COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

                    Respondent,

        -against-
                                        NO. 96
BRANDON WILLIAMS,

                    Appellant.
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                                    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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                            Christian C. Amis
                        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 Cedeno, 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 Cedeno 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 Cedeno 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 Cedeno, 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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1   C E R T I F I C A T I O N

2

3   I, Christian C. Amis, certify that the foregoing

4   transcript of proceedings in the Court of Appeals of People

5   v. Brandon Williams, No. 96 was prepared using the required

6   transcription equipment and is a true and accurate record

7   of the proceedings.

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