

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 7, 2011

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THIS WEEK:

- **Statements; *Bruton***
- **Incest; Exploitation of a Disabled Adult**
- **Mistrial; Prosecutorial Misconduct**
- **Voir Dire; *Batson***
- **Search & Seizure**
- **Hearsay; Videotaped Surveillance**

Statements; *Bruton*

Anderson v. State, A11A1385 (9/20/11)

Appellant and Espinosa, his co-defendant, were convicted of armed robbery of a convenience store. He contended that the trial court erred in denying his motion for a mistrial based on a comment made during the prosecutor's opening and the testimony of two of the investigating police officers, all of which allegedly violated his Sixth Amendment right to confront witnesses under *Bruton*. The first violation allegedly occurred during the prosecutor's opening statements when he informed the jury that although they may hear a claim that the defendants were carjacked and forced to try to elude the police, the evidence would show that there were only two occupants in the vehicle that led police on the high-speed chase. The Court found no error. "*Bruton* is not violated if a co-defendant's statement does not incriminate the defendant on its face." The Court found that given that the comment at issue was in reference to a statement by appellant and not his co-defendant and that it did not inculcate either defendant, the trial court correctly overruled the objection and motion for mistrial.

Appellant also argued that the *Bruton* rule was violated during the testimony of two of the investigating police officers. The first instance occurred when Espinosa's trial counsel sought to clarify the testimony of the officer to whom Espinosa first made his statement. Specifically, Espinosa's trial counsel asked the officer as follows: "[Officer], earlier you testified that Mr. Espinosa spontaneously said he was planning an armed robbery. Isn't it true that he actually said he was talking with other people weeks prior about how they could make a quick buck?" The officer responded: "Yes." The second instance occurred during the prosecutor's examination of the officer to whom both defendants made their formal statements. The prosecutor asked the officer to repeat what Espinosa had told him regarding his participation in the crime. The officer responded: "He advised that he had left his house going to [a nightclub]. The individual in the car with him wanted to go by the store first to obtain something to drink."

The Court agreed that the testimony concerning Espinosa's statement that referenced "other people" with regard to making a "quick buck" and the "individual" with Espinosa on the night of the robbery could be considered references to a person whom the jury may infer to be appellant. Nevertheless, pretermitted whether that testimony directly implicated appellant and thus violated *Bruton*, such a violation does not require reversal if the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the co-defendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the statement was harmless error. Here, the Court found, appellant failed to show any harm resulting from this testimony. Indeed, given the fact that the

convenience store clerk positively identified appellant as the person who robbed her at gunpoint, that video surveillance footage from the convenience store supported the clerk's identification, and that appellant's carjacking claim was undermined by the officer who testified that there were only two occupants in the fleeing vehicle, the evidence against appellant was so overwhelming that the testimony regarding Espinosa's statement could not be said to have contributed to the guilty verdict. Accordingly, the trial court did not err in denying appellant's motion for mistrial.

Incest; Exploitation of a Disabled Adult

Smith v. State, A11A1317 (9/21/11)

Appellant was charged with incest, exploitation of a disabled adult, and other sexual offenses against his two sisters. He first argued that the count of the indictment charging him with incest was insufficient as a matter of law because the Georgia incest statute does not prohibit sexual intercourse between a brother and his adoptive sister not related by blood. The Court agreed. The Georgia statute prohibiting incest provides in relevant part: "A person commits the offense of incest when such person engages in sexual intercourse or sodomy, as such term is defined in Code Section 16-6-2, with a person whom he or she knows he or she is related to either by blood or by marriage as follows: . . . (3) Siblings of the whole blood or the half blood." OCGA § 16-6-22 (a). Citing *Shabazz v. State*, 259 Ga. App. 339 (2003) (overruled on other grounds, *Adams v. State*, 285 Ga. 744, 748(2009)), the Court noted that it held that sexual intercourse between two siblings not related by blood was not a violation of the Georgia incest statute because the statute expressly applies only to siblings "of the whole blood or of the half blood." Similarly, the Court found, appellant did not commit incest because his adoptive sister was not a whole blood or half blood sibling. The trial court therefore erred when it denied the motion to quash on this ground.

Appellant also contended that the charges of exploitation of a disabled adult should have been quashed because the conduct alleged did not constitute "exploitation," within the meaning of OCGA § 30-5-8 (a). The Court found that OCGA § 30-5-8 (a) is a criminal sanction enacted as part of the "Disabled Adults

and Elder Persons Protection Act" set forth in OCGA § 30-5-1 et seq. OCGA § 30-5-8 (a) (1) provides that "[i]n addition to any other provision of law, the *abuse, neglect, or exploitation* of any disabled adult or elder person shall be unlawful." (Emphasis supplied.) OCGA § 30-5-3 defines relevant terms as follows: "(9) 'Exploitation' means the illegal or improper use of a disabled adult or elder person or that person's resources through undue influence, coercion, harassment, duress, deception, false representation, false pretense, or other similar means for another's profit or advantage."

The trial court held that "sexual misconduct" for a person's "sexual gratification" amounts to an "illegal or improper use of a disabled adult for [that person's] own profit or advantage." The Court determined that this holding did not comport with the plain terms of the statute. The criminal provisions of OCGA § 30-5-8 have never been used to impose a criminal sanction for sexual acts performed on a disabled adult or elder person. The stated purpose of the Act is "to provide protective services for abused, neglected, or exploited disabled adults and elder persons," OCGA § 30-5-2, and nothing in the statute's definitions of these terms supports the conclusion that it was intended to regulate sexual contact with a disabled adult or elder person. If the legislature had intended for abuse of a sexual nature to be proscribed by OCGA § 30-5-8, it would have included sexual abuse in the definition of either "abuse" in OCGA § 30-5-3 (1) or "exploitation" in OCGA § 30-5-3 (9). In light of the Act and its history, the Court found that the most reasonable construction of OCGA § 30-5-8 (a) is that the legislature did not intend for it to apply to sexual acts such as that alleged in the indictment. The trial court therefore erred when it denied the motion to quash on this ground.

Mistrial; Prosecutorial Misconduct

Harding v. State, A11A0918 (9/20/11)

Appellant was convicted of armed robbery, false imprisonment, and possession of a firearm during the commission of a crime. The evidence showed that appellant used a weapon to rob a movie theater. He was arrested two weeks later and a weapon was found near a dog house where he was hiding. Before the start of his trial, appellant moved to exclude evidence

of the gun, asserting that the gun should be excluded because it did not match the description of the gun used in the robbery. The trial court withheld ruling on the motion and instructed the assistant district attorney not to talk about it during her opening statement. Before opening statements, the trial court instructed the jury "that the opening statement is not evidence. Remember that what the lawyers say is not evidence." During her opening, the assistant district attorney made a reference to appellant telling the police after his arrest that he had "left a gun in the dog house."

The assistant district attorney immediately apologized for violating the court's instruction about the gun. The trial court denied appellant's motion for a mistrial, but noted that it would "have to revisit it again if it looks like when we get down to it that I don't allow it in." Following testimony by the victims, the trial court granted appellant's motion in limine with regard to the gun, but denied his renewed motion for a mistrial. The Court then gave a curative instruction, but appellant argued that "no instruction could cure the impact of the State's improper statement."

The Court held that when prejudicial matter is improperly placed before the jury, a mistrial is appropriate if it is essential to the preservation of the defendant's right to a fair trial. It is up to the trial court to decide whether a mistrial must be granted as the only corrective measure or whether the prejudicial effect can be corrected by withdrawing the testimony from the consideration of the jury under proper instructions. Considering the nature of the statement, the other evidence in the case, and the action taken by the court and counsel concerning the impropriety, the Court found no abuse of discretion in the denial of appellant's motion for mistrial.

Voir Dire; Batson

Veasey v. State, A11A1434 (9/21/11)

Appellant was convicted of one count of robbery, two counts of fleeing and attempting to elude police, and various traffic offenses. He argued that the trial court erred in denying his *Batson* challenge during voir dire, contending that the State failed to create a sufficient record to overcome his challenge.

The record showed that appellant made a *Batson* challenge after the State struck seven African American jurors from the panel. The

trial court requested a race-neutral explanation, and the State explained that it had conducted a pre-trial jury meeting with several members of law enforcement who identified potential jurors with previous run-ins or negative experiences/contacts with law enforcement. Specifically, the State offered the following explanations for striking the jurors: (1) two were mothers of convicted criminals with negative experiences with law enforcement; (2) one had a prior assault charge and negative contacts with law enforcement; (3) one was the sister of a convicted felon; (4) one had a prior arrest; and (5) one lived at an address where law enforcement frequently responded. As to the seventh juror, the State explained that he was a preacher and that, based on prior experience, preachers are oftentimes too forgiving as jurors. Additionally, this final juror was struck for strategic purposes because the prosecution deemed the replacement juror, also an African American, to be fair and impartial. The trial court accepted all of the foregoing explanations as race-neutral.

Appellant argued that the State improperly obtained its information regarding potential jurors' negative experiences with law enforcement through an unrecorded investigatory meeting. However, the Court noted that it has upheld denials of *Batson* challenges when the stated reasons were based on information gathered through off-the-record discussions with law enforcement. Accordingly, the Court concluded that the State presented an acceptable race-neutral explanation for exercising its strikes.

Search & Seizure

Varriano v. State, A11A0944 (9/20/11)

Appellant was convicted of VGCSA. He contended that the trial court erred in denying his motion to suppress. The evidence showed that police officers stopped a vehicle in which appellant was the front seat passenger; a third person was in the rear seat. One of the officers asked the driver for permission to search his vehicle, and the driver consented. On further questioning, the officer specified that he asked "for consent to search the entire vehicle" and that he "asked them if they [had] any weapons or drugs in the vehicle or anything illegal." During the search, an officer saw "a black book bag" on the rear seat, behind the driver and next to the rear seat passenger. The bag,

which was closed, had no label or identifying marks on it. Upon looking inside the bag, the officer found the contraband that was the subject of the motion to suppress. After the contraband was found, the officer asked the driver to whom the bag belonged, and both the driver and appellant acknowledged that the bag belonged to appellant.

Appellant contended that the driver's permission extended only to a visual check of the interior of the vehicle and not to any closed containers or bags within the passenger compartment, including the book bag in which he had a "reasonable expectation of privacy." The Court disagreed. Citing *Taylor v. State*, 230 Ga. App. 749 (1) (e) (1998), the Court held that the officer explicitly inquired about the presence of drugs, and he testified that he obtained "consent to search the entire vehicle," which as a "full-blown search" and under *Taylor*, includes closed packages and containers. Thus, construing the evidence in favor of the trial court's findings, the denial of appellant's motion to suppress was not clearly erroneous.

Hearsay; Videotaped Surveillance

McClain v. State, A11A1102 (9/21/11)

Appellant was convicted of armed robbery of a discount store. He contended that the trial court erred in failing to exclude as hearsay the store manager's testimony regarding her review of the store's video-surveillance-system recording, which showed an unmasked appellant just before he entered the store but which had since been recorded over and was therefore unavailable for viewing at trial. The Court, relying on its recent decision in *Hammock v. State*, __Ga. App.__, Slip op. at 3 (1) (Case No. A11A0861; decided July 12, 2011), found that the testimony was not hearsay. Here, the store manager did not testify about what another person said or wrote outside of court. Rather, she testified as to her personal observations of appellant's conduct that appeared on the video-surveillance-system recording. And given that this testimony did not ask the jury to assume the truth of out-of-court statements made by others, and instead the value of the testimony rested on the store manager's own veracity and competence, the testimony was not hearsay. Thus, as was the case in *Hammock*, "the jury was free to disregard [the store manager's] testimony that the individual depicted

in the surveillance video was [appellant]." Accordingly, the trial court did not abuse its discretion in allowing the store manager to testify regarding her observation of the video-surveillance-system recording.