

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING OCTOBER 23, 2015

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## THIS WEEK:

- **Edge; Modified Merger Rule**
- **Allen Charges**
- **Closing Arguments; Prosecutorial Misconduct**
- **Intimidating Court Officers; Severance**
- **Character Evidence; Weapons**
- **Similar Transactions**
- **Jury Instructions; Mutual Combat**
- **Motions for New Trial; General Grounds**

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### **Edge; Modified Merger Rule**

*Amos v. State, S115A1143 (10/5/15)*

Appellant was convicted of voluntary manslaughter and felony murder, both in connection with the killing of the same victim. The trial court merged the voluntary manslaughter into the felony murder, and it sentenced him for the murder. Appellant argued that the trial court should have sentenced him instead for voluntary manslaughter. The Court disagreed.

The Court noted that in *Edge v. State*, 261 Ga. 865, 866-867 (2), it adopted what has become known as the “modified merger rule,” concluding that, when a defendant is found guilty of both voluntary manslaughter and felony murder predicated on aggravated assault, the trial court should sentence the defendant only for voluntary manslaughter. Otherwise, almost every voluntary manslaughter would amount to a felony murder (predicated on a felonious assault), and such a rule would eliminate voluntary manslaughter as a separate form of homicide.

However, the Court noted, since *Edge*, it has consistently held that this “modified merger rule” is limited to cases in which the felony murder is predicated on a felony that itself is integral to the homicide, such as aggravated assault. Because the felony murder here was predicated on unlawful possession of a firearm by a convicted felon — a crime that is (on the facts of this case) independent of, and not integral to, the killing of the victim — the *Edge* rule did not apply, and the trial court properly sentenced appellant for felony murder, not voluntary manslaughter.

### **Allen Charges**

*Drayton v. State, S15A0832 (10/5/15)*

Appellant was convicted of malice murder and other charges. He argued that the trial court erred when, during jury deliberations, the court gave a so-called “Allen charge” including the sentence, “It is the law that a unanimous verdict is required” — part of the pattern instruction used in Georgia when a jury reports that it is “hung.” Specifically, he contended that this sentence misled the jurors into thinking that they had no choice but to agree on a verdict of guilty or not guilty on each count of the indictment, effectively foreclosing a possible “no verdict” outcome, at which point a mistrial would be declared on any undecided counts.

The Court stated that due process of law entitles a criminal defendant being tried by a jury to the uncoerced verdict of that body. Where a defendant claims that a supplemental instruction coerced the jury’s verdict, the Court must look to the totality of the circumstances, and consider whether the charge was coercive so as to cause a juror

to abandon an honest conviction for reasons other than those based upon the trial or the arguments of other jurors. Here, the Court found, when considered in the context of the full modified *Allen* charge and even more the jury instructions as a whole, the jury would have understood the challenged sentence to mean only that in order for the jury to return a verdict of guilty or not guilty on any count of the indictment, all 12 jurors had to agree on that disposition, and not that the jurors were absolutely required to reach agreement on each charge as opposed to deadlocking on one or more charges. Thus, the Court noted, the supplemental instruction referred right before the disputed sentence to “the desirability of agreement, if possible” and told the jury that the case had been submitted to them “for a decision and verdict, if possible”; said right after the disputed sentence that “this verdict must be the conclusion of each juror and not a mere acquiescence of the jurors in order to reach an agreement”; and concluded by informing the jury that it was being sent back to the jury room to deliberate for only “a reasonable time ... to try to arrive at a verdict.” In addition, the court told the jurors before they started deliberating that while a verdict required the agreement of all 12 of them, they all had to “freely and voluntarily agree” to it, “[e]ach of you decide this case for yourself,” and “you should never surrender an honest opinion in order to be congenial or to reach a verdict solely because of the opinions of the other jurors.

Furthermore, the Court found, the circumstances of the case were not suggestive of coercion. The record showed that after about three hours of deliberations on the second afternoon of a two-day trial, the jury had already reached unanimous agreement on how to dispose of six of the seven counts of the indictment, and on the remaining count the jurors were split 11-1. The court gave the *Allen* charge, and the jury then deliberated for another half-hour before returning to the courtroom with unanimous verdicts on all seven counts. Notably, the jury convicted appellant on some counts but acquitted him on others. And at appellant’s request, the court polled the jurors individually, and each juror confirmed the verdicts. Accordingly, in light of the context of the “a unanimous verdict is required” language, and considering the totality of the circumstances surrounding

the giving of the modified *Allen* charge, the Court concluded that the trial court did not coerce the jury’s verdicts.

### **Closing Arguments; Prosecutorial Misconduct**

*Moore v. State, S15A1211 (10/5/15)*

Appellant was convicted of felony murder, aggravated assault, armed robbery, and various other offenses in connection with a shooting death and the theft of a truck. He argued that the trial court erred by allowing the State to comment during its closing argument on a Quick Mart surveillance video that had been admitted into evidence at trial. However, the Court found, the record showed that the State did nothing more than draw reasonable deductions from evidence presented, which is entirely proper during closing arguments. Specifically, the prosecutor played portions of the surveillance video from the Quick Mart in order to highlight inconsistencies in appellant’s testimony and to point out the sequence of events in the video as they related to the evidence that the State had presented. In fact, the Court found, the record revealed that all of the State’s arguments relating to the surveillance video were proper, and that appellant’s contentions to the contrary were without merit.

### **Intimidating Court Officers; Severance**

*Harrell v. State, S15A1045 (10/5/15)*

Appellant was convicted of two counts of intimidating a court officer pursuant to O.C.G.A. § 16-10-97 and cruelty to animals. As to the court officers, the evidence showed that appellant was charged with violating the duties of a landlord and, after he failed to appear for a court hearing in connection with that charge, a bench warrant was issued for his arrest. On April 29, 2013, he placed messages on Facebook that referred to Superior Court Clerk Rhett Walker and Deputy Chief Clerk Tammy Graham. One post threatened that if the bench warrant was not lifted, appellant would post an internet link to a video which he claimed showed Graham engaging in sexual activity with appellant and two other men; no such video existed. Appellant also posted a claim that Graham had lied to the court regarding whether appellant had been

served with notice of a hearing regarding the accusation that he violated the duties of a landlord; it was his failure to appear at this hearing which served as the basis for the bench warrant being issued for him. In another post, appellant listed Walker’s personal cell phone number and urged readers to call Walker to tell him to leave appellant alone while he was “on the run,” and thus not ruin appellant’s “chicken foot eating victory.” Appellant also initiated telephone communication with Walker in an attempt to persuade him to lift the bench warrant, saying that if he did not do so by a certain date, appellant would “turn [Walker’s] world upside down,” and that “you know what will happen on Facebook.”

In Counts 2 and 3 of the indictment, appellant was alleged to have violated O.C.G.A. § 16-10-97(a)(1), with both counts accusing him of “the offense of INTIMIDATION OF A COURT OFFICER, for that [appellant] ... by a threatening communication, did unlawfully endeavor to intimidate [the alleged victim] while in the discharge of said officers [sic] duties, by threatening to embarrass and harass said [alleged victim if the alleged victim] did not withdraw a warrant issued by the Superior Court Judge ... .” The Court agreed with appellant that O.C.G.A. § 16-10-97(a)(1) was unconstitutionally applied to him.

The Court stated that a state can criminalize some speech made with the intent to intimidate another without running afoul of the First Amendment. However, intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Thus, for intimidation such as alleged in the indictment to be validly proscribed by O.C.G.A. § 16-10-97(a)(1), the intimidation must be considered a “true threat.” And, true threats encompass those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals. Here, the Court found, the evidence against appellant relating to either Graham or Walker did not rise to the constitutional level of a serious expression of intent to commit an act of unlawful violence.

Appellant also argued that he should not have been tried on the animal cruelty charge in the same proceeding in which he

had to answer the charges of endeavoring to intimidate court officers, and that the trial court erred in denying his motion to sever the counts. The Court noted that while in some circumstances joinder of charges is required, see O.C.G.A. § 16-1-7(b), the ability of the State to join charges is not unfettered. In *Dingler v. State*, 233 Ga. 462 (1975), it adopted the ABA Standards on Joinder of Offenses, under which “[t]wo or more offenses may be joined in one charge, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both: (a) are of the same or similar character, even if not part of a single scheme or plan; or (b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.”

The Court noted that the evidence showed that he placed a dead cat in the mailbox of his ex-girlfriend, the mother of his two children. He also threatened to upload pornographic pictures of her on the internet. The State contended that the similarity between the acts alleged reached the level of a pattern. But, the Court found no evidence to support this. Specifically, the State argued that appellant used the dead cat, and thus the results of the act of animal cruelty, to intimidate or otherwise hinder his ex-girlfriend from continued participation in appellant’s court case, and that appellant thus had a “common motive” in making communications intended to intimidate all three victims, all in relation to court cases involving him. However, the Court found, this argument was necessarily dependent on the claim that at the time of the animal cruelty, the ex-girlfriend was involved in a court case of appellant’s. But, the State made absolutely no showing in this regard. Furthermore, there was no evidence that appellant’s motive for contacting the ex-girlfriend was to attempt to intimidate her into any action. Nor was the evidence of animal cruelty so intertwined with evidence of endeavoring to intimidate court officers such that it would not be possible to present evidence of one without the other. Rather, there was no connection shown between the alleged animal cruelty and the alleged crimes of endeavoring to intimidate court officers. And, as there was no showing that the crimes alleged were based on the same conduct, were part of a single scheme or plan, or were a series of connected acts, joinder was not authorized.

Finally, the Court found that the failure to sever was harmful error. The crime of endeavoring to intimidate a court officer is of an entirely different nature than animal cruelty, and the posture of the defense would have been dramatically different had severance been granted, and had the State presented only evidence regarding the charge of cruelty to an animal, without the additional, and prejudicial, evidence regarding appellant’s communications to and about Walker and Graham being placed before the jury. Further, Counts 2 and 3 were allegations that should not even have been presented to a jury, whether joined with Count 1 (animal cruelty) or standing by themselves. The prejudicial effect of having to defend the charge of animal cruelty when joined with dissimilar, unconnected charges was exacerbated when those charges were not themselves properly presented for prosecution. The presentment of the joined charges to the jury here served to demonstrate the value of severance of charges, which helps to prevent a defendant from being forced to proceed at an unfair disadvantage, due to confusion of law and evidence by the trier of the fact and the “smear” effect such confusion can produce. Accordingly, the Court held, appellant’s conviction on the charge of animal cruelty must be reversed.

### **Character Evidence: Weapons**

*Young v. State*, S15A0747 (10/5/15)

Appellant was convicted of murder and other crimes. The evidence showed that after the incident, appellant fled the scene, but was apprehended at the home of his girlfriend three days later. At the time of appellant’s arrest, police recovered a .40 caliber Heckler & Koch handgun from a closet, only about seven feet away from the place in which they found him. Appellant argued that the trial court erred when it admitted the handgun into evidence even though that particular gun indisputably was not used to commit the crimes with which he was charged. Specifically, he contended, the prosecution introduced this evidence in an attempt to portray him as a violent individual with access to guns and a propensity to shoot; the evidence was irrelevant and prejudicial; and it improperly lessened the State’s burden of proving that he did not act in self-defense. The Court disagreed.

As a general rule, the circumstances connected with a defendant’s arrest are admissible, even if such circumstances incidentally place the defendant’s character in issue. A trial court generally does not abuse its discretion in admitting evidence of the circumstances surrounding the defendant’s arrest unless the evidence is wholly unrelated to the charged crime, the arrest is remote in time from the charged crime, and the evidence is not otherwise shown to be relevant.

Citing *Hanes v. State*, 294 Ga. 521, 524 (3) (2014), the Court held that appellant’s arrest occurred just three days after the murder, and the murder weapon, which was never recovered, was proved to be a .40 caliber pistol. Because the weapon found at the time of appellant’s arrest was also a pistol and was of the same caliber as well (though not of the same brand as the murder weapon), the Court found that it was relevant and that the arrest was not too remote in time for that relevant evidence to be admitted. Consequently, the trial court did not abuse its discretion in allowing the .40 caliber Heckler & Koch into evidence.

### **Similar Transactions**

*Dillard v. State*, S15A0853 (10/5/15)

Appellant was convicted of malice murder. The murder occurred in April of 2007. Appellant contended that the trial court abused its discretion in admitting evidence of six similar transactions that occurred between 1991 and 2005. The Court disagreed.

Noting that the old Evidence Code applied, the Court found that the trial court acted within its discretion in finding that a sufficient similarity existed between the six prior transactions and the crime charged so that proof of the former tended to prove the latter. Thus, the evidence was proffered to show appellant’s bent of mind, course of conduct, intent, and lustful disposition. The trial court properly admitted the evidence after finding in each of the transactions that, like the victim in this case, (1) the victims were young African-American women who were either sex workers or had substance abuse problems, or both; and (2) the victims were sexually and/or physically abused — often by choking.

Nevertheless, appellant argued that the trial court abused its discretion because the sheer number of prior transactions overwhelmed the jury with evidence of

appellant's bad character. The Court again disagreed. The mere fact that the State proffered evidence of multiple similar acts did not render them inadmissible. Here, the record showed that the trial court properly weighed each similar transaction and determined that its probative value was not substantially outweighed by the danger of unfair prejudice.

### **Jury Instructions; Mutual Combat**

*Berrian v. State, S15A0784 (10/5/15)*

Appellant was convicted of malice murder. He contended that the trial court erred in failing to give his requested charge on mutual combat. The Court disagreed.

The Court stated that a finding that a defendant was engaged in mutual combat at the time the victim was killed may authorize the jury to find the defendant guilty of voluntary manslaughter and not malice murder. The essential ingredient is mutual intent. In order to constitute mutual combat, there must be a willingness, a readiness, and an intention on the part of both parties to fight. Reluctance, or fighting to repel an unprovoked attack, is self-defense, and is authorized by the law, and should not be confused with mutual combat.

Appellant argued that because there was some evidence from which a jury could have found both parties intended to resolve their differences by fighting each other with deadly weapons, the jury could have found he was engaged in mutual combat with the victim, and thus he was entitled to the requested instruction. However, the Court found, appellant's own testimony did not support a finding of mutual combat. From the evidence, it would have been reasonable for a jury to conclude the altercation started with appellant and the victim verbally taunting each other. According to appellant, the situation escalated into a physical assault when the victim threatened appellant by coming at him with a knife and cornering him on a porch. But appellant's testimony that he responded by going inside to retrieve a gun did not support a finding that the two men engaged in mutual combat. Instead, appellant described a scene wherein, by the time he reappeared at the door of the house with his gun in his pocket, the victim had stepped off the porch into the front yard with the eye witness. Appellant testified he stepped into the yard to hand the witness a

cigarette lighter at the witness's request, not to pursue a fight with the victim. And when the victim started coming at him again, appellant backed away and attempted to flee. According to appellant, only when the victim continued to come at him did appellant attempt to fire his gun, eventually succeeding in doing so after the victim, a considerably older man, chased him out into the street. Thus, the Court concluded, the scenario described by appellant supported an instruction on self-defense, which the trial court gave, but not a mutual combat charge. Consequently, appellant's was not entitled to a new trial because the trial court erred by failing to give a mutual combat charge to the jury.

### **Motions for New Trial; General Grounds**

*Butts v. State, S15A1192 (10/5/15)*

Appellant was convicted of felony murder and related crimes. He contended that the trial court erred in denying his motion for new trial on the "general grounds" pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21. Specifically, he argued that the trial court failed to evaluate the credibility of the witnesses and to weigh the evidence in deciding whether to exercise its discretion to grant a new trial in its role as the so-called "thirteenth juror." The Court disagreed.

The Court noted that the trial court's order denying appellant's new trial motion said only: "The Defendant's Motion for New Trial having been read and considered and a motion hearing having taken place on the 3rd day of September, 2013, said motion is hereby DENIED." Although the order did not explicitly state that the court was exercising its broad discretion as the thirteenth juror in deciding the motion, it is well-established that an appellate court must presume that the trial judge knew the rule as to the necessity of exercising his discretion, and that he did exercise it. The Court will not assume, in the absence of positive evidence to the contrary, that the judge knowingly declined to exercise his discretion.

Thus, where a trial judge ruling on a new trial motion enters an order that, without more, recites that the new trial is refused or denied, this will be taken to mean that the judge has exercised of his discretion.

Here, the Court found, nothing in the order indicated that the trial court failed to

perform its duty to exercise its discretion and weigh the evidence in its consideration of the general grounds. The court did not state the incorrect standard in its order, and nothing in the record indicated that the court was unaware of its responsibility. In fact, the record demonstrated the opposite; during the hearing on the motion for new trial, the court's attention was specifically called to O.C.G.A. §§ 5-5-20 and 5-5-21, and that consideration of the general grounds thereunder involved different issues than merely the sufficiency of the evidence. The court clearly recognized that, in its discretion, it could grant a new trial under the authority of O.C.G.A. §§ 5-5-20 and 5-5-21, and chose not to do so. Moreover, this was not a case where the trial court explicitly declined to consider the credibility of the witnesses in denying appellant's motion for new trial on the general grounds. Nor did the trial court make clear its belief that it had no discretion to grant a new trial despite disagreeing with the jury's verdict. Accordingly, appellant's contention was deemed meritless.