

THIS WEEK:

- **Voir Dire; *McCollum* Challenges**
- **Non-Mirandized Statements; Impeachment**
- **Military Uniforms; Courtroom Attire**
- **Child Hearsay; Plain Error**

Voir Dire; *McCollum* Challenges

Dunn v. State, S18A1284 (11/5/18)

Appellant was convicted of malice murder and other offenses. He contended that the trial court erred in seating panel member Number 28 on the jury over his peremptory strike, based on the State's objection pursuant to *Georgia v. McCollum*, 505 U.S. 42 (112 SCt 2348, 120 LE2d 33) (1992). The Court disagreed.

The Court noted that in *McCollum*, the U. S. Supreme Court held that defendants are prohibited from engaging in purposeful racial discrimination in the exercise of peremptory strikes. When the State raises a *McCollum* objection, the trial court must engage in a three-step process to determine if the defendant's peremptory challenges were used in a racially discriminatory manner. The opponent of a peremptory challenge must make a prima facie showing of racial discrimination; the burden of production shifts to the proponent of the strike to give a race-neutral reason for the strike; the trial court then decides whether the opponent of the strike has proven discriminatory intent. Although the burden of production shifts to the defendant if the State makes a prima facie case, the ultimate burden of persuasion as to discriminatory intent rests with — and never shifts from — the State.

Appellant conceded that the State presented a prima facie showing of racial discrimination, satisfying step one of the *McCollum* test. He contended, however, that the trial court failed to consider step three of the test, and improperly found in step two of the analysis that his explanation was not race-neutral. The record showed that as to panel member Number 28, defense counsel stated that she struck this white female because “she’s extremely young. I just didn’t believe that she could understand my client’s perspective and the nature of this kind of case.” The trial court found that this was not a race neutral reason. The State then observed that the defense allowed another panel member, a black female, also listed as 21 years old, to sit on the jury. Defense counsel responded that “[Number 28] works at a credit union. She has a completely different life experience than a person who works in a fast food restaurant. And I believe that her life experience would make it so that she would not be able to understand the circumstances of this case, which are extremely — it’s extremely important that the jury understand what was going on in that house and the circumstances of both the decedent and the defendant.”

The Court found that the trial court erred in its determination that the explanation given initially for striking Number 28 was not race neutral. However, viewed in context, it was apparent that the trial court moved beyond the step two

determination of neutrality, heard the prosecutor and defense counsel's arguments with regard to appellant's explanation, and then concluded that the explanation was pretextual, and made with discriminatory intent. And, when all three steps of the *McCollum* analysis are completed and an explanation for the exercise of a peremptory strike is given, the trial court must ultimately decide the credibility of such explanation. Also, because the third step of the *McCollum* procedure mandates that the trial court act as the trier of fact, the trial court's findings are to be given great deference and are to be affirmed unless clearly erroneous. Viewed in this light, the Court found that the trial court did not clearly err in rejecting defense counsel's explanation for the strike as pretextual, particularly given the fact that counsel ultimately offered a different explanation than the one she originally provided.

Non-Mirandized Statements; Impeachment

Curry v. State, A18A1178 (10/4/18)

Appellant was convicted of armed robbery, aggravated assault, and criminal trespass. The evidence showed that appellant was one of four people who confronted the 15 year old victim as he walked home from school. Appellant was wearing a distinctive red shirt with the words "ball game" on the back and camouflage cargo pants. He pointed a gun at the victim and on demand, the victim handed over his wallet and cell phone. Later that day, the police detained appellant, who was playing basketball less than a mile from the scene of the crime, after they observed that he matched the description given by the victim. Appellant had the victim's cell phone in his pocket.

Appellant argued that the trial court erred in failing to give a limiting instruction to the jury regarding his written custodial statement. The record showed that appellant gave both an oral and written statement to police. And without dispute, he was not advised of his rights under *Miranda* before giving these statements. The trial court thus prohibited the State from mentioning the statements at trial "unless and until the defendant opens the door with respect to any statements or for impeachment purposes."

Through his trial testimony, appellant indicated that he thought the cell phone seized from his pocket belonged to one of the other basketball players, who purportedly asked appellant to hold it during the game. The State subsequently used appellant's written statement to impeach this testimony, establishing that he had previously admitted to police that he knew when he took possession of the phone that it belonged to the robbery victim. Appellant argued that the trial court should have informed the jury that it could only consider the written statement for impeachment purposes.

The Court stated that a custodial statement taken in violation of *Miranda* may, under appropriate circumstances, be admitted to impeach the credibility of the defendant. Relying on *Jones v. State, 243 Ga. 820, 826 (6) (1979)*, the Court further stated that when a statement is admitted for impeachment, however, the burden is on the trial court to caution the jury that the evidence is to be considered only for the purpose of assessing the defendant's credibility and not to establish his guilt of the offense for which he is on trial. And here, it did not appear that the trial court gave a limiting instruction when admitting appellant's statement.

But, the Court found, even if the trial court erred in this regard, reversal only results if the error was harmful and no harm resulted here. After the State cross-examined appellant, he elected to play for the jury a recording of his oral custodial statement to police. In that statement — as in the written statement — appellant admitted that he was present during the armed robbery and knew the phone in his pocket belonged to the person robbed. Thus, in light of appellant's decision to

present his oral statement to the jury, as well as the significant evidence linking him to the crimes, appellant was not harmed by the trial court's failure to give precautionary instructions to the jury regarding the purpose for which the impeachment evidence was introduced.

Military Uniforms; Courtroom Attire

Harp v. State, A18A1293 (10/15/18)

Appellant was convicted of armed robbery. The record showed that on the first day of trial, the State objected to appellant wearing his military uniform at trial and the trial court prohibited the defendant from appearing in his uniform and allowed him to change into civilian clothes. Finding no Georgia precedent on the specific issue, the trial court based its ruling on *State v. Marquez*, 145 N.M. 31 (193 P3d 578) (N.M. Ct. App. 2008), and held that wearing the uniform was an attempt to influence the jury without introducing evidence or allowing cross-examination.

Appellant argued that the trial court abused its discretion by requiring him to wear civilian clothing instead of his National Guard uniform. The Court disagreed. Like the trial court, the Court did not find any Georgia cases directly on point. But, the Court found, appellant did not testify, he was not subject to cross-examination, and his military membership was not otherwise before the jury at trial. Thus, appellant's military membership was entirely extraneous to the issues at trial and could be construed as an attempt to influence the jury in a manner not based on witness testimony or other evidence of his guilt or innocence. Further, the Court found that this was not a case in which the defendant was prohibited from presenting proper evidence of his good character or his good reputation in the military community. Under these circumstances, the trial court did not abuse its discretion.

Child Hearsay; Plain Error

Sullins v. State, A18A1146 (10/17/18)

After a bench trial, appellant was convicted of child molestation, two counts of sexual battery against a child under the age of 16, and cruelty to children in the second degree. The evidence showed that the victim, D. K., was appellant's niece. Appellant contended that the trial court committed plain error by admitting D. K.'s videotaped forensic interview, the testimony of the forensic interviewer about the interview, and the testimony of various witnesses who testified about D. K.'s out-of-court statements concerning the sexual abuse. Appellant argued this evidence was inadmissible under the Child Hearsay Statute, OCGA § 24-8-820, because the undisputed evidence showed that D. K. was 16 years old at the time she made the outcry statements and that the hearsay evidence was not admissible under any other exception.

The State conceded that D. K. was 16 years old at the time of the outcry, but argued that appellant's remedy, if any, was to assert an ineffective assistance of counsel claim due to trial counsel's failure to object at trial, and that by failing to raise an ineffectiveness claim, he waived his right to raise any error related to the improper admission of the evidence on appeal. The Court disagreed. Where an accused fails to object to the introduction of hearsay evidence at trial and does not assert that counsel was ineffective in failing to do so, the Court may still review for plain error under OCGA § 24-1-103 (d), which provides that "[n]othing in this Code section shall preclude a court from taking notice of plain errors affecting substantial rights although such errors were not brought to the attention of the court."

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Turning to the plain error analysis, the Court found that because it was undisputed that D. K. was over the age of 16 when she made the outcry statements and the forensic interview was conducted, the evidence should not have been admitted under the Child Hearsay Statute. And because there was no other discernable basis for the admission of this hearsay evidence, it was clear and obvious error to admit the forensic interview and witnesses' testimony about the victim's out-of-court statements.

As to the third prong of the plain error analysis, the Court found that there was nothing to suggest that appellant affirmatively waived this error. Rather, it appeared that the prosecuting attorney, defense counsel, and the trial court may have tried the case under the mistaken belief that the victim was under 16 years of age when the outcry was made.

Next, the Court addressed whether the error affected appellant's substantial rights which generally means the appellant must demonstrate that it affected the outcome of the trial court proceedings. The Court noted that the trial was conducted as a bench trial, and absent strong evidence to the contrary, it must be presumed that a judge in a bench trial "sifted the wheat from the chaff and selected legal testimony from that which is illegal and incompetent, unless from the judgment itself it appears that consideration was given." However, the circumstances here strongly indicated that the case was tried under a mistaken belief about the victim's age, and the trial judge may have believed the hearsay evidence to be admissible under the Child Hearsay Statute. This was demonstrated by, among other things, that during the trial, the trial court otherwise precluded witnesses from testifying to hearsay. Thus, the Court presumed that the trial judge considered all evidence she believed to be both relevant and admissible including the forensic interview and other hearsay statements.

Finally, the Court stated that under the fourth and final prong, an appellate court has the discretion to remedy the error and this discretion should be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Based on its review of the transcript and circumstances surrounding the case, the Court found that the error here meets this criteria and concluded that the error must be remedied by affording appellant the opportunity for a new trial.