

IN THE COURT OF APPEALS OF MARYLAND

No. 124

September Term, 1995

STATE OF MARYLAND

v.

MICHAEL STEWART MATUSKY

Murphy, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker,

JJ.

Dissenting Opinion by Rodowsky, J.

Filed: September 18, 1996

Rodowsky, J., dissenting.

I respectfully dissent from the holding of the Court set forth in Part IV.A of the majority opinion. That holding is that "the trial court should have redacted those portions of White's declaration identifying Matusky as the murderer and suggesting Matusky's motive for the crime." _____ Md. at _____, _____ A.2d at _____ [Majority slip op. at 19].¹

The hearsay problem under consideration is plagued with semantic difficulties. In any given case the universe of the data is the whole of what the declarant had to say that is relevant to the charges pending against the accused. The task is to determine whether the universe is admissible against the accused in its entirety, partially, or not at all, as declarations against the penal interest of the declarant. Within this universe of data there can be gradations ranging from hard core, clear cut declarations against penal interest, through varying degrees of inculpatory matter, to the clearly exculpatory or, at least, self-serving statement. In my view a conceptual rule, phrased in terms such as "extended narrative," "statement," "confession," and

¹In explaining my views, I too "shall assume, *arguendo*, that the trial court correctly determined ... that a reasonable person in White's circumstances would have realized that his declaration was contrary to his penal interest." _____ Md. at _____, _____ A.2d at _____ [Majority slip opinion at 18-19].

It should also be noted that there was no cross-petition filed. Consequently, any issue involving the Confrontation Clause that may be lurking beneath the surface in this matter is not an issue that is before this Court.

"declaration," can only be understood when legal holdings are made on specific facts.

Preliminarily, I do not believe that the majority has given appropriate precedential weight to this Court's opinion in *State v. Standifur*, 310 Md. 3, 526 A.2d 955 (1987). Nor does *Standifur* differ substantially from the analysis presented in Parts I, II.A, and II.B of the opinion of Justice O'Connor, joined by five other justices, in *Williamson v. United States*, ___ U.S. ___, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994). Both *Williamson* and *Standifur* require consideration of all of the known facts and circumstances surrounding the obtaining of the universe of data in order to determine reliability, and the entire universe may be excluded as unreliable at that level of analysis. 114 S. Ct. at 2436-37; 310 Md. at 11-13, 526 A.2d at 959-60. Looking at portions of the universe, both opinions exclude matter that is self-serving or exculpatory of the declarant. 114 S. Ct. at 2434-35; 310 Md. at 12-15, 526 A.2d at 959-61. Both opinions would test the inculpatory nature of the portion of the universe under consideration by a reasonable person test. 114 S. Ct. at 2435, 2436-37; 310 Md. at 12-13; 526 A.2d at 959-60.

With respect to portions of the universe that are "collateral" or "related" to the core declaration against penal interest, both opinions seem to take substantially the same approach. *Williamson* directs a "statement" by "statement" analysis of the portions under

the reasonable person test. 114 S. Ct. at 2436-37. Under *Standifur*, the hard core declaration against penal interest "and those related statements so closely connected with it as to be equally trustworthy, are admissible as declarations against interest." 310 Md. at 17, 526 A.2d at 962. Of course, what makes the "closely connected" statements "equally trustworthy" is that a reasonable person would have perceived them as contrary to penal interest. *Id.*

Consequently, the majority inaccurately presents *Standifur* when it states that "[t]he central distinction between the *Williamson* approach and our approach in *Standifur* is that 'proximity' between the self-inculpatory and 'collateral' portions no longer guarantees admissibility." ____ Md. at ____, ____ A.2d at ____ [Majority slip op. at 27]. "[P]roximity," denotes spacial nearness, presumably in the written presentation of the universe under consideration. *Webster's Third New International Dictionary* 1828 (1976). Nowhere in *Standifur* does the word, "proximity," appear.² Proximity is not the test for admissibility under *Standifur*, as shown above.

Even if there are differences between Maryland common law, as enunciated in *Standifur*, and the application of Federal Rule of

²The term, "proximity," is found in Part II.A of Justice O'Connor's opinion in *Williamson*. There it is stated that the "mere proximity to other, self-inculpatory, statements [of self-exculpatory statements] does not increase the plausibility of the self-exculpatory statements." 114 S. Ct. at 2435.

Evidence 804(b)(3), and even if those differences justify adopting *Williamson* as expressing Maryland common law, there is nothing in *Williamson* that compels the exclusion of the identity and motive portions of White's conversation with Marchewka. *Williamson* involved a declarant who was arrested while possessing nineteen kilograms of cocaine in two suitcases in the trunk of a rental car driven by the declarant. 114 S. Ct. at 2433. He admitted knowing that the drugs were there. *Id.* In his post-arrest statements to Drug Enforcement Administration agents, he said that he was transporting the cocaine for the accused, Williamson, who, in another vehicle, had been preceding the declarant and who had seen the traffic stop and the search of the vehicle driven by the declarant. *Id.* The quantity possessed by the declarant would support finding the declarant's intent to distribute. *Id.* at 2439. In *Williamson*, four justices, joining in a concurrence by Justice Ginsburg, found the blame-shifting to Williamson so self-serving as to render the universe wholly inadmissible. *Id.* at 2439-40. Five justices in *Williamson*, however, in three separate opinions, remanded for a "statement" by "statement" parsing of the universe.

Williamson does not say that the identity of a criminal confederate of the declarant must be excised from a declaration against penal interest. If that were the law, even the remainder of the hard core declaration against penal interest ordinarily would not be connected to the accused and likely would be

inadmissible for lack of relevancy. Five justices in *Williamson* remanded for parsing the universe in order possibly to reach an admissible declaration against penal interest. That exercise would be pointless if an ultimate, expurgated version could not even mention the name of the accused in the very case in which the declaration was to be used.

In any event, even a statement by statement parsing of White's conversation with Marchewka results in the admissibility of the identification of Matusky and of his communication of his motive to White. They are important, integrated parts of White's declaration against penal interest.³ In his conversation with Marchewka, White incriminates himself as an accomplice, or principal in the second degree, to the murders of Trudy Poffell and her daughter, Pam Poffell, and as an accessory after the fact to those murders. Knowledge that a murder was to be committed, or had been committed, is an element of either theory of criminal responsibility. 1 C. Torcia, *Wharton's Criminal Law* §§ 31 and 33 (15th ed. 1993). The knowledge element of the crimes admitted in White's declaration against penal interest is greatly reinforced by the inclusion of

³I understand the majority of this Court to hold that any reference to Matusky is inadmissible, and not simply the conclusory statement that Matusky was the murderer that appears at the beginning of White's conversation with Marchewka. Of course, if White's conversation with Marchewka had stopped at that point, the conclusory statement would not be admissible because White had not yet made any declarations against penal interest. Later incriminating portions of the conversation support the conclusion expressed earlier.

the parts of White's conversation with Marchewka in which Matusky is named as the person declaring an intent to kill and expressing the reason for having formulated that intent.

A little background is needed to place White's conversation in perspective. At the time of trial Marchewka had been employed for twenty-five years by AT & T. She was raising her teenage son and preteen daughter. White had been living with her in her home since March of 1989. The two had become engaged in 1991, although White was not divorced from his estranged wife, one of the victims, Pam Poffell. Through White, Marchewka had met Matusky. White and Matusky were "very close friends" who would see one another or go out "[a] couple times a week." The murders occurred on January 24, 1993. When the police interviewed White because he was the estranged husband of one of the victims, Marchewka falsely informed the police that White was shopping with her at the time of the murders. She did this because White was on parole, and he had told Marchewka that, at the time of the murders, he was drinking in a bar in violation of his parole. White's declaration against penal interest to Marchewka was made on Easter Sunday, April 11, 1993, after White had been drinking. The majority points to nothing indicating that the murder investigation had focused on White at that time, much less that he was suspected of being the actual killer.

The legal test as to what constitutes a declaration against penal interest is whether a reasonable person would perceive the

statement to be incriminating. One way to test whether White's references to Matusky and to his motive are integral parts of the declaration against penal interest would be to look at a similar declaration that did not contain those references. In that analytical framework a prosecutor would be seeking to convict White of being a principal in the second degree to murder based on White's admission as a party opponent that White met someone in a bar whom White did not know, that that person said that he wanted to murder Trudy and Pam Poffell for reasons that were not expressed, and that White drove the stranger to the Poffell home in the stranger's car. Although our hypothetical illustration contains some evidence of knowledge, the knowledge element is greatly diminished from the standpoint of any weight that would be attributed to it. To a reasonable person, the expurgated version sounds more like the statement of a mentally disturbed individual than a declaration against penal interest.

Much the same argument that the majority of this Court today accepts was rejected by the Supreme Court of Virginia in *Chandler v. Commonwealth*, 249 Va. 270, 455 S.E.2d 219, cert. denied, ____ U.S. ____, 116 S. Ct. 233, 133 L. Ed. 2d 162 (1995). In *Chandler* the Virginia court unanimously affirmed a death sentence imposed for a murder committed in the course of the armed robbery of a convenience store. The unavailable declarant, Bernice Murphy, was the girlfriend of the accused, Chandler. The witness was a special

agent of the Virginia State Police who had taken a statement from Murphy as part of the murder investigation. 455 S.E.2d at 224. "In her statement, Murphy described riding in the car with Chandler [and others] to obtain the gun, and Chandler's discussion about 'going in, robbing the store and leaving.'" *Id.* Murphy remained in the car during the robbery and murder. Murphy described Chandler's statements made when he returned to the car, including, "[W]hy didn't the man open the register?" and "[H]e got shot over money that wasn't even his.'" *Id.*

Chandler argued to the Virginia court that under *Williamson* "only those portions of the statement which directly implicate Murphy are admissible" and that "Murphy's statements regarding [Chandler's] accounts of the robbery would be inadmissible." 455 S.E.2d at 225. The Virginia court first observed that *Williamson* "concerned the interpretation of the Federal Rules of Evidence" which were "not applicable here." *Id.* The court then held:

"Furthermore, in the present case, Murphy's recitations of statements made by Chandler showed her knowledge of and complicity in the criminal act and exposed her to liability as an accessory to the crimes. Accordingly, Murphy's entire statement is admissible as a declaration against penal interest."

Id.

Similarly, in the instant matter, White's statements that it was Matusky who communicated the intent to murder and the reason why "showed [White's] knowledge of and complicity in the criminal act and exposed [him] to liability as an accessory to the crimes."

