

## THIS WEEK:

- **Voir Dire; Publically-Traded Corporate Victims**
- **Special Demurrers; Impeding a Court Officer**
- **Child Testimony; Courtroom Closures**
- ***Brady*; Confidential Informants**
- **Jury Charges; Lesser Included Offenses**

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### **Voir Dire; Publically-Traded Corporate Victims**

*Coffee v. State, A18A0960 (10/1/18)*

Appellant was charged with 4 counts of theft by shoplifting in which the victim in each count was Walmart. He contended that the trial court erred in denying his request to remove juror #39 for cause because of the juror's ownership of stock in Walmart. The Court agreed and reversed his convictions.

The Court stated that “[t]his turns on a fundamental principle essential to ensuring fair jury trials in Georgia. Our general rule is that a criminal defendant is entitled to a full panel of *qualified* jurors to which to direct his peremptory strikes.” Where a corporation is the person injured, it occupies the position of a party at interest, and its stockholders are not competent to serve as jurors in a trial against the alleged wrongdoer due to their relationship to the “person” having an interest in the case. Thus, members of the venire who have stock ownership in a victim company are disqualified to serve as a matter of law and are subject to challenge for cause.

Here, the Court noted, the trial court declined to disqualify juror #39 for cause because it was uncertain how much Walmart stock she owned in the “multi-billion” dollar company and the trial court did not believe that her stock ownership in the victim company evidenced any bias. Appellant then had to expend one of his peremptory strikes to remove the juror from the array, though the trial court later noted in its order denying appellant’s motion for a new trial that he did not use all of his strikes. This, the Court held, was an incorrect application of the law and the trial court should have granted appellant’s motion for a new trial.

### **Special Demurrers; Impeding a Court Officer**

*State v. Cerajewski, A18A0997 (10/1/18)*

Cerajewski was indicted for making a false statement in violation of OCGA § 16-10-20 (Count 1) and three counts of impeding a court officer in violation of OCGA § 16-10-97 (a) (1) (Counts 2-4). Specifically, Count two alleged that Cerajewski “between the 10th day of May, 2017, and the 23rd day of June, 2017, did, by threatening communication, endeavor to impede JUDGE T. MARKLE, an officer of the Fulton County Superior Court, while in the discharge of such officer’s duties. . . .” Counts three and four were identical to count two, except for the identity of the court officer.

Cerajewski filed a special demurrer to the three counts of impeding a court officer. The trial court granted the motion, but dismissed the entire indictment. The State appealed.

The Court stated that by filing a special demurrer, the accused claims not that the charge in an indictment is fatally defective and incapable of supporting a conviction (as would be asserted by general demurrer), but rather that the charge is imperfect as to form or that the accused is entitled to more information. A defendant who has timely filed a special demurrer is entitled to an indictment perfect in form and substance.

The Court found that Counts two, three, and four of the indictment did not inform Cerajewski which of his statements formed the basis for the crimes alleged. The indictment provided no information about the language of the alleged threatening communications or how the threats were communicated. The indictment similarly provided no information about how Cerajewski's communications were alleged to have impeded any court officer. Therefore, the Court concluded, the language of Counts two, three, and four did not provide enough information to allow Cerajewski to prepare for trial, and, thus, could not withstand a special demurrer. Accordingly, the Court affirmed the trial court's grant of the special demurrer.

Nevertheless, the State argued, the trial court erred in dismissing the entire indictment. The Court agreed. Citing *Perry v. State*, 118 Ga. App. 22, 22-23 (1) (1968), the Court held that in a multi-count indictment, the fact that one or more of the counts is bad against demurrer will not result in the sustaining of a general demurrer or motion to quash the whole indictment. Accordingly, since Cerajewski advanced no arguments challenging Count one of the indictment, the trial court erred in quashing the entire indictment.

## **Child Testimony; Courtroom Closures**

*Chamberlain v. State*, A18A1256 (10/3/18)

Appellant was convicted of two counts of child molestation. He contended that the trial court violated his right to a public trial when it closed the courtroom prior to the victim's and her brother's testimony. OCGA § 17-8-54 provides that "[i]n the trial of any criminal case, when any person under the age of 16 is testifying concerning any sexual offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, victim assistance coordinators, victims' advocates, and such other victim assistance personnel ..., jurors, newspaper reporters or broadcasters, and court reporters." Prior to the victim's and her brother's testimony, the State asked the trial court to clear the courtroom of all non-essential personnel. The defense objected and the trial court referenced an exception for victims of child molestation and said that he would "follow the statute."

Appellant argued that the courtroom was completely closed because his aunt was excluded from the courtroom and that, in its recitation of the statute, the State failed to mention that the press was excepted from the statute. The Court disagreed. First, the Court stated that the partial closure of the courtroom permitted under OCGA § 17-8-54 does not violate a defendant's constitutional right to a public trial. Next, the Court agreed with the trial court that appellant's aunt did not fall under the category of "immediate family" and did not err in so holding. Black's Law Dictionary defines "immediate family" as "[a] person's parents, spouse, children, and siblings." Black's Law Dictionary (10th ed. 2014). Finally, the Court found that appellant also could not show from the record that any member of the press was excluded. Accordingly, the

Court found, appellant did not identify from the record any person or category of persons who were wrongfully excluded under OCGA § 17-8-54. Therefore, appellant failed to show that the partial closure of the courtroom pursuant to the statute violated his Sixth Amendment right to a public trial.

### **Brady; Confidential Informants**

*McClendon v. State, A18A1408, A18A1409 (10/4/18)*

McClendon and Glover were jointly indicted and tried on two charges each of felony murder and aggravated assault and one charge each of murder, conspiracy to commit murder, participation in criminal street gang activity, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. The evidence showed that on April 9, 2013, Dunlap and Wise were shot at an apartment complex on Delmar Lane in an area known as “the Nine.” Dunlap died at the scene, and Wise was injured and taken to the hospital. There was testimony that (a) Dunlap and Wise were members of the Goodfellas gang; (b) Dunlap had been released from prison just a few days before his death; (c) the Goodfellas gang is a “hybrid criminal street gang” in Atlanta with approximately 400 members, most of whom are incarcerated; (d) McClendon, who was incarcerated at the time of the incident and is the acting leader of the Goodfellas, ordered Dunlap’s death because of an alleged conflict over a woman; and (e) Dunlap told people that McClendon had placed a hit on him and that people would be at the Nine ready to kill him. Dunlap and Wise were shot during the incident, and Dunlap’s injuries were fatal. The jury convicted McClendon and Glover on the charge of participation in criminal street gang activity, but acquitted them of the remaining charges.

One of the State’s key witnesses in the case was Taliah Knox, Glover’s girlfriend at the time. She told the lead detective that Glover was on a speaker phone with Dunlap and Goodfellas-gang-member Darrell McBride while McBride was trying to convince Dunlap to come to the Nine. When Dunlap hung up, McBride told Glover to “take care of business” and Glover said “I got it.” At trial, Knox testified that Glover was on the phone with “another male” and that sometime after the phone call, Dunlap arrived at an apartment at the Nine, began arguing with Glover and fellow co-defendant Eric Kendrick, and then pulled out a gun. Glover and Kendrick shot at Dunlap, and Dunlap fled out the back door of the apartment. Once Dunlap was outside, several witnesses, including Knox, observed McBride stand over Dunlap and shoot him in the head.

Glover contended that the trial court erred in denying his motion for new trial on the ground that the State failed to disclose evidence of payments made to or on behalf of Knox in violation of *Brady v. Maryland*, 373 U. S. 83 (83 SCt 1194, 10 LE2d 215) (1963). At the motion for new trial, evidence was presented that an investigator with the gang unit testified that Knox began working with him in January of 2013 and that she signed a confidential source agreement on February 4, 2014, and that she was twice paid \$60 for information she provided on the Goodfellas and “Delmar Lane,” as well as other non-gang cases. At one point, Knox told the investigator that she “need[ed] to get her an office and get on the [police] payroll.” There was also testimony that the DA’s Office paid a total of \$6,421.63 in witness expenses on behalf of Knox during the trial at issue, including a one and a half month hotel stay, per diem expenses, as well as the security deposit on a new apartment, moving expenses, and rent for the first month in that apartment. The prosecutor testified that Knox was in a hotel “for her safety.”

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING NOVEMBER 16, 2018

Issue 46-18

The Court noted that to prevail on a *Brady* claim, the defendant must show that (1) the State possessed evidence favorable to the defendant; (2) the defendant did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the trial would have been different. The suppression of impeachment evidence is “material” when a reasonable probability exists that the result of the trial would have been different if the suppressed documents had been disclosed to the defense. For purposes of determining reasonable probability, the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

The Court found that Knox was the only witness who identified Glover as a member of the Goodfellas and testified about his involvement in the shooting of Dunlap at the Nine. And, given that Knox was the only witness to connect Glover to the Goodfellas and the shootings, her pecuniary interest was material to appellant’s defense and that the State’s suppression of this evidence undermined confidence in the outcome of the trial. Thus, the trial court erred in denying Glover’s motion for new trial based on this *Brady* violation.

McClendon raised the same *Brady* argument, but the Court stated that his case presented differently than Glover’s case as there were a number of witnesses at trial who identified McClendon as a member, and as a leader of the Goodfellas gang. Nevertheless, the Court agreed with McClendon that he was entitled to a new trial.

The Court stated that the pivotal question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether there is confidence that the jury’s verdict would have been the same. In this vein, the standard is not whether there is sufficient evidence for conviction, but whether there is a “reasonable probability” that the outcome would have been different, meaning that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

And here, the Court held, that standard was met. The impeaching evidence was strong enough to cast doubt over Knox’s testimony. While several people told the lead detective that McClendon had placed a hit on Dunlap, only Knox insinuated that Glover and McBride lured Dunlap to the Nine, presumably at McClendon’s direction. Moreover, all but one witness who implicated McClendon in the hit denied at trial giving statements to the lead detective, and that witness testified that he had been threatened. And, Dunlap’s girlfriend testified that Dunlap told her somebody was trying to kill him, but Dunlap never told her who. Given these circumstances, it was highly probable that Knox’s testimony influenced the jury and it was reasonably probable that the jury, if made aware of the impeaching evidence, would have given less credence to Knox’s testimony or viewed her version of events with a great deal more suspicion, and would have returned a different verdict. Moreover, she corroborated the lead detective’s critical testimony. Knowledge that the State paid Knox might have lead the jury to question the credibility of the lead detective if it also questioned Knox’s credibility and corroboration of the detective’s version of events. Because Knox was the key witness in the case, *any* evidence impacting her credibility or bias was relevant and material, and should have been disclosed to defense counsel prior to trial and the trial court erred in ruling otherwise.

## Jury Charges; Lesser Included Offenses

*Garr v. State, A18A1106 (10/5/18)*

Appellant was indicted for armed robbery, aggravated assault, and possession of a firearm during the commission of a felony. The evidence showed that appellant and an accomplice went to the victim's apartment to buy a pair of basketball shoes from the victim. However, appellant had a gun and the two stole the victim's shoes and fled. The victim retrieved a gun and followed them. The victim testified that as appellant and his accomplice were driving away from the scene, they fired gunshots at him and he returned fire. The jury found appellant guilty of the lesser included offenses of robbery and simple assault, and not guilty of the firearm offense.

Appellant contended that the trial court erred in refusing to give his requested jury instruction on robbery as a lesser included offense of armed robbery. The Court noted that its review was limited to plain error since appellant failed to object at trial. And here, appellant failed to demonstrate that the alleged error affected the outcome of the trial. As appellant acknowledged in his appellate brief, the trial court actually gave his requested instruction as part of a recharge to the jury. During deliberations, the jury sent a note to the judge asking if armed robbery could be changed to robbery. In response, the trial court recharged the jury on the offense of armed robbery and included the requested jury instruction on robbery as a lesser included offense.

Nevertheless, appellant argued, the court's initial refusal to charge on the lesser included offense constrained his defense because his counsel would have had the opportunity to explain to the jury the difference between armed robbery and simple robbery. However, the Court found, the trial court's recharge adequately explained that difference. Moreover, the jury returned a verdict finding guilt as to that lesser included offense, not the greater offense of armed robbery. So even if the trial court erred in initially omitting the requested jury charge on robbery as a lesser included offense, any error was cured when the judge corrected the omission during the recharge.

Appellant next contended that since the trial court did not give the requested charge on robbery as a lesser included offense during the original jury charge, the court erred in subsequently giving it as part of the additional instructions to the jury. The Court disagreed. The only evidence that appellant used a gun during the incident was the testimony of the victim. The police never found the alleged gun and, although the victim claimed that he had engaged in a shootout with appellant and his accomplice in the parking lot, the police found only shell casings from the victim's gun at the scene and did not find any physical evidence of appellant's alleged weapon. The jury, as the finder of fact and judge of witness credibility, was thus authorized to reject the victim's testimony and find from the evidence that appellant did not use a gun during the incident.

Thus, the Court stated, where a case contains some evidence, no matter how slight, that shows that the defendant committed a lesser offense, then the court should charge the jury on that offense. Because this case contained some evidence from which the jury could find that appellant did not use a weapon to take property from the victim, the court was authorized to give a charge on the lesser included offense. And it was well within the trial court's discretion to give such a charge during its additional instructions responding to a question from the jury.