Witness: Lissa McElroy

Date: 2004-08-03

Proceedings held August 3, 2004

Called by: People (prosecution)

Phase: Guilt

Examinations: Direct – Rick Distaso; Cross – Pat Harris

Day 1 of 1 for this witness

Court: San Mateo County Superior Court, Redwood City (People v. Scott Peterson)

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Direct Examination by Rick Distaso

DISTASO: Miss McElroy, do you know Sharon Rocha?

McELROY: Yes, I do.

DISTASO: How is it that you know her?

McELROY: We met about 12 years ago at work.

DISTASO: And do you and Miss Rocha, Sharon Rocha, still work together?

McELROY: Yes.

DISTASO: Okay. Some time during the last week of December, 2002, somewhere between December 28th and December 31st, were you over at Scott Peterson's home at 523 Covena?

McELROY: Yes.

DISTASO: And during that time, did you assist Mr. Peterson in helping to pick out some photographs to give to Kim Peterson to be used by the media?

McELROY: Yes.

DISTASO: And Kim Peterson, who is Kim Peterson?

McELROY: She is the director of the Carol Sund Foundation.

DISTASO: That's like a, kind of a charitable foundation in Modesto?

McELROY: Yes.

DISTASO: Can you describe for the jury what was going on, or where did this take place, in what part of the house?

McELROY: We had just come in the door. We were standing inside the door, which is the almost in the dining room area

DISTASO: Let me stop you for a second. Who did you go into the house with?

McELROY: With Sharon and Patty Amador and Sandy Rickard.

DISTASO: And what happened next then? How did you get involved in this?

McELROY: We kind of stepped inside the door. Sharon was there to meet with people from, the photographer from People Magazine. And Kim had turned to Scott and said, Scott, GERAGOS: Objection. Hearsay.

JUDGE: Well, yeah, it would be hearsay. Sustained.

DISTASO: Okay. Did Kim Peterson tell the defendant something? Just don't tell me,

McELROY: Yes.

DISTASO: Did she talk to Scott Peterson?

McELROY: Yes.

DISTASO: And then based on that conversation, did Scott Peterson go and do something?

McELROY: Yes.

DISTASO: What was that?

McELROY: He went into the family room to get some photos of Laci.

DISTASO: And did you go with him?

McELROY: Yes, I did.

DISTASO: Who was present there in the family room?

McELROY: There was, I think his nieces, two nieces of his. I saw his father in the background over by the back of the sofa. I saw him walk by. I don't know if he was sitting down. There may be one or two other people in the room. I wasn't really paying exact attention to them.

DISTASO: And you said that these photographs were to be given to Kim Peterson?

McELROY: Correct.

DISTASO: And were you and Scott Peterson looking at the photographs?

McELROY: Yes.

DISTASO: What was the defendant's demeanor during that time?

McELROY: Fairly nonchalant.

DISTASO: And what kind of photographs was he pulling out to be, or just describe for the jury what happened.

McELROY: He pulled out the first photograph. It was of Laci in a bathing suit on the beach. And he said, "How about this one?"

DISTASO: What did you tell him?

McELROY: I said, "No, I don't think so."

DISTASO: Okay. What happened next?

McELROY: Then he pulled out another photograph, and it was a picture of Laci and three of her friends at a backyard area. I don't know what the location was. They were all holding up their drinks cheering somebody, and a picture was taken. And I said, "I don't think that's appropriate for the media."

DISTASO: Did he pull out another picture?

McELROY: Yes.

DISTASO: What was that?

McELROY: It was a picture of him and maybe six or seven guys. It was getting obviously to be evening time. It looked like there was shrubbery behind them. They were all dressed fairly nicely, kind of in a semicircle. And the guy in the middle was turned around and was mooning the camera

DISTASO: When you saw mooning, was he exposing his buttocks to the camera?

McELROY: Yes.

DISTASO: And what did you tell him about that particular picture?

McELROY: I said, "Scott, aren't you glad I'm here so you don't screw this up?"

DISTASO: And did eventually you pick out, or did eventually you and Mr. Peterson pick out appropriate pictures for the media?

McELROY: We ended up taking some up to the counter. I don't know which pictures it was that Kim actually took to go give to the media. I don't know.

DISTASO: Nothing further, your Honor.

Cross Examination by Pat Harris

HARRIS: Good afternoon.

McELROY: Good afternoon.

HARRIS: Your testimony today is also similar to the report you gave to Detective Grogan of the Modesto police; is that right?

McELROY: Should be, yes.

HARRIS: Do you recall meeting with Detective Grogan?

McELROY: No, I did not meet with him. I spoke to him on the phone.

HARRIS: It was a telephone interview?

McELROY: Correct.

HARRIS: Do you recall that interview was March 9th of this year?

McELROY: Correct.

HARRIS: It was, occurred about 6:30 in the evening March 9th?

McELROY: It was in the evening. I couldn't say 6:30 for sure.

HARRIS: The phone conversation was prompted by Sharon Rocha; is that true?

McELROY: I don't know.

HARRIS: You don't recall Sharon Rocha asked you to call?

McELROY: I didn't call him. He called me.

HARRIS: Do you recall if Sharon Rocha ever asked you to call the police with this information?

McELROY: I don't remember her ever asking me to call the police regard to this.

HARRIS: Did you ever tell her this information prior to this day?

McELROY: I told her the day that we walked out of the house and we got back in the car. They asked me what was wrong, and I told them.

HARRIS: So you had told her prior to this?

McELROY: I told her the day it happened.

HARRIS: I'm sorry, let me just finish the question.

McELROY: I'm sorry.

HARRIS: You had told her prior to this that she had never asked you to call the police before; is that correct?

McELROY: She had, at some point early on, probably in January said, "You probably need to talk to Craig about this."

HARRIS: Early in January of in year?

McELROY: No. Last year. In 2003.

HARRIS: 2003?

McELROY: Yes.

HARRIS: But it wasn't until March 9th of this year that, in fact, Modesto Police Department actually called you to question you about this; is that right?

McELROY: Correct.

HARRIS: Okay. You said you were a friend of Sharon. In fact, you work with her; is that correct?

McELROY: Correct.

HARRIS: You work together at Ambeck Mortgage?

McELROY: Correct.

HARRIS: You see her on a daily basis at work?

McELROY: Not any more.

HARRIS: Did you at that time?

McELROY: Yes.

HARRIS: You no longer work there?

McELROY: No, I work there.

HARRIS: Did, at any point in time that Detective Grogan was talking to you about, or asking you questions about these issues of the photographs, did he show you any photographs?

McELROY: No. We were talking on the phone.

HARRIS: You are right. Did he ask you to come look at any photographs?

McELROY: Well, last night.

HARRIS: Last night he did?

McELROY: Un-hun.

HARRIS: Did you go look at photographs?

McELROY: I'm sorry?

HARRIS: We'll get it straightened out.

McELROY: Okay.

HARRIS: Last night he asked you to go look at photographs?

McELROY: Yes.

HARRIS: And you did?

McELROY: Yes.

HARRIS: Where did you go?

McELROY: To the hotel.

HARRIS: Okay. You went through some photo albums?

McELROY: Yes, I did.

HARRIS: You viewed, did you find the photo albums that you saw that night?

McELROY: No.

HARRIS: You saw pictures that you saw that night?

McELROY: No.

HARRIS: None of the pictures that you allege that were seen that day, that you saw that day that you and Scott Peterson were going through, were shown to you, were they?

McELROY: I did not see them in what they gave me last night, no.

HARRIS: As were you going through them, may I have just one second?

GERAGOS: We need to talk outside the presence.

Hearing on Discovery Violation

JUDGE: Outside the presence of the jury, outside the presence of the witness?

GERAGOS: Yes.

JUDGE: All right. We'll have to excuse you for just a few minutes. We'll bring you right out after I have heard this offer of proof. We'll ask you, Miss McElroy, to wait outside.

JUDGE: All right. Record should reflect that the witness has left the courtroom. Yes, Mr. Geragos.

GERAGOS: Well, at the peril of once again falling on that, apparently having anybody concerned about it, the idea that specifically yesterday I asked Mr. Distaso for the photo albums. Mr. Distaso said, well, they were never taken. I said, well, clearly they were taken. They were taken on February 18th in the second search warrant. He says, oh, okay. He said, I said I'd like the photo albums here today.

JUDGE: You don't have them?

DISTASO: They are right there.

GERAGOS: They are here. The bigger problem though, bigger problem, this is a slam dunk Brady violation, in that they show, before you start screaming over here, they show the photo albums to the witness last night at the hotel, and the witness is unable to show any of these supposed photos that she's now recounting on a March-this-year interview, which has never been reported beforehand. Not only is there, and I know that apparently the 1054 proscriptions apparently from the DA's office don't apply, but 1054 requires all of the information to be provided 30 days before trial. March 4th we were picking a jury, if the Court will remember in this courtroom. Apparently that week all of these witnesses that were shown today were rounded up. I defy you, with the exception of Mr. Wilson and this last witness, to find anything in any report showing that there was a connection between the people who were testifying and Patty Amador and Sharon Rocha, or that there was any indication whatsoever that there may be an interest or bias, which, last time I looked, does bear upon whether or not somebody should have that information, if you are from the defense, prior to doing cross examination. No harm no foul, because we discover it on the stand, or when I run outside and ask Miss Krueger if she happened to be Patty Amador's sister, because when she is up here she is testifying as if she is a family friend who just walked in. I thought when they put her up on the stand that the woman was a, looked at the photo at the Modesto PD did some police work and identified somebody who happened to be a stranger. Funny me, I should have known better that with Modesto PD there was no way in the world, absent starting to ask some questions, she wasn't going to fess up as to what it was. And then me, running outside after she testifies, to find out that she is, in fact, Patty Amador's sister. In fact, there is a relationship which was never disclosed. Neither here nor there. There is no way in the world that a witness who goes and is looking at photo albums, which I have specifically asked to be brought to court, because I believe that they are relevant to this witness's testimony, and I asked for it yesterday, once again, we get into a situation where my work product is invaded, because I am forced to ask for documents that they are holding in

the evidence room, so they know what it is I want. When I tell them this is what I want for this witness, that gives them a heads-up as to where it is I'm going. So, fine, once again my work product has no protection. Once again, however, they go and they show these photo albums to the witness, and the witness is unable to pick out the photos. I don't think under any interpretation of either Giglio, under in re Brown, which is a California formulation of Kyles V Whitley or the Brady Doctrine, that I'm not entitled. That the first thing Mr. Distaso should have done before he called this witness is, by the way, I forgot to tell you, we showed her the photo albums, which are right here as he says, apparently packaged up again. Have not disclosed, and have not disclosed to me that she didn't identify. Why do I have to find that out on the stand? I guess the fallback position for them is, there are 40,000 pages of documents? What do we know? How many times do we hear that? How many times is that going to be the refrain? How many times am I going to have to get discovery by cross examination? And at a certain point I think that the Court has to do something. I don't want to just keep filing motions for mistrial. I don't want to keep filing motions for discovery sanctions that don't get granted. I don't know what to do, except to make a record that there is no way in the world that I'm going to be judged effective assistance of counsel if we repeatedly, week-in-week-out, have the same situation happen over and over again. You, yourself, have told them on more than ten occasions, when I have been present, pretry these witnesses so we don't have these surprises. How many times we have heard that? It's your mantra. Well, here they pretry it. Don't you think under some circumstances what just came out is Brady? And if that was Brady, then shouldn't there be a sanction?

DISTASO: Well, judge, look,

JUDGE: Wait a minute. Wait a minute, Mr. Distaso. I have had it about up to here with these violations now. Why didn't you tell Mr. Geragos that this lady looked at these albums last night and couldn't pick out the pictures? Why didn't you tell him that?

DISTASO: Judge, I did not even think it was an issue. Here is the deal. Hold on,

JUDGE: Don't tell me to hold on.

DISTASO: I'm sorry, I,

JUDGE: It's an issue, you don't think that's important to the defense in this case? I'm just about ready to impose some sanctions here. I'm just getting sick of this now. I'm sick of this, wait a minute.

DISTASO: Judge,

JUDGE: Wait a minute. I have had this conversation with the prosecution he said at least ten times. It's getting to be vexatious it's starting to annoy me. I'm going to have to start doing something about it to ensure that you guys comply with the discovery. Now, what's your excuse for this?

DISTASO: Judge, these pictures were taken six weeks after this witness saw this event. Six weeks after. I don't know that any of these albums are even anything that she is even looking at.

JUDGE: Let me ask you something, Mr. Distaso. Did you know when you put this woman on the stand that last night that she looked at these albums, and she could not pick out the photographs that she claims she examined with Mr. Peterson back in December? Did you know that?

DISTASO: Here, well, yes, judge.

JUDGE: Then listen to me. Why didn't you tell Mr. Geragos?

DISTASO: I don't know, judge. I don't have any, I have no excuse for it.

JUDGE: Okay. I'll tell you what the solution is. I'm going to strike her testimony, because I have had it now. Let this be a warning,

DISTASO: Judge, can I ask the Court for a less severe sanction than that?

JUDGE: No.

DISTASO: I apologize to the Court.

JUDGE: No, I'm, Mr. Distaso, I'm, I have had it now. You know, this has been a constant refrain in this case. You knew that last night. When we started, I asked you a long time ago, do you pretry these witnesses?

DISTASO: I know.

JUDGE: You said, no, you didn't. Then you said you did. Your boss was sitting right here in the audience when I asked you that question, I found out later. But this is going to have to stop. And the only sanction, to get your attention, to divulge this information to the defense like you are supposed to is, I'm going to have to do something. I have to set an example. That's exactly what's going to happen. I'm going to strike Miss McElroy's testimony. That's going to be the sanction.

DISTASO: Your Honor,

JUDGE: Yes?

DISTASO: Can I ask the Court for a less severe sanction? I apologize to the Court profusely. But let me tell the Court how I was viewing this. I did not view it as, if she had picked out the photographs, then certainly I would have told the defense, because that is what I would have used here. The thing here, how I look at it, these are photographs that were six weeks after the fact. The defense has gone through every one of these pictures I know that for a fact. They know that those pictures are not in this album. She said it's, none of them are here. I can't pick them out. She said none of them are here.

JUDGE: That's fine. But you are supposed to let the defense know this. She's testifying.

DISTASO: Judge, they have gone through in detail every single one of these pictures. They know for a fact that the pictures she is not describing are not in there. I expected them to cross examine her on that issue. I mean that's certainly appropriate cross examination, should be done.

JUDGE: Did you, wait a minute. Mr. Geragos, did you know that the photographs that she was shown were not in this album?

DISTASO: Yes, they have gone through.

JUDGE: Your answer, I asked him not, you did you know that?

HARRIS: I personally, we went to a, at one point we went and looked at certain photographs. There was a reason we had to look at certain photographs. There were not all photograph albums present. They were not all photograph albums presented to us. No, we did not look at all photographs. We looked at some photographs based on an idea. We had whole 'nother separate area, had nothing to do with this, nothing to do with this issue. So, no, we did not look at all the photographs, no. We had no idea I specifically asked Mr. Distaso yesterday for those photo albums for this purpose. He knew exactly why I was asking for them.

DISTASO: They are here. They could have looked at them at any time.

JUDGE: That's not the point, they are here. Point is, you should have told them the question of discovery.

DISTASO: Thing is, judge, I was told, and the, I know for a fact they went through all these pictures.

GERAGOS: It's not, I'm not the witness. She's the witness.

JUDGE: Calm down. Calm down.

GERAGOS: It doesn't matter.

JUDGE: Calm down. Calm down.

DISTASO: They know the pictures are in there. It's legitimate,

JUDGE: I told you Mr. Distaso, I have gone along with this, trying to work this out so we don't have this problem. There comes a point where I just lose my patience, and this is the point. So you can sit down and be quiet now. I'm going to bring the jury back. I'm going to say the District Attorney violated discovery order. Lissa McElroy's testimony is stricken. They are to disregard the testimony. That's it, everybody. You got any other witnesses today?

D. HARRIS: Yes. Detective Wall.

JUDGE: Okay. Now, is there any issue about discovery with this witness?

D. Harris: There shouldn't be. Everything,

JUDGE: I hope so. All right. All right, bring the jury back. You can excuse Miss McElroy. Enough is enough.

Testimony Stricken

JUDGE: Let the record show the defendant is present with counsel. Ladies and gentlemen of the jury, there has been a violation by the District Attorney of the discovery order now with respect to the testimony of Miss McElroy. So as a sanction, the Court is striking the testimony of Miss McElroy. I'm going to ask you to disregard her testimony. All right, call your next witness.