

THIS WEEK:

- Rule 701; Curative Instructions
- Remands; OCGA § 5-6-10
- Impeachment; Testimony Concerning Legal Issues
- Aggravated Assault; Vehicle as a Deadly Weapon
- Voir Dire; Defendant's Use of Peremptory Strikes

Rule 701; Curative Instructions

Gude v. State, S22A0406 (6/1/22)

Appellant was convicted of malice murder and other offenses in relation to the shooting death of the victim. The evidence showed that appellant shot the victim in the head, put him in the trunk of the victim's car and then drove around in the victim's car for a few days. When others noticed a foul odor from the trunk, appellant hid the vehicle at an abandoned apartment complex. It was eventually discovered by the police.

Appellant contended that the trial court abused its discretion when it permitted the State to elicit from the victim's sister, Shaniki, testimony about her subjective perception that the victim "was maybe scared or upset" based on her exchange of text messages with the victim on the night he was killed. Appellant argued that Shaniki's perception was based on hearsay — namely, the content of her brother's text messages — and was inadmissible as lay opinion under Rule 701 (a). The Court disagreed.

The Court noted that the text messages between Shaniki and the victim were not admitted in evidence. Neither did Shaniki recount the contents of the text messages in her testimony. Accordingly, Shaniki's testimony about her impressions she had from the text exchange was not hearsay.

The Court then stated that Rule 701 (a) allows a lay witness to testify in the form of an opinion or inference if the testimony is rationally based on the perception of the witness, helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge. And here, Shaniki's testimony concerned her own belief that the victim was "maybe scared or upset," which she perceived from her text message conversation with him in light of her close personal relationship with him. The complete extent of the complained of testimony was that she perceived the victim to be "maybe scared or upset." The Court stated it could see no error in the trial court's determination to admit this testimony as an abuse of the trial court's discretion.

Appellant next argued that the trial court abused its discretion when it overruled his objection to testimony in which an officer stated his opinion about statements appellant made in an interview. He also contended that the curative instruction was insufficient to cure the prejudice to him from the officer's testimony. The Court again disagreed.

The record showed that on direct examination of a detective, and over the continuous objections of appellant's counsel, the prosecutor elicited from the detective that it was not unusual to get half-truths from a person. The prosecutor then asked "When he doesn't tell you about the body being in the trunk or him putting the body in the trunk, was that unusual?" Over another objection, the detective stated that "For me that's not unusual at all because I think that's tougher to admit to than killing.... that's tougher to admit to than killing him. That is cold, to throw somebody in their own car and to drive -" Defense counsel again objected and the judge stated, "Sustained. Stricken. The jury will disregard. Let's move on."

The Court noted that juries are presumed to follow curative instructions in the absence of proof to the contrary. Moreover, a new trial will not be granted unless the trial court's curative instruction clearly failed to eliminate the effect of the prejudicial comment. And here, the Court found, within the context of the examination of the detective and the record as a whole, it could not say that it was clear that the trial court's curative instruction failed to eliminate the effect of the prejudicial comment. Thus, it could no be said that the curative instruction constituted an abuse of discretion.

Remands; OCGA § 5-6-10

Harris v. State, S22A0414 (6/1/22)

Appellant was convicted of felony murder. The trial court granted his motion for new trial on the ground that his trial counsel had provided ineffective assistance in failing to move to suppress certain text messages, but the Court reversed. See *State v. Harris*, 301 Ga. 234 (2017). Following remand for consideration of other issues raised in appellant's motion for new trial, appellant raised additional, new grounds for his motion. The trial court addressed all the issues presented and denied the motion for new trial.

The State argued generally that appellant's claims of error by the trial court at trial and claims of ineffective assistance of trial counsel were not properly before the Court because they were not raised in appellant's motion for new trial prior to remand. The Court noted that its previous decision directed the trial court to "consider the remaining grounds in [appellant]'s motion for new trial." *Harris*, 301 Ga. at 236-240 (2). OCGA § 5-6-10 provides that, upon remittitur of an appellate court decision to the trial court, "[t]he decision and direction shall be respected and carried into full effect in good faith by the court below." Given the Court's direction in remanding the case, this principle limited the trial court to considering the already raised claims that remained undecided; for an appellate court to authorize further action by the trial court required a clear direction, whether express or by necessary implication. This limitation on the trial court's power was jurisdictional.

Appellant generally did not dispute that he failed to raise the claims at issue prior to remand. Rather, he argued that the nature of the Court's remand meant that his motion for new trial was once again pending. The Court stated that he correctly observed that generally a motion for new trial "may be amended any time on or before the ruling thereon." OCGA § 5-5-40 (b). And he attempted to distinguish *State v. Jackson*, 295 Ga. 825, 828 (2014) on the basis that in that case, there was no direction in the Court's opinion for the trial court to take any further action. But, the Court stated, although it is true that here, unlike in *Jackson*, the remand authorized the trial court to take further action on the case, that authorization was not unlimited. Here, the Court remanded the case "with direction that the trial court consider *the remaining grounds* in [appellant]'s motion for new trial." *Harris*, 301 Ga. at 240 (2) (emphasis added). The trial court's authorization was limited to resolving "the" remaining grounds raised by appellant that the court previously had found it

unnecessary to consider due to its ruling that appellant had received ineffective assistance of counsel in one particular respect. That authorization did not include considering whatever new grounds in support of his motion for new trial that appellant might also raise on remand. None of the claims that appellant raised on appeal — including claims of error by the trial court at trial, claims of ineffective assistance of trial counsel, and a claim for a new trial based on newly discovered evidence, as well as a related evidentiary claim — were raised before the trial court prior to remand. By considering those new claims of error in support of appellant's motion for new trial, the trial court exceeded the scope of its jurisdiction on remand.

Furthermore, the Court stated, with respect to appellant's claims of ineffective assistance of counsel, appellant's failure to present them to the trial court means that they are waived. They were not raised prior to the State's initial appeal, even though they could have been, given that appellant had new counsel when he amended his motion for new trial in February 2015. And the trial court was without jurisdiction to consider his claims of ineffective assistance of counsel when he raised them after remand. Thus, the Court concluded, it could not consider them.

Moreover, the Court stated, it could not consider appellant's claim for a new trial based on newly discovered evidence, either. An appellate court's consideration of such a claim is dependent upon a trial court's having first considered the evidence and made particularized findings of fact, something the trial court lacked jurisdiction to do here given the limited scope of its authority on remand. And appellant discussed this enumeration of error only in terms of error by the trial court in denying the motion for new trial, not in terms of any particular error at trial.

Nevertheless, the limited scope of what was properly before the trial court on remand does not mean that the Court was foreclosed from considering appellant's claims about error by the trial court at trial. OCGA § 5-5-40 (g) makes it plain that “[o]n appeal, a party shall not be limited to the grounds urged in the motion [for new trial] or any amendment thereof.” Appellant's failure to raise claims in his motion for new trial does not preclude him from raising claims of trial court error at trial now. Unlike appellant's claim based on newly discovered evidence, he framed these claims in terms of error at trial, not in terms of error in denying the motion for new trial. Although the Court generally lacks jurisdiction to consider a party's second direct appeal, the prior appeal in this case was brought by the State after appellant was granted a new trial; this appeal was his first opportunity to raise claims of trial court error at trial before the Court. Therefore, the Court found it could proceed to consider those claims of error.

Impeachment; Testimony Concerning Legal Issues

Wynn v. State, S22A0103 (6/1/22)

Appellant was convicted of the malice murder of his cellmate. He argued that the trial court plainly erred in permitting the State to use allegations that appellant had committed a prior sexual assault against another inmate in 2011 to impeach him and in failing to instruct the jury to disregard the resulting testimony. The Court disagreed.

Here, the Court found, appellant's claim failed on the first prong of plain-error review because he did not identify any error. When a criminal defendant takes the stand, any discrepancies in his testimony may be fully explored on cross-examination regardless of their relevance or the fact that it may reflect poorly on the defendant's character. By testifying that he had “never actually hurt anyone before,” appellant invited the State to cross-examine him on the matter in an

attempt to contradict and discredit his testimony. The State did just that, asking targeted questions intended to elicit testimony that appellant had in fact hurt someone before.

Nevertheless, appellant contended, the question was unduly prejudicial under Rule 403. But, the Court stated, the exclusion of relevant evidence under Rule 403 is an extraordinary remedy that should be used only sparingly. Although appellant argued that the State's questions "suggested that it was [appellant]'s nature to commit serious violent felonies against his cellmates," the State never argued to the jury that the evidence demonstrated appellant's propensity for violence but rather that his testimony about the alleged sexual assault reflected badly on his credibility. Moreover, appellant's testimony that he had "never actually hurt anyone before" suggested that he lacked a propensity for violence, opening the door to the State's limited impeachment. See OCGA § 24-4-405 (b). Given the limited and probative nature of the State's inquiry, the impeachment evidence was not substantially more prejudicial than probative.

Moreover, the record belied appellant's contention that the State's questions introduced out-of-court statements that might run afoul of the Confrontation Clause and hearsay rules. Rather than asking appellant about what the inmate had *said* about the alleged sexual assault, the State asked whether appellant had in fact sexually assaulted the inmate and been charged with doing so. Therefore, the Court concluded, there was no error in the trial court's permitting the testimony, and a curative instruction was unnecessary.

Appellant also argued that the trial court erred in failing to instruct the jury to disregard allegedly improper legal testimony offered by a detective who investigated the homicide, both when the detective offered the testimony and when the State referenced the testimony in closing argument. The Court noted that at trial, the State sought to rebut appellant's justification defense by showing that he was not the victim of a forcible felony. To that end, the State asked the detective to explain the offenses of aggravated battery, misdemeanor battery, and simple battery. After the detective testified that "aggravated battery can be losing a member, losing a finger, losing an eye, losing a tooth, you know, being shot, losing your liver," appellant objected that the detective was giving improper legal testimony. The court overruled the objection but told the jury, "I will instruct you as to what the law is at the conclusion of this case." The detective then testified that misdemeanor battery "mean[s] a visible injury like a bloody lip, a black eye, bruising," and that "simple battery would be ... like the threat of an assault." The detective also testified that, when meeting with appellant following the incident, he did not observe any "visible injuries, abrasions, lacerations, or bruising" on appellant other than a minor abrasion on appellant's shoulder and a bumped or scraped knee.

Outside the presence of the jury, Appellant objected again that the detective was giving improper legal testimony about statutory requirements and asked, "that the court instruct the prosecutor to ask the witness factual questions only and not legal questions, questions where he's defining what this statute is or what this offense is." The trial court sustained the objection, noting that it would not permit the detective to testify about what legal conclusions the evidence would support. Appellant did not ask the court to strike the detective's testimony about the law or request a curative instruction, and the court did not tell the jury that the objection was sustained.

During closing arguments, the State reminded the jury that the detective "did not see any marks" on appellant. When the State argued that "there's no evidence that [appellant] was the victim of a forcible felony," and, "[a]t most, it was a misdemeanor offense," the court sustained appellant's objection but did not take further action. The State then argued

that the detective's testimony showed that "at most [appellant committed] a minor offense" because "[appellant] didn't have any injuries that would have risen to the level of felony assault."

The Court found that because appellant never requested a curative instruction for the jury to disregard the detective's testimony about the law, it must review his argument for plain error. Considering the issue in the context of the trial as a whole, the Court found no need for a curative instruction specifically directing the jury to disregard the detective's legal testimony. Although appellant was correct that the detective's testimony included "incorrect statement[s] of law," the court specifically instructed the jury during the detective's testimony that the court, not the detective, was responsible for instructing the jury on the law. Moreover, when charging the jury that deadly force could be used in self-defense to prevent the commission of a forcible felony, the court correctly defined "forcible felony" as "any felony which involves the use o[r] threat of physical force or violence against any person." While the court did not expressly tell the jury to disregard the detective's legal definitions, the court's instructions, considered together, amounted to such a charge.

Finally, appellant's argument failed on the second prong of plain-error review. Where the objection to the prejudicial matter is sustained, the court has no duty to rebuke counsel or give curative instructions unless specifically requested by the defendant. Accordingly, the alleged error was not clear or obvious under current law.

Aggravated Assault; Vehicle as a Deadly Weapon

Brooks v. State, A22A0320 (4/29/22)

Appellant was convicted of aggravated assault. He contended that the evidence was insufficient to support his conviction. The Court disagreed.

Appellant contended that the State failed to prove that he used his car as a deadly weapon in an offensive manner. But here, the Court found, the evidence showed that while the victim attempted to exit the car, Appellant grabbed her hair and held it while the moving car dragged her with it. In fact, the evidence showed that the victim was dragged at least 3 to 5 feet before appellant released her. Under this specific set of facts, the Court found, the jury could conclude that appellant intentionally used the moving car as an instrument to drag the victim along the pavement, thereby inflicting serious injuries. Concomitantly, the jury was authorized to conclude that, based on this manner of use, the vehicle was an "object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury" and that appellant was guilty of aggravated assault.

In so holding, the Court noted that appellant's argument that he cannot be guilty because he did not use the vehicle offensively to drive toward the victim or strike her, as has occurred in prior cases that he cited, does not require reversal. While the cases cited by appellant did determine that a car could be a deadly weapon when used to drive at someone or hit them, they do *not* stand for the proposition that such a fact scenario is the *only* one in which a car could be considered a deadly weapon.

Voir Dire; Defendant's Use of Peremptory Strikes

Johnson v. State, A22A0567 (5/2/22)

Appellant was convicted of voluntary manslaughter, criminal attempt to sell marijuana, and possession of a firearm by a convicted felon. He argued that the trial court erred in seating four jurors after the State challenged his exercise of peremptory strikes. The Court disagreed.

The Court noted that it is unconstitutional for a prosecutor or defense counsel to exercise a peremptory challenge to a prospective juror because of the juror's race or gender. In *Batson*, the United States Supreme Court set out a framework for evaluating whether a prosecutor's peremptory strikes were racially discriminatory, and that framework has been extended to strikes that discriminate as to gender and to strikes made by defense counsel. Under that analytical framework, 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 or a manner that discriminated due to gender. The opponent of a peremptory challenge must make a prima facie showing of racial or gender discrimination; the burden of production shifts to the proponent of the strike to give a race-neutral or gender-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.

The Court first noted that appellant did not challenge step one, but rather argued only that the State failed to perfect the record as to whether there was a prima facie case of discrimination. But, the Court stated, to the extent this argument concerns the appellate record, it has no merit, because it is appellant's burden to show error affirmatively by the appellate record. The decisions appellant cited in support of this argument do not hold otherwise. Instead, those decisions are procedurally inapposite, because the appellants in those cases were the persons *challenging* the exercise of peremptory strikes and, as such, their burden of showing error by the appellate record included establishing a prima facie case of discrimination. But in any event, the Court found, step one of the inquiry was moot in the present case because appellant tendered his purportedly race- and gender-neutral explanations for the peremptory strikes.

The record then showed that the trial court moved to step two, stating that “the burden shifts to the defendant to explain the striking[.]” The Court noted that this statement, in context, referred to appellant's burden of production and did not support appellant's argument that the trial court improperly imposed upon him a burden of persuasion. At this point, the record showed that appellant offered race- and gender-neutral explanations for the strikes. Appellant was not required to enunciate an explanation that is persuasive, or even plausible. Rather, a neutral explanation means an explanation based on something other than the race or gender of the juror. Unless a discriminatory intent is inherent in the proponent's explanation, the reason offered will be deemed race or gender neutral. The Court found that appellant's explanations for striking the four jurors at issue satisfied this minimum requirement. Among other things, he noted that one had law enforcement experience and was a crime victim, one was a business owner and a crime victim, one was “a member of the country club crowd” whom appellant's counsel thought would be “more law and order than the general citizenry,” and one was an IT worker. These explanations were based on something other than the jurors' race or gender and were not inherently discriminatory.

Next, the record showed that after appellant's counsel offered race-and gender-neutral explanations for his strikes, the trial court asked the prosecutor if he wanted "to argue that — the issues?" By doing so, the trial court implicitly indicated that he was moving to step three of the analysis. The prosecutor then argued to the trial court that the reasons given by appellant's counsel for seven of the eight strikes were pretextual (including the four strikes at issue here), and appellant's counsel interjected arguments for why the strikes were not pretextual. Ultimately, the trial court found that four of the challenged strikes were "an improper strike" and reseated those jurors over appellant's objection. The trial court found that the other challenged strikes were proper.

The Court agreed with appellant that the record could be clearer but nevertheless concluded from the context and the entirety of the discussion that the trial court properly engaged in step three of the analysis. The Court found nothing in the record to suggest that the trial court prematurely ended the analysis at step two by rejecting appellant's explanations as not race-or gender-neutral. To the contrary, the Court found, the trial court moved into step three by inviting the State to argue whether appellant's proffered explanations were pretextual and by hearing both sides' positions on that issue. Thus, because the trial court heard and considered the State's response to appellant's explanations before he found race and gender discrimination, the trial court did not end his analysis at step two, and he did not shift the burden of persuasion to appellant.

Nevertheless, appellant argued, the trial court "failed to determine" whether the State had proved discriminatory intent. But the Court stated, contrary to appellant's position, the trial court was not required to make express findings on this point. A trial court's finding of pretext may be implicit, and the proffer of a pretextual explanation naturally gives rise to an inference of discriminatory intent. So, although the trial court did not clearly express his findings on the point, the record indicated that the trial court in fact assessed the totality of the circumstances and found discriminatory intent in appellant's use of peremptory strikes against the four reseated jurors, thereby completing the *Batson* inquiry. Accordingly, the Court discerned no clear error in this ruling.