

THIS WEEK:

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Hearsay; Rule 803 (4)

State v. Almanza, S18G0585 (10/9/18)

Almanza was indicted for child molestation, incest, aggravated sexual battery, statutory rape, and aggravated child molestation. Prior to trial, the State could not locate either the mother of the victim or the victim. Thus, the State filed a motion in limine to obtain a ruling on the admissibility of the mother's statements to two treating physicians of the victim that Almanza raped and molested her daughter. Following a hearing on the motion, the trial court ruled that the doctors would be allowed to testify at trial to any findings they made during the physical examination of the child and to the mother's statements regarding the fact the child had reported being sexually abused. But the trial court also ruled that neither physician could testify as to "[a]ny identification of [Almanza] as the abuser." The State appealed that ruling, and the Court of Appeals affirmed. *State v. Almanza*, 344 Ga. App. 38, 52 (807 SE2d 517) (2017).

The Court granted certiorari to decide whether hearsay identifying the alleged sexual abuser of a child victim is admissible under the hearsay exception for statements made for purposes of medical diagnosis or treatment found in OCGA § 24-8-803 (4) ("Rule 803 (4)"). The Court noted that if a rule in the new Evidence Code is materially identical to a Federal Rule of Evidence, courts must look to federal case law. If there is no materially identical Federal Rule of Evidence and a provision of the old Evidence Code was retained in the new Code, our case law interpreting that former provision applies. However, the Court stated, this case presented an unusual situation: Rule 803 (4) is materially identical both to Federal Rule 803 (4) and to the medical treatment and diagnosis hearsay exception under the old Evidence Code (former OCGA § 24-3-4).

Nevertheless, the Court stated, the principles of interpretation outlined above still apply. Thus, having found a Federal Rule of Evidence using materially identical language that addresses the evidentiary issue covered by Rule 803 (4), the question of whether to apply state or federal precedent ends: our courts must look to federal appellate precedent until a Georgia appellate court decides the issue under the new Code. Consequently, the next question becomes what federal precedent controls?

The Court found that neither the United States Supreme Court nor the Eleventh Circuit has specifically addressed whether statements of identification are admissible testimony in child sexual abuse cases under Federal Rule 803 (4). In looking at the other ten Circuit Courts of Appeals, the Court adopted the “straightforward but rigorous two-step test for the admissibility of hearsay statements under Federal Rule 803 (4)” found in *United States v. Renville*, 779 F2d 430 (8th Cir. 1985). First, the declarant's motive in making the statement must be consistent with the purpose of promoting treatment. Second, the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis. The Court found that these two prongs ensure that the hearsay statement has a sufficient guarantee of trustworthiness while excluding statements beyond the scope of the rule.

Accordingly, the Court held that the Court of Appeals' holding that identification testimony in child sexual abuse cases was categorically barred under Rule 803 (4) was error. The trial court must consider admissibility of such evidence under Rule 803 (4) in the light of the *Renville* test. Thus, the Court reversed the Court of Appeals' decision and remanded with instructions to vacate the trial court's order and remand for further proceedings.

Rule 807; Motion of New Trial on General Grounds

State v. Holmes, S18A0851, S18X0852 (10/9/18)

Holmes was convicted of malice murder and other offenses arising out of the shooting death of Burkes. Briefly stated, the evidence showed that Holmes and Burke were friends. On the night of Burkes' death, Holmes and Burkes were apparently arguing about a woman and were in the possession of a revolver. They were last seen together at the entrance to a pedestrian bridge. Burkes' body was discovered on the pedestrian bridge with several gunshot wounds that appeared to have been fired from a revolver that was never recovered. Also, Burkes' phone and wallet were missing. A resident of a nearby third-floor condo heard shots fired around 3:30 a.m. and then saw a person running away from the direction of the bridge who was wearing a gray hoodie. That witness could not identify the person, however, and did not notice any distinguishing markings on the hoodie. Holmes was wearing a dark-colored hoodie on the night of the murder.

During the investigation, Burkes' phone records led the police to Colin Hamilton, who told an investigator in an interview two weeks after the shooting that he found Burkes' body and took the cell phone from next to it because the phone belonged to him. Hamilton said the phone was stolen from him on the night of the murder by two men, and he described their clothing and appearance. Hamilton stated one man was holding a revolver and was wearing a gray hoodie, while the other man was wearing clothing that matched the victim's clothing. Hamilton could not identify Holmes when given a photo line-up that included Holmes' picture. He also said that he had seen the victim and that other person walk onto the pedestrian bridge just two minutes before hearing gunshots. When Hamilton could not be located for trial, Holmes wanted to introduce only a portion of Hamilton's statement in which he stated he found his own phone on the bridge near the victim's body, which had been taken from him in a robbery, but Holmes did not want to introduce other portions in which Hamilton stated he was robbed by the victim and a person wearing a gray hoodie or that he had seen the victim and that other person walk onto the pedestrian bridge just two minutes before hearing gunshots. Holmes argued that the hearsay was admissible under the residual exception to hearsay, codified at OCGA § 24-8-807. But, because the trial court ruled that the defense would be required to enter Hamilton's statement in its entirety, Holmes did not present the statement to the jury.

Nevertheless, the trial court subsequently ruled that it erred in denying the admission of the evidence sought by Holmes and granted him a motion for new trial. The trial court further granted the motion for new trial on the general grounds as the “thirteenth juror.” The State appealed.

The Court found that the trial court did not properly apply Rule 807 because in analyzing whether Hamilton's statement to the police had sufficient guarantees of trustworthiness, in its ruling on the motion for new trial it relied primarily upon cases decided under Georgia's former Evidence Code, which are no longer applicable. Specifically, the trial court erred by concluding Hamilton's statement to the police officer was reliable and admissible under the residual exception without considering whether this was an exceptional circumstance in which the guarantees of trustworthiness were the equivalent to those found in the other statutory exceptions to hearsay set forth in Rules 803 and 804. Accordingly, the Court vacated the grant of a new trial on this ground, and remanded the case to the trial court.

Next, the Court addressed the trial court's finding that it had erred at trial because the “rule of completeness” did not require the entirety of Hamilton's statement to be admitted. The Court stated that the rule of completeness, OCGA § 24-1-106, is concerned with fairness. When one party has introduced a portion of a writing or recorded statement, an adverse party may require the introduction of an omitted part “which, in fairness, should be considered contemporaneously with the writing or recorded statement.” Here, the trial court did not permit Holmes to introduce part, but not all, of Hamilton's statement and so the State did not seek to introduce any other part of it. Instead, at trial, the State opposed the introduction of any portion of Hamilton's statement on the ground that the statement lacked sufficient guarantees of trustworthiness. The Court stated that on remand, and after applying the proper analysis for determining the admission of Hamilton's statement, if the trial court again concludes at least some of Hamilton's statement is admissible, it should next consider whether the court's pre-trial ruling that the State could require the additional portion of the statement to be introduced contemporaneously with the portion introduced by Holmes was correct under OCGA § 24-1-106. If the pre-trial ruling was correct, then this claim would not be a basis for a new trial.

Finally, the Court turned to the grant of a new trial on the general grounds. The Court noted that the order granting new trial recited that it was made after considering the conflicts in the evidence, the credibility of witnesses, and the weight of the evidence. But it also cited as a ground for granting the motion on the general grounds the evidentiary error the court concluded it made at trial with respect to excluding Hamilton's statements to the investigator unless all, and not just a portion, of the statement was admitted. Thus, because this legal ground for granting the motion does not comply with OCGA §§ 5-5-20 and 5-5-21, the Court vacated the grant of the motion for new trial on the general grounds and remanded the case to the trial court for its consideration of the motion after applying the appropriate discretionary standard.

Opening Statements; Miranda

Kidd v. State, S18A1025 (10/9/18)

Appellant was convicted of malice murder and other offenses. She contended that the trial court erred by overruling her objection when the prosecutor in opening statements said, “I anticipate that the defense will be raising many defenses. You all probably have that idea during voir dire. First one would be accident.” Defense counsel objected to the remark about “accident” being a potential defense at trial because no evidence had been presented on that issue.

The Court stated that although a comment during opening statement which forecasts evidence to be presented at trial by the defendant is improper, the State here referenced an anticipated defense theory without predicting what evidence might be presented. But, even if the State's comment could be construed as improper, it was not harmful because defense counsel did actually advance the anticipated theory through appellant's own testimony at trial, and the trial court instructed the jury that counsel's arguments are not evidence. Thus, the Court found, under the circumstances presented in this case, it was highly probable that the prosecutor's comments did not contribute to the judgment. Thus, there was no reversible error.

Appellant also argued that the trial court erred in denying her motion to suppress her statement to police made during a custodial interrogation. Specifically, Appellant claims that her confession was involuntary due to impermissible force and coercion exerted by law enforcement, and that such coercion was evidenced by the fact that she never received a written waiver form to formally waive her *Miranda* rights. The Court disagreed.

Here, the lead investigator testified that he orally advised appellant of her *Miranda* rights, that she responded that she did not want an attorney, and that she proceeded to talk about what happened that night, voluntarily. In this regard, a written waiver is not necessary where a suspect is orally advised of his or her rights and subsequently waives those rights through his or her responses. Appellant also said she understood the effect of her statement. Furthermore, the investigator testified that he did not make any verbal threats to appellant that would have induced a confession. In fact, the only evidence of intimidating behavior on the part of the officers was appellant's testimony to that effect, and the trial court's decision against her position was the result of a credibility determination which is not clearly erroneous. Accordingly, the Court found no error in the trial court's denial of appellant's motion to suppress.

Jury Instructions; Plain Error

Cato v. State, S18A0669 (10/9/18)

Appellant was convicted of felony murder and a firearm offense. The evidence, briefly stated, showed that appellant and three others shot in the direction of an apartment where the victim was standing on a porch. The victim died from one of the gunshots.

Appellant argued that the trial court committed plain error by instructing the jury on the commission of aggravated assault in a manner not charged in the indictment. Specifically, the trial court instructed the jury: "A person commits aggravated assault when that person assaults another person with a deadly weapon. To constitute such assault, actual injury to the alleged victim may not be shown. It is only necessary that the evidence show beyond a reasonable doubt that the defendant intentionally committed an act that placed the alleged victim in reasonable fear of immediately receiving a violent injury."

Appellant argued that the trial court erred by instructing the jury that the State could prove aggravated assault based on mere reasonable apprehension of injury, such that the jury could have found appellant guilty if it found that he simply pointed a gun at the victim, even though the indictment alleged that appellant actually fired a weapon at the victim.

The Court stated that it is error to charge the jury that an aggravated assault may be committed in a method not charged in the indictment. But even assuming that the trial court gave an incorrect charge on aggravated assault, appellant could not show that this instruction likely affected the outcome of the proceedings. Here, it was unlikely that there was any confusion about what the State had to prove in light of the other instructions given by the court, the nature of the charges, and the evidence presented at trial. Specifically, the indictment charged that appellant and his three co-defendants committed felony murder by causing the victim's death during the commission of the offense of aggravated assault by shooting the victim with a handgun. The trial court provided the indictment to the jury during its deliberations. The trial court also instructed jurors that the State bears the burden to prove every material allegation and every essential element of the crime charged beyond a reasonable doubt. Although appellant complained that this instruction came in the court's preliminary instructions, several days before the jury began deliberating, the trial court also instructed the jury after the close of evidence that "[t]he indictment and the plea form the issue that you are to decide" and that "[n]o person shall be convicted of any crime unless and until each element of the crime as is charged is proven beyond a reasonable doubt." Thus, the Court found, no sort of instruction was necessary to explain to the jury what it meant to say appellant and his co-defendants committed aggravated assault against the victim "by shooting her." These instructions cured any defect in the instructions.

Additionally, the context of the instructions made the juror confusion suggested by appellant even more unlikely. Appellant and his co-defendants were charged with felony murder, the jury was properly instructed on felony murder, and there was no dispute that the victim died as a result of being shot (not as a result of being placed in fear). Thus, there was no likelihood that the jury, in convicting appellant of felony murder, thought that the aggravated assault on which that charge was premised merely put the victim in reasonable apprehension of immediately receiving a violent injury. Therefore, the Court concluded, appellant failed to show a likelihood that any error in the aggravated assault instruction caused the jury to convict him on the basis that he committed felony murder in a manner not charged in the indictment.

Habeas Corpus; *Lafler and Frye*

Gramiak v. Beasley, S18A0784 (10/9/18)

Beasley was convicted of rape, aggravated sodomy, kidnapping with bodily injury, and aggravated assault. He was convicted and sentenced to 20 years for the rape offense, 10 years for aggravated sodomy, to be served consecutive to the rape sentence, life imprisonment for kidnapping with bodily injury, to be served concurrent with the sentence for rape, and 10 years for aggravated assault, to be served concurrent with the sentence for aggravated sodomy. Beasley's direct appeal was affirmed by the Court of Appeals. Beasley then filed a pro se habeas petition in which he asserted he received ineffective assistance of appellate counsel for failure to raise on direct appeal Beasley's claim that trial counsel failed to advise him that he faced a mandatory life sentence if convicted of the kidnapping charge. He claimed that if he had been properly advised by trial counsel, he would have accepted the State's offer of a twenty year sentence, to serve ten years in prison, with respect to the rape charge and to nolle pros the remaining charges. After the habeas court hearing at which Beasley appeared pro se, but did not testify, the court granted his petition and the Warden appealed.

The Court stated that to find that appellate counsel provided ineffective assistance, a reviewing court must find appellate counsel's failure to raise trial counsel's ineffectiveness on appeal represents deficient professional conduct. Even if deficient performance of appellate counsel is shown, a demonstration of prejudice requires a showing that, had the ineffective

assistance of trial counsel been raised on direct appeal, a reasonable probability exists that the outcome of the appeal would have been different. This, in turn, requires a finding that trial counsel provided deficient representation and that the defendant was prejudiced by it.

Thus, the Court first turned to whether Beasley's trial counsel was ineffective under the two pronged test of *Strickland v. Washington*. The Court found that trial counsel rendered deficient performance by failing to discuss with Beasley the possibility that he could face a life sentence if convicted because it was counsel's belief that even the combined sentences on all counts charged would not result in a life sentence, when in fact, a conviction for kidnapping with bodily injury carries a *mandatory* life sentence.

Next, the Court addressed whether Beasley was prejudiced by his trial counsel's deficient performance. Under *Lafler v. Cooper*, 566 U.S. 156, 163 (II) (B) (132 SCt 1376, 182 LE2d 398) (2012) and *Missouri v. Frye*, 566 U.S. 134 (132 SCt 1399, 182 LE2d 379) (2012), the defendant must show [1] that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), [2] that the court would have accepted its terms, and [3] that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Addressing the third criterion first, the Court found that this was easily established. The sentence under the offer's terms (if accepted by the defendant and the trial court) would have been less severe than the mandatory life sentence imposed for the conviction for kidnapping with bodily injury. However, the Court stated, the first and second criteria pose difficult issues in this case.

With respect to whether the plea offer would have been presented to the trial court, the record reflected no intervening circumstances that might have prompted the State to withdraw its plea offer since the plea hearing was held immediately prior to the trial's commencement. But a conclusion that the plea offer would have been presented for approval to the trial court also requires a finding that Beasley would have accepted the plea had he been advised by counsel that a life sentence was mandatory for a conviction for the kidnapping with bodily injury charge. But, here, the Court found, there was no direct evidence presented to the habeas court on this issue. Beasley did not provide sworn testimony at the habeas hearing or at the motion for new trial hearing. The habeas court simply recited that Beasley had consistently asserted in his motion for new trial and appeal that he would have pleaded guilty had he known he was facing this mandatory sentence. However, arguments and representations made in court briefs do not constitute record evidence to support a finding of fact. Thus, the Court remanded for the habeas court to make a finding based on evidence in the record as to whether Beasley would have accepted the State's plea offer if he had been afforded effective assistance of trial counsel who adequately informed him that he would face a mandatory life sentence upon conviction of the kidnapping charge.

Next the Court addressed whether under the second criterion of the *Lafler* test, the trial court would have accepted the terms of the offered plea. And as to this criterion, the Court found that because the habeas court failed to address it at all, a remand as to this criterion was also necessary. The Court noted that making such a showing may be difficult in the context of a habeas proceeding because it requires a prediction about what the trial court would have done had the defendant accepted the plea offer. But, similar to a determination of a reasonable probability that the defendant would

have accepted the plea offer if he had been afforded reasonably competent advice of counsel, the probability that the trial court would have accepted the plea needs only be sufficient to undermine the confidence that the plea would not have been approved.

Finally, the Court addressed the issue of whether appellate counsel provided constitutionally ineffective assistance. To prevail on his claim that appellate counsel's failure to raise ineffective assistance of trial counsel on appeal establishes ineffective assistance of appellate counsel, Beasley must demonstrate that this omission represents deficient professional conduct—that is, that it was outside the wide range of professionally competent assistance. This requires a showing that no reasonable attorney would have made the same choice with respect to raising, or failing to raise, an issue on appeal.

On remand, even if the habeas court finds ineffective assistance of trial counsel, and also finds appellate counsel's decision not to pursue the issue on appeal prejudiced Beasley because it was likely a winning argument, the habeas court must make a determination of whether the failure to pursue this issue amounts to deficient performance of appellate counsel. The Court noted that the habeas court order incorrectly recited that if a reasonable probability of a different result exists if an issue had been raised on appeal, “it follows” that appellate counsel was deficient for failing to raise the issue on appeal. But, the Court stated, this is an incorrect analysis of the issue. With respect to deficient performance, the question is not whether an appellate attorney's decision not to raise a particular issue was correct or wise, but rather, whether his decision was an unreasonable one which only an incompetent attorney would adopt. To prevail on the deficiency prong of the *Strickland* test requires the petitioning party to show that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment. Further, judicial scrutiny of counsel's performance must be highly deferential to the counsel's conduct and must apply the strong presumption that counsel's conduct falls within the broad range of professional competence. And here, the Court found, the habeas court did not consider, and the parties did not adequately brief either the habeas court or it, on whether appellate counsel's performance was outside the range of professionally competent assistance that is required by the deficient performance prong of *Strickland*. Accordingly, the Court declined to make a determination regarding the sufficiency of appellate counsel's professional conduct in the first instance, and remanded this issue to the habeas court.

Out-of-time Appeals; Hearings

Appellant v. State, A18A1047 (9/19/18)

In 2007, appellant was convicted of various felonies. The case then had a long procedural post-conviction history which resulted appellant's sentence being amended three times. On November 17, 2017, appellant filed in the trial court a motion for an out-of-time appeal, asserting that he had been denied his right to appeal the third amended sentence order because the trial court had failed to notify him of that sentence “in a timely manner.” The trial court denied the motion for an out-of-time appeal, and this direct appeal followed.

The Court stated that the trial court was required to notify the attorney of the losing party or the pro se defendant of its judgment. A lack of notice could furnish a basis for the grant of an out-of-time appeal in that the defendant was deprived of his right to appeal, which is of constitutional dimensions. Thus, the issue is whether defendant received notice and delayed taking action, in which case he has forfeited his right to appeal, or whether there was no timely notice, in which

case either the judgment should be set aside and a new judgment entered from which a timely appeal might be taken or an out-of-time appeal should be considered.

Consequently, the Court stated if appellant actually received notice of the third amended sentence and delayed taking action, he forfeited his right to appeal. If, however, he did not receive timely notice, he was entitled to request an out-of-time appeal. The judicial inquiry on a motion for an out-of-time appeal is whether the appellant was responsible for the failure to file a timely direct appeal. But, if appellant was not responsible for his failure to file a timely notice of appeal, the trial court should have granted his motion for an out-of-time appeal. Generally, the court should hold an evidentiary hearing to make this determination, though no hearing is required where the undisputed facts in the record show that the defendant waived or slept on his appellate rights. In considering a motion for an out-of-time appeal, a trial court abuses its discretion if it fails to make a factual inquiry as to whether the movant's conduct caused the loss of the right to a direct appeal.

And here, the Court found, the trial court did not make a factual determination as to who bore responsibility for the failure to file a timely appeal and, though the undisputed facts of record did not show that appellant waived or slept on his rights, did not conduct an evidentiary hearing on the matter. Accordingly, the Court remanded the case for an evidentiary hearing and determination as to whether appellant was properly notified of the third amended sentence, and whether his right of direct appeal was frustrated through no fault of his own. In so holding, the Court noted that it will be appellant's burden to prove at the hearing on the motion for an out-of-time appeal that he was not at fault in his failure to file a timely direct appeal from the third amended sentence order.

***Miranda*; Request for Counsel**

Garza v. State, A18A1081 (9/19/18)

Appellant was convicted of aggravated child molestation, aggravated sexual battery, two counts of child molestation, and enticing a child for indecent purposes. Citing *O'Kelley v. State*, 278 Ga. 564, 568 (2) (2004), he argued that his trial counsel was deficient in failing to challenge the admissibility of the statement he made during a custodial interview with the police, which he argued was made in violation of his Sixth Amendment right to counsel. The recording of appellant's interview showed that, after being informed of his rights, he waived his right to have counsel present at the interview. Appellant argued that this waiver was ineffective because, before the police-initiated interview, he had asserted his right to counsel by filling out forms requesting the appointment of a public defender, and by asking, immediately before entering the interview room, "Where's my lawyer?"

The Court stated that a request for a lawyer must be clear and unambiguous; the mere mention of the word 'attorney' or 'lawyer' without more, does not automatically invoke the right to counsel. Also, *Edenfield v. State*, 293 Ga. 370 (744 SE2d 738) (2013), suggests that the assertion of the right to counsel must be made *during* the custodial interview. Furthermore, *Edenfield* is controlling notwithstanding that it appears to be at odds with the Supreme Court's earlier holding in *O'Kelley*. *O'Kelley* relied on a United States Supreme Court decision, *Michigan v. Jackson*, 475 U. S. 625 (106 SC 1404, 89 LE2d 631) (1986), that was subsequently overruled in *Montejo v. Louisiana*, 556 U. S. at 797 (IV). And our Supreme Court cited *Montejo* in support of its holding in *Edenfield*. Moreover, the only evidence that appellant committed the acts that he alleged were an assertion of his right to counsel — filling out the request for a public defender before the interview, and

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asking about his lawyer — was appellant's own testimony at the motion for new trial hearing. The trial court was authorized to disbelieve appellant's testimony. Accordingly, the Court found the trial court did not err in finding no ineffective assistance of counsel.