

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 13, 2017

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THIS WEEK:

- **Jury Charges**
- **Ineffective Assistance of Counsel; Expert Testimony**
- **Search & Seizure; Pre-trial Detainee Mail**
- **Hearsay; Rule 807**
- **Evidence of Victim's Therapy; Prior Bad Acts**
- **Expert Witnesses; Identification**

Jury Charges

Jackson v. State, S17A1171 (8/28/17)

Appellant was convicted of murdering his sister. The evidence, briefly stated, showed that he stabbed her repeatedly because he believed she stole his social security check. He contended that the trial court erred by denying his request to instruct the jury regarding a lesser included offense of voluntary manslaughter in addition to the instruction on self-defense that was given. The Court noted that jury charges on self-defense and voluntary manslaughter are not mutually exclusive; however, the provocation necessary to support a charge of voluntary manslaughter is different from that which will support a claim of self-defense. The distinguishing characteristic between the two claims is whether the accused was so influenced and excited that he reacted passionately rather than simply in an attempt to defend himself. Only where this is shown will a charge on voluntary manslaughter be warranted.

Here, the Court found, while appellant's testimony might have supported some level of provocation, it did not provide even slight evidence that appellant stabbed his sister due to a sudden, irresistible passion. Instead, ap-

pellant stated repeatedly that he stabbed his sister because he believed that she had stolen his social security check, and the evidence showed that this belief was neither sudden nor irresistible. The evidence indicated that appellant's suspicion developed over the course of an extended period of time, and, approximately an hour before the murder, appellant stated his intention to kill his sister. Thereafter, appellant slowly placed this plan into action. In addition, appellant, himself, testified that he was not angry with his sister at the time that he confronted her. Furthermore, arguments over money are not serious provocations requiring a voluntary manslaughter charge, nor in general are any words alone sufficient. Accordingly, the Court concluded, the trial court did not err by denying appellant's request for an instruction regarding voluntary manslaughter as a lesser included offense.

Appellant also argued that the trial court erred by denying his request to charge the jury regarding the defense of insanity. The Court noted that in Georgia, a defendant is presumed to be sane. To overcome this presumption, a defendant wishing to assert an insanity defense has the burden to prove by a preponderance of the evidence that he was insane at the time the crime was committed. This affirmative defense of insanity may be established by showing that, at the time of the act constituting the crime, the defendant either (1) did not have mental capacity to distinguish between right and wrong in relation to such act or (2) had a mental disease causing a delusional compulsion as to such act which overmastered his will to resist committing the crime. Appellant conceded that he was not acting under a delusional compulsion, and he provided no evidence to show that he lacked the mental

capacity to distinguish between right and wrong at the time that he was stabbing his sister. To the contrary, the evidence showed that appellant knowingly intended to confront his sister because he believed that she had taken his social security check and that he set forth a plan of action to do so. In the absence of any evidence of legal insanity at the time the crime was committed, appellant was not entitled to a related charge on that defense.

Moreover, the Court found, appellant's arguments that he suffered from schizophrenia and manic depression and that he acted strangely after the stabbing did not change this result. Under the facts presented in this case, appellant had not drawn any connection between these facts to show that he could not distinguish right or wrong at the time of the crime, especially in light of his own testimony that he knew exactly what he was doing, he knew the reason that he was doing it, and he believed that he was justified in doing so.

Ineffective Assistance of Counsel; Expert Testimony

Richardson-Bethea v. State, S17A1104 (8/24/17)

Appellant was convicted of malice murder and abuse of Susan Walter, a disabled adult with an intellectual disability who lived in appellant's home. At trial, the State introduced the testimony of Kris Sperry, the State's long-time chief medical examiner, who testified that several of Walter's injuries could not have resulted from a fall. Sperry, who performed Walter's autopsy, described extensive bleeding on the undersurface of Walter's scalp and a massive bruise on her lower abdomen, saying the fat in that area had "liquefied because of the extensive blows that were sustained[.]" Sperry testified that the abdominal injury appeared to have been caused by "multiple blows" to the area, possibly 15 to 20 or more punches, kicks, or blows from an object, and that it could not have been caused by Walter falling onto the shower bar. Sperry testified that Walter died due to swelling of her brain, compounded by a subdural hemorrhage. He said he thought her death was caused by repeated blows to the right side of her head by fists and/or feet. Sperry testified that most of the injuries Walter sustained, including the abdominal injury, occurred around the same time, that she most likely would have been unconscious (and thus

unable to talk on the phone) by the time the last of the blows to the head was inflicted, and that the head injuries would have caused her death within 30 to 60 minutes.

Appellant contended that she was denied effective assistance of counsel during the preparation of the case for trial and during the trial itself by trial counsel's failure to retain expert testimony to refute the medical testimony presented by the State. But, the Court found, assuming without deciding that trial counsel was deficient for failing to present expert medical testimony to the jury — or, at the very least, consult with a potential expert witness — appellant was not entitled to a new trial because she could not show a reasonable likelihood that, but for the failure to retain an independent expert, the outcome of her trial would have been more favorable.

At the motion for new trial, appellant presented the testimony of a forensic pathologist, Joseph Burton, who previously had served as the chief medical examiner for several Georgia counties. The Court found that even putting aside the trial court's stated questions about Burton's credibility, Burton's testimony would have bolstered, rather than rebutted, the testimony of the State's expert. The Court noted that Burton's testimony that it was possible Walter died as a result of head injuries caused by a fall associated with a seizure and that her abdominal bruises were caused by a fall in the shower might conceivably have created some doubt in the mind of a juror. But, that is not the standard; the standard is whether there is a reasonable probability that the result of the trial would have been different had trial counsel presented the proffered evidence. Although there was evidence presented that Walter was unsteady and had a history of seizures, Burton acknowledged that it was likely that Walter had been kicked or punched in the head, and he would not commit to a medical certainty to his posited scenario that Walter died as a result of a fall associated with a seizure. Given the equivocal nature of Burton's testimony, the many ways in which Burton bolstered Sperry's damning testimony, and Burton's inability to address other aspects of the State's case, the Court concluded there was not a reasonable probability that the result of the trial would have been different had trial counsel presented Burton's testimony. The trial court did not err in rejecting appellant's motion for new trial based on ineffective assistance of counsel.

Search & Seizure; Pre-trial Detainee Mail

Leslie v. State, S17A1313 (8/24/17)

Appellant was convicted of murder and related offenses. At trial, the State tendered a letter written by appellant instructing a woman named Renatta Lester to establish an alibi for him for the day of the murder. Appellant contended that the trial court erred in denying his motion to suppress the letter. Specifically, he argued, he maintained a presumption of privacy in his outgoing jail mail because he was a pre-trial detainee, not a convicted prisoner, and therefore, the State could not search his mail without probable cause. The Court disagreed.

A pre-trial detainee's Fourth Amendment expectation of privacy in his cell and personal effects is necessarily diminished. Consequently, items found during searches conducted for security and maintenance purposes are not within the scope of protection of the Fourth Amendment. However, where a search is not initiated for legitimate prison objectives, but instead is instigated by the State for the purposes of bolstering the prosecution's case against a pre-trial detainee, then the pre-trial detainee retains a limited but legitimate expectation of privacy and is protected from an unreasonable search.

Here, appellant wrote the Renatta Lester letter from his jail cell and then placed it in the outgoing mail; the letter was later seized pursuant to the jail's routine mail inspection procedures, which all inmates were informed of during their incarceration. At the motion to suppress hearing, the deputy who seized the letter testified that, while inspecting inmate mail, she pays attention to the thickness of an envelope because it indicates that the mail could contain contraband. Upon inspecting appellant's letter, the deputy noticed the thickness of the envelope, as well as gang signs written on the front. She further testified that her inspection of the letter was done pursuant to security protocols and not specifically targeted at appellant. Therefore, the Court concluded, because the record showed that the letter was recovered during a search conducted for security and maintenance purposes, the trial court properly found that appellant's Fourth Amendment rights were not violated.

Hearsay; Rule 807

Tanner v. State, S17A1024 (8/28/17)

Appellant was convicted of felony murder, conspiracy to commit robbery, and attempt to purchase marijuana, all in connection with the fatal shooting of Cedric Huff. The evidence showed that Huff was found lying outside his apartment building and bleeding from an apparent gunshot wound. Huff was stabilized and taken to the hospital. When asked what happened, Huff said he did not know what happened or who was responsible. Huff was in the hospital's intensive care unit for sixteen days, mostly in an unconscious state due to a medically-induced coma. However, at one point he awoke, and had a conversation with his mother, Mary Huff, who was sitting by his side. She asked Huff if he knew who she was and where he was, and he replied, "yes, momma." She then asked him what happened, and "who did this" and he replied, "they robbed me." When asked who, he said "Leshan Tanner" twice and confirmed that Tanner worked at Denny's. He also mentioned "Oakwood" and when asked who else was involved in the shooting, he replied "Little Monster." Huff's mother was unfamiliar with either Tanner or "Little Monster," but implored her son to tell someone the truth as to what happened. However, before he could do so, the forty-one-year-old Huff died.

Appellant contended that the trial court committed reversible error in admitting Huff's hearsay statements pursuant to OCGA § 24-8-807 ("Rule 807") because they were not sufficiently reliable and were far less probative than the testimony of eyewitness Stokes, whose testimony the State had procured but chose not to present. Stokes was appellant's co-conspirator and pled guilty prior to trial.

The Court stated that the residual hearsay exception contained in Rule 807 was designed to be used very rarely and only in exceptional circumstances, and only when there exists certain exceptional guarantees of trustworthiness and high degrees of probativeness and necessity. Here, the Court noted, outside the presence of the jury, the State made a proffer of the pertinent, anticipated testimony of Huff's mother, and following the proffer and argument by counsel, the trial court permitted the testimony, finding that the requirements of Rule 807 were met.

The Court found that the exceptional guarantees of trustworthiness were established. The evidence showed that although Huff was in serious condition and intermittently in a medically-induced coma during the period of his hospitalization, he was lucid and oriented at the time of his statements to his mother. Huff was urged, essentially ordered, by his mother, with whom it was established that he had a close relationship, to tell the truth about who shot him. And, while Huff may not have wanted his mother to know about his drug dealings, he then had no apparent reason to lie to her about the identities of the men who caused his mortal injury. Furthermore, the statements were consistent with other evidence of appellant's involvement in the crimes. It was within the trial court's discretion to find that the statements were more probative on the identities of the perpetrators than any other evidence, including that from Stokes, as they were uttered by the victim himself who had no apparent bias or potential benefit in making such identifications; the testimony of accomplices in a felony prosecution, unlike that of victims, requires corroboration to sustain a conviction. Thus, the Court concluded, the totality of the circumstances in this case made plain that the trial court did not abuse its discretion in admitting into evidence Huff's statements to his mother.

Nevertheless, appellant contended, the admission of Huff's hearsay statements violated his rights under the Confrontation Clause as they were testimonial and thus prohibited. Specifically, he contended that Huff's mother's ongoing cooperation with the police and her "actively assisting" in the investigation made her essentially an agent of the police; therefore, the statements were testimonial in nature and it was harmful error to admit them. The Court disagreed.

A statement is testimonial if its primary purpose was to establish evidence that could be used in a future prosecution. Here, the circumstances of the victim's statements showed that they were not made in order to assist in a future prosecution. Instead, the circumstances suggested that Huff was merely answering his mother's questions after days of unconsciousness, confiding in her unlike the evasive manner in which he spoke to the police immediately following the shooting. What is more, his mother's obvious distress at her son's condition and her imploring him

to tell the truth supported the conclusion that the mother was acting primarily as a concerned mother during the exchange with her son, rather than as an agent of the police. Accordingly, the Court concluded, Huff's statements to his mother concerning the shooting were non-testimonial.

Evidence of Victim's Therapy; Prior Bad Acts

Robinson v. State, A17A1415 (8/23/17)

Appellant was convicted of aggravated child molestation. The evidence showed that at the time of the crime, the victim was 13 years old and appellant was 16 years old. He argued that the trial court committed plain error in allowing the State to elicit testimony from the victim and her mother that the victim had been in continuous therapy since the time of the sexual encounter. Specifically, he contended, the testimony about the victim's need for therapy was not material to any issue in the case, was prejudicial to him, and constituted impermissible victim-impact testimony that should have been introduced only in the sentencing phase of his trial. The Court disagreed.

The Court found that evidence that the victim underwent therapy after her sexual encounter with appellant was relevant and admissible to corroborate her claim that appellant had forcibly raped and injured her, a claim that was hotly disputed by appellant and defense witnesses who testified that the victim appeared "regular, like nothing had happened" after the sexual encounter and had joked about it. Therefore, the Court held, appellant failed to demonstrate any error, plain or otherwise, in the trial court's admission of testimony regarding the victim's therapy.

Appellant also contended that the trial court erred in permitting the State to introduce evidence of his two prior bad acts because neither prior bad act was introduced for a proper purpose under OCGA § 24-4-404 (b). However, the Court stated, Rule 404 (b) does not control the analysis. Rather, OCGA § 24-4-413 (a) ("Rule 413") and OCGA § 24-4-414 (a) ("Rule 414") are the more specific statutes that supersede the provisions of Rule 404 (b) in sexual assault and child molestation cases. Moreover, Rules 413 and 414 create a rule of inclusion, with a strong presumption in favor of admissibility, and the State can seek

to admit evidence under these provisions for any relevant purpose, including propensity.

Turning to the first prior bad act, the Court stated that evidence that appellant fondled and exposed his penis in the presence of underage girls at their middle school in 2009 constituted evidence of a prior act of child molestation committed by appellant. Introduction of evidence of the 2009 incident thus was governed by Rule 414 (a), and under this Rule, showing a disposition toward molestation is a relevant purpose and not unfairly prejudicial in light of the nature of that conduct. Thus, evidence that a defendant engaged in child molestation in the past is admissible to prove that the defendant has a disposition of character that makes it more likely that he did commit the act of child molestation charged in the instant case. Moreover, while appellant was 13 years old at the time of the 2009 incident, and a defendant's youth at the time of a prior similar transaction should be considered in determining the relevancy of such evidence, appellant was old enough at the time of the prior bad act to be held criminally responsible for his conduct in this State. Thus, the Court stated, given appellant's age and his decision to expose himself to several underage girls in a school setting, his actions were not the faultless act of an innocent child, but rather demonstrated evidence of his lustful disposition. Accordingly, the trial court did not abuse its discretion in concluding that evidence of the 2009 incident was admissible for a relevant purpose under Rule 414 (a).

As to the second prior bad act, the Court stated that evidence appellant attempted to sexually assault his adult female neighbor in 2012 constituted evidence of a prior attempted rape or sexual battery. Rule 413 (a) provides: "In a criminal proceeding in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense of sexual assault shall be admissible and may be considered for its bearing on any matter to which it is relevant." And, pursuant to Rule 413 (a), evidence of appellant's prior offense of sexual assault was relevant to prove his intent and lustful disposition in this case, and to disprove his claim that the victim's allegation of a forced sexual encounter was fabricated. Consequently, the Court held, the trial court did not abuse its discretion in concluding that evidence of the 2012 incident was admissible for a relevant purpose under Rule 414 (a).

Nevertheless, appellant contended, the prejudicial effect of the prior bad acts he committed in 2009 and 2012 substantially outweighed any possible probative value of the evidence under OCGA § 24-4-403. But the Court stated, pretermitted whether the standard balancing test employed under Rule 403 should apply to evidence introduced under Rules 413 (a) and 414 (a), even if it does apply, the trial court did not abuse its discretion in concluding that the balance favored admission of evidence of the 2009 and 2012 incidents. Particularly in light of appellant's attacks on the victim's credibility, the strong presumption in favor of the admission of evidence under Rules 413 and 414, and the trial court's limiting instructions to the jury, the trial court acted within its discretion in permitting the State to introduce evidence of appellant's prior acts of child molestation and sexual assault.

Expert Witnesses; Identification

Smith v. State, A17A0916 (8/30/17)

Appellant was convicted of two counts of armed robbery, two counts of false imprisonment, one count of kidnapping, and one count of aggravated assault. The evidence showed that appellant and a co-defendant followed five high-school-age boys to an apartment complex pool where the boys were going to go swimming. Appellant held the boys at gunpoint, forced them into the pool to restrict their ability to flee, and stole two cell phones and money from them before fleeing.

Appellant contended that the trial court erred in allowing one of the investigating police officers to testify as an expert regarding interviewing witnesses to a crime. He further argued that the evidence was improper bolstering. The Court disagreed.

First, the police officer testified that he had extensive training in conducting investigations and interviewing witnesses and 11 years of experience doing so. Given these particular circumstances, the trial court did not abuse its discretion in finding that the State laid a sufficient foundation that the officer possessed a greater knowledge and experience in this area than that of the average juror, and, therefore, it did not err in qualifying the officer as an expert witness. Second, improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining

witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror. But here, the officer testifying as an expert did not offer any opinion as to the truthfulness of the boys. Rather, the officer testified that, on the basis of his experience, multiple witnesses to a crime often provide inconsistent accounts of the event. And, the Court stated, that testimony was in no way a comment on an ultimate issue of fact. In fact, the Court stated, as to the ultimate issue of whether appellant was one of the males who committed the robbery, it would have been impossible for the officer to provide such an opinion on the boys' truthfulness given that the boys themselves did not, at any point, identify either of their assailants. Accordingly, the trial court did not err in allowing the officer to testify as an expert regarding interviewing witnesses to a crime.