 it was, as I mentioned to the court earlier, the glue that
3 held the prosecution's case together. Without this
4 statement, you simply have two dubious non-eyewitness - - -
5 eyewitnesses who looked at a videotape and - - - without a
6 prior hearing or a voir dire, according to what this court
7 requires in Mosley - - - and said, oh, that guy was a
8 bouncer, so you would have absolutely no idea who was
9 robbed in the nightclub. I think any reasonable juror
10 might wonder, given, let's say, the quality of the - - -
11 the videotape and questions as to the credibility of the
12 witnesses, a reasonable juror might wonder, would a
13 reasonable night - - - nightclub bouncer go out and kill
14 someone - - - a patron of the nightclub - - - just because
15 he thought it was his part of his job duty? I mean, it
16 would be - - - it would be kind of hard to picture the job
17 interview of a potential bouncer in that situation. Okay.
18 So your - - - your - - - your duties will be to take money
19 at the gate and to keep everyone generally quiet. But if I
20 come and tell you that a patron was robbed, I expect you to
21 take a gun and come with me and shoot the guy. I mean,
22 that would be rather extraordinary. So that would
23 introduce doubt into the case. But that doubt was
24 effectively addressed by the prosecutor in opening
25 statement.

1 And as I've mentioned to the court in Cedeno and
2 Johnson, this court has looked to factors outside the
3 strict content of the Bruton case. And in Wheeler, I
4 looked at the fact that there were only two defendants at
5 the table, as was - - - as this case.

6 And just to briefly touch on Judge Rivera's
7 question about Golo. On page 13 to 14 of our reply brief,
8 we do distinguish Golo, where we point out to the court
9 that the threshold, the separate question there was a
10 threshold question and did not involve two separate
11 analytical tracks as this question that the People are
12 submitting here for the - - - for this court's review.

13 I would also ask the court to consider what
14 Bruton says. Bruton discusses the impossibility of
15 determining what effect the incriminating evidence has upon
16 the juror's mind. Bruton found that to be impossible and
17 found that the evidence was inherently prejudicial.

18 And I'm recalling something that I learned in my
19 first year introduction to Philosophy classes in
20 undergraduate. Aristotle says in his laws of - - - his
21 laws of metaphysics, something cannot be itself and the
22 opposite of itself at one and the same time. You cannot
23 have a pot of water at a rolling boil and be a block of ice
24 at a one at the same time.

25 Bruton says evidence of this nature is

1 devastating in its effect and inherently prejudicial, so
2 therefore, it is untenable to call that same thing
3 harmless. It doesn't make any sense. And we - - - we
4 discussed that in our brief. And unless your - - - Your
5 Honors have any - - - have any questions, I'll rest on my
6 papers. And we would ask this court to reverse and order a
7 new trial.

8 CHIEF JUDGE WILSON: Thank you, Counsel. Thank
9 you.

10 MR. BERKO: Thank you.

11 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Brandon Williams, No. 96 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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