IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2002-KA-00044-COA

TRACY HARRIS **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF TRIAL COURT JUDGMENT:	6/11/1999
TRIAL JUDGE:	HON. JOHN L. HATCHER
COURT FROM WHICH APPEALED:	BOLIVAR COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JOHNNIE E. WALLS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS
DISTRICT ATTORNEY:	LAURENCE Y. MELLEN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	MURDER - LIFE IMPRISONMENT. THE SENTENCE IMPOSED SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED.
DISPOSITION:	AFFIRMED - 09/16/2003
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	

EN BANC

BRIDGES, J., FOR THE COURT:

¶1. Tracy Harris was indicted on March 30, 1999, by the grand jury of the Circuit Court of the Second Judicial District of Bolivar County, Mississippi. The indictment charged him with the murder of Frederick Haywood in violation of Mississippi Code Annotated section 97-3-17 (Rev. 2000). On April 6, 1999, Harris was arraigned and entered a plea of not guilty.

¶2. On June 10-11, 1999, Harris was tried before a jury and was found guilty of murder and received a life sentence in the custody of the Mississippi Department of Corrections. It is from this conviction and sentence that Harris now appeals to this Court.

STATEMENT OF THE ISSUES

I. DID THE TRIAL COURT ERR IN REFUSING TO GRANT INSTRUCTION D-2 AS REQUESTED BY HARRIS?

II. DID THE TRIAL COURT ERR IN ALLOWING THE PROSECUTION TO USE THREE OF ITS PEREMPTORY CHALLENGES IN A RACIALLY DISCRIMINATORY MANNER?

III. DID THE TRIAL COURT'S FAILURE TO GIVE A SUA SPONTE CAUTIONARY INSTRUCTION CONSTITUTE REVERSIBLE ERROR?

FACTS

¶3. On the night of March 27, 1998, Frederick Haywood, Anthony O'Bryant, and Algesa Haywood arrived at the American Legion Hut ("the Hut") in Mound Bayou, Mississippi. Already at the Hut were Joe Smith, Nakil O'Bryant, Willie Morgan, and the Appellant, Tracy Harris.

¶4. Larry Haywood, also known as "Slug", walked into the Hut. Moments later when he exited, he was immediately hit in the head with a gun by Joe Smith. Frederick Haywood walked to a Ford Explorer to get a bat. It was then that Nakil O'Bryant and Willie Morgan began shooting at the Ford Explorer. According to testimony, Harris reached over the shoulder of Nakil to retrieve the gun while stating, "You ain't shooting this M.F. right" and began shooting until Frederick Haywood fell to the ground. Harris then ran across the street and jumped in a ditch.

¶5. Several of the witnesses from the night in question agreed to testify at trial. Anthony O'Bryant testified that he was at the American Legion Hut on the night of the shooting and that he remembered hearing Harris say to Morgan that he was not firing the handgun properly. Anthony O'Bryant also testified

to seeing Harris take the gun from Morgan, who was shooting into the air at the time, level it and begin shooting at Frederick Haywood.

¶6. Algesa Haywood also testified at trial and identified Harris as the person who shot Frederick Haywood. Algesa also stated that Harris took the gun from Morgan, and then "aimed at him and Fred fell." Algesa also corroborated the testimony of Anthony O'Bryant in hearing Harris say to Morgan, "You ain't shooting it right."

¶7. Ronald Robinson, chief of police in Mound Bayou, testified to finding Frederick Haywood with a bullet wound in his chest. Robinson also found a handgun in a ditch nearby and four cartridge shells were found at the scene of the shooting. At the autopsy, a bullet was recovered from the body of Frederick Haywood, which was labeled, packaged and sent to the crime laboratory for testing. Dr. Steven Hayne, who performed the autopsy on Frederick Haywood, testified that Haywood died from a gunshot wound to his upper chest and a .45 caliber bullet was removed from his body.

¶8. Steve Byrd from the Mississippi State Crime Laboratory testified that the bullet was fired from the .45 caliber semi-automatic handgun that was found near the scene of the shooting. Nakil O'Bryant later testified and identified the handgun as belonging to him and that the same gun was the one taken out of his truck by Morgan while at the American Legion Hut.

¶9. Harris decided to testify in his own behalf and began by saying that he did take the handgun but he denied having argued with the victim or having shot at him or anyone else. He also denied having told anyone that he shot Haywood. (He originally told investigators that he took the handgun from Morgan.)

¶10. After he was found guilty, Harris filed a motion for a JNOV. Harris's motion was denied by the trial court.

ANALYSIS

I. DID THE TRIAL COURT ERR IN REFUSING TO GRANT INSTRUCTION D-2 AS REQUESTED BY HARRIS?

¶11. During jury instruction selection, the defense requested jury instruction D-2, which was later rejected by the trial court. Harris felt he was entitled to an instruction that included the phrase, "in the heat of passion." Consequently, the trial court found that there was a lack of evidence that Harris had acted in the heat of passion without malice aforethought. The trial court, however, did grant an alternative instruction which covered manslaughter. In this lesser-included-offense instruction for manslaughter, the phrase used was "the killing of a human being without malice, by use of a dangerous weapon, without authority of law is manslaughter."

¶12. "In determining whether error lies in the granting or refusal of various instructions, the instructions actually given must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found." *Johnson v. State*, 823 So. 2d 582, 584 (¶4) (Miss. Ct. App. 2002).

¶13. In *Murphy v. State*, 566 So. 2d 1201, 1206 (Miss. 1990), the court held that a defendant was not entitled to an instruction which incorrectly stated the law, was without foundation in the evidence or was stated elsewhere in another instruction.

> A defendant is entitled to have an instruction on his theory of the case. There is a limitation, however, because a trial judge may refuse an instruction which incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instruction.

Id. (citations omitted).

¶14. The trial court did not err in denying jury instruction D-2 since instruction C-30 sufficiently covered a lesser-included-offense instruction for manslaughter. The evidence from the record shows that there was

no claim of acting in the heat of passion by Harris or his own witnesses. Harris's own testimony was that he had no confrontation with the victim, and he did not shoot at anyone. Harris had possession of the handgun used in the shooting only after someone else had allegedly fired it at the victim. However, the record reflects an abundance of corroborated eyewitness testimony that Harris deliberately and intentionally used a dangerous weapon, a handgun, to shoot and kill the victim. When reading the instructions actually given as a whole, this Court finds that the "instructions fairly announce the law of the case and create no injustice." Therefore, the Court finds this issue is without merit.

II. DID THE TRIAL COURT ERR IN ALLOWING THE PROSECUTION TO USE THREE OF ITS PEREMPTORY CHALLENGES IN A RACIALLY DISCRIMINATORY MANNER?

¶15. "On review, the trial court's determinations under *Batson* are afforded great deference because they are, in large part, based on credibility." *McGilberry v. State*, 741 So. 2d 894, 923 (¶118) (Miss. 1999) (citing *Coleman v. State*, 697 So. 2d 777, 785 (Miss. 1997)). "This Court will not reverse any factual findings relating to a *Batson* challenge unless they are clearly erroneous." *Id.*

¶16. The State exercised peremptory challenges against four black veniremen. Harris alleges that the State made its strikes on the basis of race. The State argued that the three jurors that were stricken were teachers, and further stressed that teachers as a whole are more sympathetic to a defendant's cause and to wrongs committed by others. The State concluded by relating a situation where teachers were on a jury a few weeks earlier that sent a note inquiring whether the jury could recommend counseling for a young man who was on trial for shooting someone. The trial court examined the reasons given by the State and made on-the-record factual inquiry and determinations, and found the reasons for the strikes to be sufficient to meet the *Batson* challenges.

¶17. The Mississippi Supreme Court has also accepted demeanor as a legitimate, race-neutral basis for a peremptory challenge. *Walker v. State*, 671 So. 2d 581, 628 (Miss. 1995); *see also Davis v. State*, 660 So. 2d 1228, 1242 (Miss. 1995).

¶18. This Court finds it inappropriate to strike jurors just because they are a member of a particular class; however, it is noteworthy that the record reflects that the State had accepted five black jurors prior to striking four black jurors, three of whom were teachers.

¶19. We will not reverse a trial judge's factual findings on this issue unless they appear clearly erroneous or against the overwhelming weight of the evidence. *Walters v. State,* 720 So.2d 856, 865 (¶28) (Miss. 1998). According to the record, the trial court's findings on Harris's challenges are not clearly erroneous nor against the weight of the evidence. This issue is without merit.

III. DID THE TRIAL COURT'S FAILURE TO GIVE A SUA SPONTE CAUTIONARY INSTRUCTION CONSTITUTE REVERSIBLE ERROR?

¶20. During cross examination, Linda Anderson, a defense witness, was questioned regarding statements she allegedly made to Joseph Smith. Anderson denied having talked to Joseph Smith, or having made any statement. Defense counsel objected to the line of questions unless it could be proven. The prosecution stated for the record that it would call Joseph Smith to substantiate that Anderson had made a statement. The defense neither made a motion to strike nor requested a cautionary instruction.

¶21. When Joseph Smith testified he stated that Anderson told him that "folks got me in here trying to say something that I didn't say." The defense then cross examined Smith regarding the statements allegedly made by Anderson and Smith was neither impeached nor shown to be lacking in credibility as to what Anderson allegedly said to him.

¶22. The prosecution told the jury, during closing argument, that it believed the statements Anderson allegedly made to Smith were, in the prosecution's interpretation of the testimony, an indication that Anderson was not telling the truth, and that the jury should consider this in their evaluation of the credibility of witnesses.

¶23. The Mississippi Supreme Court has noted that "the better practice is that a limiting instruction be granted by the trial judge sua sponte when proper request is not made by defense counsel." *Peterson v. State*, 518 So. 2d 632, 638 (Miss. 1987). While giving a limiting instruction sua sponte may be the "better practice" when a request by defense counsel has not been made, failure to give a limiting instruction sua sponte is not always reversible error. *Williams v. State*, 819 So. 2d 532, 540-41 (¶¶ 24-28) (Miss. Ct. App. 2001).

¶24. Relying solely on *Webster v. State*, 754 So. 2d 1232 (Miss. 2000), Harris asserts that the court erred in failing to give a cautionary instruction. In *Webster*, the Mississippi Supreme Court held that whenever Rule 404(b) evidence of another crime is offered, a cautionary instruction must be given to the jury. *Id.* at 1240 (¶19). However, we find that *Webster* also held "that harmless error analysis is applicable in cases where the trial court does not sua sponte give the required limiting instruction when Mississippi Rule of Evidence 404(b) evidence is admitted." *Id.* at 1240 (¶ 22). "An error is harmless when it is apparent on the face of the record that a fair-minded jury could have arrived at no verdict other than that of guilty." *Floyd v. City of Crystal Springs*, 749 So. 2d 110, 120 (¶37) (Miss. 1999)

¶25. In contrast to the *Webster* case involving evidence of prior acts or crimes, the present case concerns testimony given. The State questioned Anderson concerning whether or not she was told to lie by defense counsel. The record reflects that defense counsel objected and said that "unless he can prove somebody--that I told somebody to lie." There was no objection based upon the need for the court to

conduct a Mississippi Rule of Evidence 403 balancing test. The trial court overruled the objection in allowing the question about possible lying. After the defense objected, the prosecution indicated that it would accept the challenge of the defense by presenting an additional witness on the issue. When Joe Smith testified, he confirmed that Anderson had told him that she felt the defense attorney, Mr. Walls, was pressuring her to testify about something that she had not said. Smith was cross examined by defense counsel and Smith was neither impeached nor contradicted.

¶26. When this issue was brought up in Harris's motion for a mistrial or in the alternative, to set aside the verdict of the jury, the trial judge responded by stating, "I think the way it ended up and the explanation made by the prosecution removed any claim by them that you [defense counsel] actually did this and was solely for the impeachment of the witness." In this case, we hold that harmless error analysis is applicable in cases where the trial court does not sua sponte give the required limiting instruction when Rule 404(b) evidence is admitted. *Webster*, 754 So. 2d at (¶22). In the present case, the evidence of Harris's guilt was overwhelming, and therefore, we find that this issue is without merit.

¶27. **THE JUDGMENT OF THE BOLIVAR COUNTY CIRCUIT COURT OF CONVICTION OF MURDER AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, TO RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO BOLIVAR COUNTY.**

THOMAS, LEE, MYERS, CHANDLER AND GRIFFIS, JJ., CONCUR. KING, P.J. DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY IRVING, J. SOUTHWICK, P.J. DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY MCMILLIN, C.J.

KING, P.J., DISSENTING:

¶28. With appropriate regard for the majority opinion herein, I dissent as to whether the trial court should have granted a limiting instruction *sua sponte.* I do not believe the majority's summation of the facts regarding this issue provides a full and accurate view of the matter.

¶29. Perhaps that testimony which best explains the facts surrounding this issue begins with the cross-examination of Linda Anderson by Glenn Rossi, the assistant district attorney, goes through the re-direct examination of Ms. Anderson by Mr. Walls, the defense attorney, and ends with what has to be considered an objection by Mr. Walls.

¶30. That testimony is as follows:

CROSS-EXAMINATION

BY MR. ROSSI:

Q. Ms. Anderson, did you have a conversation today with Joseph Smith?

A. No, I didn't.

Q. Do you know who Joseph Smith is?

A. Yes, I do.

Q. Did you tell Joseph Smith that Mr. Walls, the attorney, was trying to get you to lie about what happened out there?
A. No, I didn't.

Q. Did you have any conversation with Joseph Smith - -

MR.. WALLS: Your Honor, I'm going to object to that, unless he can prove somebody - - that I told somebody to lie. I want him to prove that right now.

MR. ROSSI: Your Honor, I have to ask her first before I can put Joseph Smith on.

THE COURT: All right. He's following procedure. Whether he can follow-up with it or not, I don't know. The objection is overruled.

MR. ROSSI CONTINUED:

Q. Did you have any conversation with Joseph Smith about that?

A. Today, no. I just spoke to him.

Q. Did you have any conversation with him at all about that, whether today or any other time?

A. No, I did not.

Q. have you spoken to him today?

A. Yes, I did.

Q. When was that?

A. Earlier today when I first got here.

Q. About what time?

A. I don't know the time.

Q. Well, where were you, and where was he when you spoke to him?

A. He was at the vending machine down there, right there in the hall.

Q. And you said you spoke to him. What did you say to him?

A. I said, "What's up?" That's how I speak.

Q. What did he say?

A. He spoke back. He said, "Hi."

Q. And then what did you say?

A. I was joking with him about some money. I was just really joking. I didn't say anything but speaking, like I always do when I see him.

Q. And you had no conversation with him about what Mr. Walls wanted you to testify to?

A. No, I did not.

MR. ROSSI: No further Question, Your Honor.

THE COURT: Any redirect?

MR. WALLS: I will never forget that, Your Honor.

REDIRECT EXAMINATION

BY MR. WALLS:

Q. Have I ever asked you to lie for anything in this case or any other place?

A. No, you have not.

Q. Have I asked you what did you know about this case, if anything?

A. yes, you did.

Q. And did you tell me what you knew?

A. Yes, I did.

Q. And is that all I asked you to testify to?

A. Yes, you did.

Q. And the questions that I asked you earlier, were those the questions that I asked you outside?

A. Yes.

Q. And isn't that what I told you I was going to ask you about, what you just testified about?

A. Yes, sir.

Q. And did I ask you did you know anything else?

A. Yes, sir.

Q. And what did you tell me?

A. No, sir.

MR.. WALLS: I have nothing further, Your Honor.

THE COURT: Okay. Any further need of this witness, Mr. Walls?

MR. WALLS: No, Your Honor. And I want to say on the record that I think it's low of the D.A. - -

THE COURT: No, no - -

MR. WALLS: - - to impugn my integrity in front of the jury.

THE COURT: Hold on. We're not going to go into that.

MR. WALLS: Your Honor, if he was going to go into that, he should have done it outside the presence of the jury.

THE COURT: Mr. Walls, y'all can have another forum in which you can talk about that, but don't do it in front of this jury.

¶31. The record clearly reveals something more than the benign testimony inferred by the majority opinion. Likewise it also indicates an action that without question extended beyond an attack on the credibility of a witness.

¶32. If the purpose of the examination was to call into question the credibility of Ms. Anderson, the prosecution could have done so by asking her if anyone had urged her to lie about what she knew, rather than asking, "Did you tell Joseph Smith that Mr. Walls, the attorney, was trying to get you to lie about what happened out there?"

¶33. The question as posed by the prosecution, could only have as its effect, intended or unintended, the public impugning of the integrity of the defendant's attorney, and by so doing, undermining the defendant's right to effective representation of counsel.

¶34. The majority opinion attempts to circumnavigate this issue by calling it harmless error. I do not believe the error harmless under the circumstances of this case.

¶35. This case comes down to a question of credibility. That matter was clear in the minds of the prosecution team. In its closing argument the prosecution made numerous references to the credibility of its witnesses and the lack of credibility of the defense witnesses. Sandwiched between those references were also references to "what Mr. Walls would have you believe." Also by the prosecutor, "Mr. Walls and his client would have you believe ladies and gentlemen, that that couldn't happen . . . ."

¶36. These actions continued to call into question the credibility of defense counsel, Mr. Walls, and beyond question undermined the right to the effective assistance of counsel.

¶37. Under these circumstances, that is not harmless error.

IRVING, J., JOINS THIS OPINION.

SOUTHWICK, P.J., DISSENTING:

¶38. With respect for both the majority and the other dissenting opinion, I find the issue that divides the Court should be decided within a different analytical framework.

¶39. The other dissenting opinion would reverse because the prosecutor cross-examined a defense witness about whether she had been encouraged to perjure herself by defense counsel. The defendant made an appellate issue of whether a limiting instruction from the judge was required because of this suggestion. The other dissent does not agree with that characterization of the error. Instead, it finds that error arises from impugning the integrity of defense counsel. That undermined the right to effective counsel by casting counsel in an impermissibly negative light in front of the jury. The issue could only be pursued by the artificial mechanism of asking whether an unnamed person had encouraged falsehoods.

¶40. The majority accepts the defendant's appellate approach that the issue is whether a limiting instruction was required to be offered *sua sponte*. It then finds that the absence of an instruction was at worst harmless error because it also finds that the evidence of guilt was overwhelming. I note that no one has identified just what such a limiting instruction would have said -- perhaps, "even if you find that defense counsel (or some unnamed person) may have sought to have one witness perjure herself, that does not mean others committed perjury." Surely such an admonition or any other one serves no purpose. Once the issue is *properly* injected, I find no justified line to draw for the jurors in how far they should take the inferences that flow from that evidence.

¶41. With respect for the authors of each opinion, I take a different tack. If a proper predicate is laid, a witness is subject to being questioned concerning whether she has some form of bias that may be affecting her testimony. Under my reading of those rules, this evidence fits within the category of relevant bias evidence used to impeach a witness. Where I find error is with the failure to apply safeguards before introducing evidence of this volatility. I would reverse and remand.

¶42. Anderson was one of the last witnesses called by the defense. She testified quite briefly -- her direct testimony occupies only two pages of the transcript. It did not seemingly address any central issue of the case. As best as I can discern, the defense was using her testimony to describe some ambiguous actions by another possible perpetrator of the crime. It is in the context of this minor witness that the issue before us needs to be addressed.

¶43. I start with the manner in which this charge of pressure on a witness was injected into the case. The State attempted to get the defense witness Anderson to admit that counsel had encouraged her to lie. She denied that. She was then asked whether she had told Joseph Smith earlier that day about such encouragement. Anderson denied that too. The State later called Smith and asked him what Anderson

had said. He answered that Anderson had claimed that the defense counsel was attempting to get her to "say something that I didn't say." There is some ambiguity in that phrase. Still, I find that it created a reasonable fact question about the following point: did Anderson claim to Smith that she had been pressured in some manner by the defense counsel to change her version of what she had witnessed? Anderson did not admit to testifying falsely, but at least what she said raised suspicions about, i.e., it "impeached," the accuracy of her testimony.

¶44. Asking a witness whether she has in some manner been encouraged to give false testimony raises an inflammatory matter. For the State to raise that defense counsel himself may have sought to suborn perjury, unless there was a legitimate basis on which to make that allegation, suggests prosecutorial misconduct. Because the matter is so volatile, the issue should be introduced outside the hearing of the jurors and the predicate laid. As just explained, the predicate did exist. I will review the remaining considerations on admissibility.

Design of Rules of Evidence as to impeachment

¶45. Impeachment of a witness on any basis that would draw testimony into legitimate question is permitted. M.R.E. 607. Five bases for attacking witness credibility are generally identified: (1) prior inconsistent statement, (2) witness character, (3) bias, (4) contradictions of the testimony through other evidence, and (5) ability of witness to perceive, recall or narrate. 27 WRIGHT & GOLD, FED. PRAC. & PROC. § 6094, at 516. The federal courts have never had specific rules permitting impeaching on the last three categories, but the United States Supreme Court held that all traditional methods of challenging credibility were still available. *Id.* In 1989 the Mississippi rules gained an explicit section permitting impeaching a witness based on bias. M.R.E. 616 cmt.

¶46. Even before state Rule 616 was adopted, then, impeaching for bias was permitted. That is because Rule 607 allowed the impeaching of witnesses generally, without stating any limitation. M.R.E. 607. Unless something else in the rules specifically excluded bias-based impeachment, it was proper under the general authorization for relevant evidence. M.R.E. 402; *see* 27 WRIGHT & GOLD, FED. PRAC. & PROC. § 6092, at 487 (explains this reasoning for admitting bias evidence).

¶47. What needs to be kept in mind are that the specific categories of impeachment covered by the evidentiary rules have varying approaches to admissibility -- prior inconsistent statement (M.R.E. 613), witness character (M.R.E. 608), bias (M.R.E. 616), and the character-related issues of a prior conviction (M.R.E. 609) and religious beliefs (M.R.E. 610). Impeachment based on character, or more precisely, on reputation testimony, is limited and extrinsic evidence is usually prohibited. M.R.E. 608 (a) & (b). However, as one authority on the similar Federal Rules of Evidence has written, "bias is never classified as a collateral matter lying beyond the scope of inquiry, or as a matter on which an examiner is required to take a witness's answer." 2 WEINSTEIN'S FED. EVID. §607.04 [1] (2000). Extrinsic evidence of bias is broadly permitted, as I will show.

Evidence Rule 616

¶48. The question of the bias of a witness may legitimately be pursued.

> For the purpose of attacking the credibility of a witness, evidence of bias, prejudice or interest of the witness for or against any party to the case is admissible.

M.R.E. 616. This is not evidence of character, or of prior bad acts. This is allowing evidence that a particular witness for reasons of "bias, prejudice or interest," may not be telling the truth.

¶49. What constitutes "bias" or "prejudice" is the next important issue. Threats, bribes, or other inducements to tell a certain story may properly be characterized as bias. Someone may be continually

biased because of past attitudes or connections with a party or an issue. A witness instead may be situationally biased, in that the person is inclined to one side because of specific inducements. Professor Wigmore defined "bias" for purposes of impeaching witnesses as including "all varieties of hostility or prejudice against the opponent personally or of favor to the proponent personally," "specific inclination . . . produced by the relation between the witness and the cause at issue in the litigation," and "corruption [which] is here to be understood as the conscious false intent which is inferrable from giving or taking a bribe or from expressions of a general unscrupulousness for the case in hand." 3A WIGMORE, EVIDENCE § 945 (Chadbourn ed. 1970), quoted in 27 WRIGHT & GOLD, FED. PRAC. & PROC. § 6095 at 517 (1990). A fourth classification has been noted, which is "coercion, intended to include any form of mental, emotional or physical duress or compulsion that overcomes a witness' duty to tell the truth." 27 WRIGHT & GOLD, FED. PRAC. & PROC. § 6095, at 517 n.7. In a list of specific sources of bias, included are bribes and fear. *Id.* at 519-20.

¶50. As has been said, evidence of bias is always relevant since it undermines all the assumptions about witness testimony.[1] *Id.* at 516 & 526. Regardless of category, bias may be explored through cross-examination and with extrinsic evidence. Another rule becomes involved if the bias arises from evidence of any form of bribery. That is reviewed next.

Evidence Rule 408

¶51. A more specific rule has been used when the issue is one of obstructing a criminal prosecution. Evidence Rule 408 generally bars proof of pretrial offers to compromise civil claims. There is a caveat in

[1] The assumptions as to all testimony are "(1) that the witness perceived the fact, (2) that he accurately recalls his perception, (3) that he truthfully states his recollection, and (4) that he expresses his testimony in a way that permits it to be understood by the jury in the general manner intended by the witness." 27 WRIGHT & GOLD, FED. PRAC. & PROC. § 6092, at 487.

the rule that makes clear that evidence of financial pressure on criminal witnesses is admissible: "The rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, . . . or proving an effort to obstruct a criminal investigation or prosecution." M.R.E. 408. Under the nearly identical Federal Rule of Evidence 408, it has been concluded that evidence of "efforts to 'buy off' the prosecution or a prosecuting witness" is admissible. 2 WEINSTEIN'S FED. EVID. §408.08[6].

¶52. Therefore, depending on what the examination of the witnesses uncovered, evidence of efforts to suborn perjury by bribes or other pressures would have been relevant and admissible under one of these evidentiary rules. As shown in the majority opinion's excerpts from the testimony, there never was any indication of how the counsel allegedly had tried to get the witness to tell her story in a certain way. Rules 607 and 616 are sufficient, with Rule 408 specifically relevant to bribery.

¶53. This analysis is to be distinguished from the general rules for presenting evidence of the character and conduct of a witness. *See* M.R.E. 404, 405 & 608. There, issues of what can be proved solely through questions to the witness and what can be shown through extrinsic evidence take center stage. There is a quite different right that allows introduction of extrinsic evidence when bias is the concern. Under Rule 616, *evidence* of the bias of a witness is *admissible*.

Rule 613

¶54. Once the witness Anderson denied having been encouraged by the defense counsel to lie, she was asked whether she had told Joseph Smith the contrary. She denied having said anything to Smith about counsel's encouraging her to lie. When Smith himself was then called, he quoted what she had allegedly told him. That was a prior inconsistent statement of the first witness, which she was initially given an

opportunity to admit, deny, or explain. However, I do not find that the specific evidentiary rule on prior inconsistent statements to be applicable. M.R.E. 613.

¶55. Rule 613 applies to prior statements being used to challenge the credibility of a witness on an issue relevant to the underlying case. The typical example is that a witness testified as to one version of relevant events, and a prior statement told a different story. If on the other hand the prior statement of that witness is being used to establish bias, another rule applies. The existence of bias is a question about state of mind. "Statements of a witness asserting that she is biased for or against a party are admissible over a hearsay objection on the grounds that they are offered to prove the witness' state of mind." 27 WRIGHT & GOLD, FED. PRAC. & PROC. § 6095, at 517 n.9. A hearsay rule allows admission of a declarant's then-existing state of mind. M.R.E. 803(3).

¶56. Therefore, this prior statement was not just admitted for impeachment purposes. When Rule 613 is used generally to attack witness credibility with a prior inconsistent statement, the evidence is solely impeachment and cannot prove the matter asserted. But when the category is not witness credibility generally but bias, the prior statement can be used as substantive evidence of that bias. Rule 613 is not the door through which the evidence has been admitted; Rule 803(3) is. *See* 27 WRIGHT & GOLD, FED. PRAC. & PROC. § 6095, at 533 (distinguishes between admission of prior inconsistent statement to attack "credibility," and introduction to show bias).

Rule 403

¶57. It was incumbent on the State to present a legitimate basis on which to make this volatile claim. I find that such evidence was provided in the form of the Joseph Smith's testimony. He testified that the witness Anderson told him that defense counsel had "got me in here trying to say something that I didn't

say." Though this unfortunately impugned the integrity of defense counsel, it was not inadmissible for that reason. This was relevant and admissible evidence.

¶58. What I find to be the extent of possible error here is that the line of valid inquiry was nonetheless so inflammatory that a legitimate issue of undue prejudice existed. Yes, a witness being encouraged to "say [at trial] something that I didn't say" before trial is relevant evidence. It is also extraordinarily inflammatory when it is defense counsel himself who is implicated. The evidence is still relevant. Here, the witness whose out-of-court statement is at issue was an extremely minor one. However, the jury's acceptance of the evidence of suborning perjury would likely cause them to doubt other defense witnesses as well.

¶59. I agree with the other dissent to this extent: to inject into a criminal trial the possibility that defense counsel himself is suborning perjury is potentially so fundamentally destructive that such evidence cannot be treated as just another item of impeachment. Indeed, if any counsel did what the prosecutor alleged, that is a basis for a mistrial, criminal charges, and a variety of other results. Those ramifications do not mean that the issue cannot be pursued. Indeed, it should be vigorously investigated.

¶60. The problem in this case was the method by which the inquiry was undertaken. In fairly blithe fashion, the prosecutor asked whether defense counsel had asked a witness to lie. The trial judge also appeared somewhat nonchalant concerning the seriousness of the charge.

¶61. Whenever an issue of a counsel's attempt to suborn perjury exists, I conclude that the party with that concern should raise it out of the presence of the jury. A hearing should be held, with whatever witnesses desired by either side or the court being called to explore the charge. If the trial court concludes that there is a basis on which to believe an attempt to cause perjury was made by one of the counsel on the case, then unless lesser remedies appear adequate, consideration should be given to declaring a mistrial and of referring the matter for criminal and professional sanction.

¶62. If instead the trial court finds no reasonable basis on which to believe any such attempt was made, then findings to that effect should be entered. What further steps to take depends on whether the party with the concern still wishes to pursue it as impeachment of a witness. If the party agrees to drop the impeachment evidence, then nothing further is needed. However, the counsel who raised the issue may not wish to abandon the point. A criminal defendant has a constitutional right to impeach government witnesses. *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974). This would include the right to seek to convince a jury that the prosecution improperly sought to coerce witnesses, even if a trial judge did not accept that a substantial basis to believe the claim existed. The State would not have a corresponding constitutional right. It would have the rights granted under the Rules of Evidence, however, which are to have admitted relevant evidence that does not run afoul of the restrictions set out in the rules. Among those restrictions is that the probative value of relevant evidence be not greatly outweighed by the prejudicial impact of it.

¶63. I find no basis after such a hearing on which to deny the defense the right to pursue the impeachment if it desires to do so, even if the trial judge found insufficient grounds to believe that opposing counsel had sought to suborn perjury. A full evidentiary presentation to the jury on the matter by the State would also be allowed to counter the impeachment.

¶64. If the State wishes to override a trial judge's conclusion after such a hearing and still use the impeachment evidence that perjury was suborned by defense counsel, then the admission should be controlled by comparing the probative value to the prejudicial effect.

¶65. It is true that trial counsel did not raise the issue of the Rule 403 balancing. The objection by defense counsel was simply that there was no basis on which to be asking these questions. The State then showed a valid basis. Counsel did not object that whatever probative value of bias that might be shown

was too greatly outweighed by the prejudicial impact. *See* M.R.E. 403. I find no general obligation for a trial judge unbidden to state orally his balancing of prejudice to probative value, though "a trial court is required to consider whether the probative value of the questionable evidence is outweighed by undue prejudice." *McCullough v. State,* 750 So. 2d 1212, 1216 (¶15) (Miss. 1999). That just makes it necessary that the judge think about this. Indeed, since Rule 403 applies to all evidence, were an on-the-record balancing always needed, then every ruling on any objection that raises an issue of admissibility would have to include a statement about the balancing. I find no such mandate in the caselaw.[2]

¶66. I would place the matter before us today in the category of requiring not just an on-the-record balancing, but an actual separate hearing. The implications of the charge made by the State were serious enough that the failure to treat this outside the jury's presence, with adequate fact-finding, was fundamental error that removes the need for a contemporaneous objection.

¶67. In the balancing that would occur when the State wishes to impeach despite a trial judge's conclusions after a hearing, it would be relevant to determine whether the witness was a minor one. In addition, the strength of the foundation for the evidence would be relevant. Here, the witness Smith did not state that the earlier witness Anderson had told him that she had actually said something untruthful, but only implied that defense counsel had tried to get her to do so. A jury would be entitled to infer for purpose of determining bias that the attempt was successful since the witness was used, but that is not a necessary inference. The court might find the probative value too attenuated and the prejudice too great to permit introduction.

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[2] There is some suggestion, but only occasional, that before admitting evidence of other bad acts under Rule 404, an on-the-record balancing must occur. *Anthony v. State*, 843 So. 2d 51, 55 (Miss. Ct. App. 2002). The nature of Rule 404 evidence makes it more of a candidate for *sua sponte* fact-finding on the balance than does most other evidence.

¶68. What sense to make of relevant, admissible evidence is ultimately for jurors, not for judges. There is an initial function for trial judges, though, which is to filter unfairly prejudicial evidence through proper procedural protections. I would reverse and remand for the failure to do so.

¶69. The majority finds the evidence overwhelming. I find the evidence contested. I do not believe that we can ignore that an insinuation of this magnitude oozed into the case even if there was substantial evidence on which a jury could rely to convict. There were also denials of Harris's complicity on which the jury could have relied to acquit. This was an immeasurable distortion of the fact-finding process. To find it to be harmless error is to declare that the harm in this case can be confidently quantified. I do not feel so audacious.

McMILLIN, C.J., JOINS THIS SEPARATE WRITTEN OPINION.