

2. Appellant was denied the opportunity to present his defense by the trial court's refusal to permit the jury to hear reliable, memorialized evidence that the co-defendant had admitted Appellant was not a participant in the homicide.

After thorough consideration of the propositions raised, the Original Record, Transcripts, briefs and arguments of the parties, we find Mr. Miller's convictions in Case No. CF 2003-5573 should be reversed and remanded for a new trial for the reasons set forth below.

The record reflects Mr. Miller entered into a Plea Agreement with the United States Attorney's Office of the Western District of Oklahoma. On the first paragraph, the Agreement states that it did not bind "any other federal, state or local prosecuting, administrative or regulatory authority." Although some language in the Agreement could be construed to promise the defendant statements made by him would not be used against him in a subsequent state criminal proceeding, he was specifically advised before giving his statement to an Oklahoma City police detective that Oklahoma was not a party to the Agreement and that it did not bind the Oklahoma County District Attorney's office. After being specifically advised the Agreement did not protect him from state prosecution, Mr. Miller waived his rights and voluntarily gave a statement.

After considering the circumstances surrounding Mr. Miller's statements to the detective, the trial court properly concluded the State had met its burden of showing by a preponderance of the evidence that the statement was voluntarily made. *See Davis v. State*, 2004 OK CR 36, ¶¶ 33-34, 103 P.3d 70, 80 (the voluntariness of a confession is judged from the totality of the

circumstances, including the characteristics of the accused and the details of the interrogation; this Court will not reverse a trial court's ruling where the trial court's decision to admit the statement is supported by competent evidence of the voluntary nature of the statement); *see also Crawford v. State*, 1992 OK CR 62, ¶ 29, 840 P.2d 627, 635 (written waiver of rights is strong evidence of voluntariness). No relief is warranted on Proposition One.

Prior to trial, Mr. Miller's attorney conducted a taped interview of the codefendant. During that interview, the codefendant admitted his involvement in the crimes, but his statements exculpated Mr. Miller. When Mr. Miller's counsel called the codefendant to testify at trial, the codefendant refused to testify on the advice of his counsel. Mr. Miller's counsel then sought admission of the taped interview under 12 O.S.Supp.2002, § 2804(B)(3) which provides:

3. A statement which was at the time of its making contrary to the declarant's pecuniary or proprietary interest, or *which tended to subject him to civil or criminal liability ... and which a reasonable man in his position would not have made unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.* A statement or confession offered against the accused in a criminal case, made by a codefendant or other individual implicating both the codefendant or other individual and the accused, is not within this exception ...

(emphasis added).

The non-testifying codefendant's tape-recorded statement subjected him to criminal liability and specifically exculpated Mr. Miller. The codefendant admitted in this statement that he knew Mr. Miller was the one who exposed his involvement and knew Mr. Miller placed himself in the crime when he

talked to an Oklahoma City police detective in hopes of getting a reduction in his federal sentence.

Section 2804(B)(3) prohibited admission of this tape-recorded interview “unless corroborating circumstances clearly indicate the trustworthiness of the statement.” The trial court refused to admit the statement finding it was not “corroborated by anything which would indicate to this Court that it’s trustworthy for its use.”

In *Miller v. State*, 2004 OK CR 29, ¶ 27, 98 P.3d 738, 744, we said a non-testifying codefendant’s non-testimonial confession *implicating* the accused would be admissible and would not violate the defendant’s right of confrontation if the hearsay was inherently trustworthy and reliable. “To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.” *Id.* at ¶ 31, 98 P.3d at 745 (citations omitted).

The codefendant’s recorded statement should not have been excluded because it was corroborated by other evidence. The trial court’s determination on the trustworthiness of the statement should have focused on those factors relating to whether he “was particularly likely to be telling the truth when the statement was made” not whether it was corroborated by other evidence admitted at trial. *Idaho v. Wright*, 497 U.S. 805, 822, 110 S.Ct. 3139, 3150, 111 L.Ed.2d 638 (1990)(factors to determine whether hearsay is reliable are not exclusive and the unifying principle is that the factors relate to whether the

declarant was particularly likely to be telling the truth when the statement was made). The trial court's reliance upon *Lilly v. Virginia* and *Black v. State* in reaching its decision was misplaced.

In *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), the issue was whether a non-testifying codefendant's statements to police could be admitted *against the defendant* under the statements against penal interest exception to the hearsay rule. The Court observed this particular type of hearsay [a statement against penal interest *offered by the prosecution* to establish the guilt of an alleged accomplice of the declarant] "encompasses statements that are inherently unreliable." *Id.*, 527 U.S. at 131, 119 S.Ct. at 1897. Admission of such statements violate the defendant's right of confrontation unless they bear sufficient guarantees of trustworthiness. "To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.*, 527 U.S. at 138, 119 S.Ct. at 1901, *quoting Idaho v. Wright*, 497 U.S. at 822, 110 S.Ct. at 3150.

Black v. State, 2001 OK CR 5, 21 P.3d 1047, also does not support the trial court's decision. In *Black*, the trial court excluded codefendants' statements which were potentially exculpatory. We did not determine the exclusion of those statements was proper; rather, we assumed the trial court erred and found the appellant did not show prejudice.

“[T]o determine whether a defendant was unconstitutionally denied his or her right to present relevant evidence, we must balance the importance of the evidence to the defense against the interests the state has in excluding the evidence.” *Richmond v. Embry*, 122 F.3d 866, 872 (10th Cir.1997), *cert. denied*, 522 U.S. 1122, 118 S.Ct. 1065, 140 L.Ed.2d 126 (1998). To establish a due process violation, the defendant must show a denial of fundamental fairness and it is the materiality of the excluded evidence to the presentation of the defense that determines whether a defendant has been deprived of a fundamentally fair trial. *Id.* “Evidence is material if its suppression might have affected the trial’s outcome. In other words, material evidence is that which is exculpatory – evidence that if admitted would create reasonable doubt that did not exist without the evidence.” *Primeaux v. State*, 2004 OK CR 16, ¶, 88 P.3d 893, 903-904.

Admission of the codefendant’s statement would not have violated the Confrontation Clause; the Sixth amendment protects the accused not the State. To that extent, the holding in *Lilly* is inapplicable to this case. The codefendant gave his statement to Mr. Miller’s attorney. He knew it was being recorded. His attorney gave him permission to give the statement. He was awaiting trial for the same crimes. He was not coerced or promised anything in exchange for his statement. He had nothing to gain by saying Mr. Miller was not involved. He was not being interrogated by police officers. The fact that he tried to minimize his own involvement does not bear on the trustworthiness of that part of his statement relating to Mr. Miller.

The trial court's decision to admit evidence will not be disturbed absent a showing of abuse of discretion accompanied by prejudice. *H.W. v. State*, 1988 OK CR 138, ¶ 9, 759 P.2d 214, 218. In the case of evidentiary error, the proper inquiry is whether this Court has "grave doubts" that the outcome of the trial would have been materially affected had the error not occurred. (citations omitted). *Douglas v. State*, 1997 OK CR 79, ¶ 45, 951 P.2d 651, 667, *cert. denied*, 525 U.S. 884, 119 S.Ct. 195, 142 L.Ed.2d 159 (1989).

Under the facts of this case, exclusion of the codefendant's taped statement constituted an abuse of discretion; it prejudiced Mr. Miller and deprived him of due process. The evidence was material and its admission might have created a reasonable doubt which did not exist without its admission. The only evidence connecting Mr. Miller to the homicide and the conspiracy was Mr. Miller's confession to Detective Veasey. At trial, Mr. Miller testified he believed that confession was protected, that it would not be used against him, and that he made up his involvement to get a reduction in his federal sentence. The codefendant's statement implicating himself and exculpating Mr. Miller, which verified the circumstances under which Mr. Miller came to have knowledge of the crime and which in all other respects mirrored Mr. Miller's description of the crime to Detective Veasey, was essential to Mr. Miller's defense. Because Mr. Miller's defense was that he put himself in the crime to make his knowledge of the crime more credible, the codefendant's statement that he knew Mr. Miller was responsible for his (the codefendant's)

prosecution and knew Mr. Miller put himself in it to gain credibility with the FBI was relevant evidence which was vital to Mr. Miller's defense.

Under these circumstances, we cannot say we have no grave doubts the exclusion of this evidence did not prejudice Mr. Miller and deprive him of a fair trial. Relief is required on Proposition Two and we find this case should be reversed and remanded for a new trial.

DECISION

The Judgments and Sentences imposed in Oklahoma County District Court, Case No. CF 2003-5573, are hereby **REVERSED AND REMANDED FOR A NEW TRIAL**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE DANIEL OWENS, DISTRICT JUDGE

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OPINION BY: C. JOHNSON, J.

CHAPEL, P.J. : CONCURS
LUMPKIN, V.P.J. : CONCURS IN PART/DISSENTS IN PART
A. JOHNSON, J.: RECUSE
LEWIS, J.: CONCURS

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

In concur in the affirmance of Count I but dissent to the reversal of Count II. The plain language of 12 O.S. 2001, § 2804(B)(3) requires that in order to be admissible, the hearsay statement must expose the declarant to criminal liability and exculpate the defendant. The trustworthiness of the statement must be clearly indicated by corroborating circumstances. *See also Ashinsky v. State* 1989 OK CR 59, ¶¶ 6-7, 780 P.2d 201, 204; *Costa v. State*, 1988 OK CR 74, ¶¶ 4-5, 753 P.2d 393, 394-395. This is a high standard and the trial court properly found Appellant had not supplied sufficient corroborating evidence to find the statement trustworthy.

The hearsay statement at issue sought to demonstrate that a third party, a man going by the name of Spiderman, rather than Appellant, was with Jones and O'Neal when the crime was committed. There was no evidence other than Jones' statement which inculpated Spiderman. The only corroborating evidence offered was that Appellant and Jones knew each other from serving time together prior to the current crime and that Jones' statement was corroborated by Appellant's pre-trial statement. Neither of these reasons is sufficient to find the statement trustworthy. (It is not surprising that Jones' statement was consistent with Appellant's as to the details of the crime as both participated in the crime). In *Costa*, this Court excluded the testimony of Marlene DeLong concerning the hearsay statement of Tracy Swing. This Court stated:

In the instant case, the only persons to hear Swing allegedly admit to Dye's murder were DeLong and the appellant, who were long time acquaintances and traveling companions. No evidence was presented supporting the alleged statements made by Swing that he, not the appellant, murdered Dye. Furthermore, DeLong testified that Swing handed her a double-edged knife. This was in direct conflict with the autopsy report which revealed that Dye was killed with a single-edged knife. In light of these events and the numerous witnesses who identified the appellant as the perpetrator of the crime, we find that the trial court properly excluded DeLong's testimony due to the lack of corroboration which would indicate the trustworthiness of the alleged statements. This assignment is without merit.

1988 OK CR 74, at ¶ 5, 753 P.2d at 395.

Similarly, the lack of corroborating circumstances surrounding the statement in the present case do not support a finding that the statement was trustworthy. Here, the Court seeks to improperly enlarge section 2804(B)(3). To do so opens the door to manufactured hearsay and the denial of the State's right to confront witnesses.