

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 29, 2017

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THIS WEEK:

- **Rule 404 (b); Prior Difficulties**
- **Voir Dire; Jury Pool Taint**
- **Objections to Evidence; Sufficiency of Evidence**
- **Other Acts Evidence; Inconsistent Verdicts**
- **Ineffective Assistance of Counsel**
- **Hearsay; Exceptions for Medical Diagnosis and Treatment**

Rule 404 (b); Prior Difficulties

Pittman v. State, A17A1122 (10/30/17)

Appellant was convicted of entering an automobile and two counts of theft by taking. The evidence showed that appellant and Stokes were at one time involved in a romantic relationship. However, their relationship ended because Stokes became romantically involved with the victim. Appellant entered the victim's car and took the victim's purse. Less than a year earlier, appellant and the victim got into a physical altercation. The altercation was the result of ongoing tension regarding Stokes' simultaneous romantic relationships with appellant and the victim. Appellant was accused of simple battery and disorderly conduct. Appellant pled guilty to disorderly conduct, and the other charge was dismissed. Appellant argued that the trial court erred in admitting the unredacted accusation from the prior altercation with the victim because it

was inadmissible bad character evidence. The record showed that defense counsel challenged the veracity the victim's testimony regarding her past difficulties with appellant by suggesting that the victim's testimony was not credible. Defense counsel then questioned the victim about her claim that appellant previously "attacked" her and was arrested in connection with the attack. Defense counsel's questions attacked the credibility of the victim's version of events because the victim could not produce a police report to confirm her story. In an effort to rehabilitate the victim's testimony regarding the prior altercation, the State asked the victim about appellant's arrest for simple battery and introduced appellant's prior accusation in support of the victim's testimony that the prior altercation occurred and that appellant was arrested in connection therewith. The Court noted that OCGA § 24-4-404 (b) governs the admissibility of prior difficulty evidence. Because the dispute regarding the prior altercation was not limited to whether appellant had been arrested, but also included whether the prior altercation had actually occurred as recounted by the victim, the unredacted accusation bore directly on the victim's credibility, and its admission, even if it incidentally reflected on appellant's character, was proper. Redacting the accusation to show only the conviction of disorderly conduct and not the charge of simple battery would not

have served its rehabilitative purpose because the victim testified that she was “attacked” by appellant and that appellant was arrested for simple battery. Thus, the Court concluded, because the unredacted accusation was properly admitted to rehabilitate the prosecution's witness, the trial court did not abuse its discretion in admitting it as evidence of prior difficulties between appellant and the victim pursuant to OCGA § 24-4-404 (b).

Voir Dire; Jury Pool Taint

Lester v. State, A17A1007 (10/31/17)

Appellant was indicted for aggravated battery and aggravated assault for striking a woman in the face with a pool stick (a/k/a pool cue) at a local bar. The jury acquitted him of the aggravated battery, but convicted him on the aggravated assault. The evidence showed that the victim was appellant's former girlfriend. After appellant insulted her a number of times, the victim threw a drink in appellant's face. Appellant then bashed the pool stick over the victim's head and left the bar. Appellant contended that the trial court abused its discretion by refusing to let him ask potential jurors two questions — (1) Is there anyone here who believes that a woman cannot be the aggressor in an argument with a man? and (2) Is there anyone here who believes a man cannot defend himself from physical violence by a woman? He argued that the trial court's ruling denied him the opportunity to expose possible bias in potential jurors. Specifically, he argued that the questions permitted by the trial court were insufficient to expose bias in the potential jurors and that his questions should have been permitted because the subject matter of the action was an altercation between a man and a woman, and the man claimed self-defense. Thus, he contended, his proposed questions sought juror's impressions of his defense in this case. The Court disagreed. First, the Court

noted, it has previously held that a trial court does not abuse its discretion in refusing to allow questions designed to find jurors willing to accept a particular defense. Second, this was not a case in which the trial court foreclosed all inquiry concerning the subject matter to which the questions were directed. The entire panel was asked the following: “Is there anyone here who has had to defend themselves or others from physical violence?”; “Has anyone been involved in a physical altercation with a member of the opposite sex?”; and “Has anyone witnessed a physical altercation between members of the opposite sex?” During individual voir dire, defense counsel was permitted to follow up on those questions and specifically asked numerous prospective jurors if the woman was the aggressor in the fights they had witnessed. After reviewing the record, the Court concluded that the thorough voir dire in this case was sufficient to ascertain the fairness and impartiality of the prospective jurors, and there was no manifest abuse of discretion by the trial court. Appellant also contended that the trial court erred in denying his motion to strike the venire after the State displayed demonstrative versions of a pool stick in the courtroom during voir dire. He argued that the presence of the pool sticks constituted an improper influence on the jurors. The Court again disagreed. The Court noted that generally, physical evidence should not be viewed by the jury before the trial begins. But, here, the Court found, the pool sticks were in the courtroom before voir dire began and, although defense counsel stated during her motion to strike the panel that she had an “immediate concern” when she saw them, no one objected to their presence. Before any jurors were questioned, the trial court read the indictment, which charged appellant with causing bodily harm to the victim by striking her in the face with a pool stick and depriving her of the use of her eye. Thus, the potential

jurors were aware that a pool stick was involved in the crimes alleged to have been committed. And before any evidence was presented, the pool sticks were removed from the courtroom. During the testimony of the owner of the bar where the incident occurred, one of the typical pool sticks used at his bar was admitted into evidence. Under the circumstances, the Court found no abuse of the trial court's discretion in denying appellant's motion to strike the entire jury panel.

Objections to Evidence; Sufficiency of Evidence

Harvey v. State, A17A0898 (10/30/17)

Appellant was found guilty of possession of cocaine with intent to distribute, possession of an illegal substance within 1,000 feet of a housing project, possession of a firearm during the commission of a felony, possession of less than an ounce of marijuana, and possession of a firearm by a convicted felon. The evidence showed that law enforcement executed a search warrant on an apartment. An officer saw an unidentified male run into a back bedroom. The officer ordered the person to the ground and noticed a gun on the floor lying next to the individual. Later that evening, a sergeant saw several officers, as well as appellant and another individual in custody, in the back bedroom. Appellant argued that the trial court erred by overruling his objection that the sergeant lacked personal knowledge that razor blades, marijuana, and currency had been retrieved from appellant's person. The Court noted that the record showed the sergeant was asked whether he was “handed any items pertaining to [appellant.]” Defense counsel objected “to the form” of the question on the basis that the sergeant “may not have personal knowledge that [the items] originated from [appellant.]” Thus, the Court held, the trial court properly overruled the objection, as the question

posed by the State—on its face—did not call for an answer outside the sergeant's knowledge. The sergeant participated in the investigation of the criminal activity at the residence (including a search of the premises) knew that a search of appellant's person was occurring, and was present in the residence while the search was being conducted. The sergeant conceded at trial that he did not personally conduct or observe the search of appellant's person, but was handed razor blades, cash, and a small bag of marijuana to enter into evidence. Therefore, the sergeant could testify as to all of these facts based on his own personal knowledge. Accordingly, the trial court did not abuse its discretion in overruling appellant's objection to the form of the question. Although magic words are not needed to make a proper objection, appellant must articulate his concern with sufficient specificity to inform the trial judge of the alleged error when objecting. Appellant's objection to the form of the question was properly overruled. Appellant argued that the evidence was insufficient to support his conviction for possession of a firearm during the commission of a felony. The Court agreed. OCGA § 16-11-106 (b) provides that it is unlawful for a person to have “on or within arm's reach of his or her person a firearm” during the commission of certain drug-related crimes. Appellant was convicted of having a gun “within arm's reach of his person.” Thus, appellant's conviction could not be sustained unless there was evidence that he had immediate access to the weapon while possessing cocaine with intent to distribute. And here, the Court found, there was no evidence showing that appellant had a gun on his person. Rather, the gun was retrieved from the bedroom where it was found next to an unidentified individual. Testimonial evidence established that at some point afterwards, appellant was found in the room (with another person in custody)

and the crack cocaine was found next to him. While appellant did not appear to dispute his possession of the crack cocaine, there was no evidence showing that appellant, as opposed to some other person, exercised dominion over the gun. Therefore, the Court overturned this conviction. Appellant also argued that the evidence was insufficient to support his conviction for possession of a firearm by a convicted felon because the evidence failed to prove beyond a reasonable doubt that the firearm was in his possession. The Court again agreed. In order to violate OCGA § 16-11-131 (b), appellant needed only to possess, not to own, the gun in question. Here, the gun appellant was charged with possessing was found on the bedroom floor next to an unidentified individual. A sergeant testified that a couple of papers bearing appellant's name were found in the closet of that bedroom, but appellant's name did not appear on the lease for the apartment and there was no evidence that appellant had any clothing or personal items there. Thus, the only evidence linking appellant to the gun, other than his proximity to it, was the discovery of paperwork bearing his name in a closet of the apartment. This circumstantial evidence did not provide a link between appellant and the gun, nor did it exclude the possibility that the gun belonged to others present in the apartment — such as the other individual detained in the bedroom or those individuals found in the living room. Accordingly, the Court concluded, the conviction of possession of a firearm by a convicted felon had to be reversed.

Other Acts Evidence; Inconsistent Verdicts

Blevins v. State, A17A0639 (10/30/17)

Appellant was convicted of enticing a child for indecent purposes and four counts of child molestation. He was acquitted of aggravated child molestation and false imprisonment.

The evidence showed that appellant was a band director at a middle school. He lured the 14-year-old victim into a school storage room, placed a music stand against the door and then molested her. He contended that the trial court erred by admitting evidence of prior bad acts pursuant to OCGA § 24-4-404 (b) involving “other acts” witnesses. The en banc Court disagreed. The Court found that this other acts evidence, which showed appellant's communications and interactions with his young female students, and his comments to colleagues about photographs of these girls in their swimsuits as well as his perception of their beauty, now and in the future, was relevant and probative. Where the extrinsic offense is offered to prove intent, its relevance is determined by comparing the defendant's state of mind in perpetrating both the extrinsic and charged offenses. As to both the victim and the other acts students, appellant used his position of authority as a band director to prey on the girls under his supervision through suggestive acts and sexual banter, and inappropriate touching, which he intended to entice them into indecent or sexual acts that aroused their sexual desires or his own. Appellant's communications with his colleagues further showed his motivation to connect sexually with underage girls whom he deemed beautiful and his intent to leverage those connections into sexual contact. Further, the probative value of this relevant evidence was not substantially outweighed by a danger of unfair prejudice, a confusion of the issues, or the risk of misleading the jury. It added value through its similarity to the other proof available to establish the facts at issue, and the State had a strong need for the evidence to combat appellant's attacks on the victim's credibility. Moreover, these extrinsic acts were not of such a heinous nature that they were likely to incite the jury to an irrational decision. Finally, the

trial court repeatedly gave limiting instructions that applied to all extrinsic evidence testimony. Relying on *Wiley v. State*, 124 Ga. App. 654 (1971), appellant also argued that the trial court erred in denying his motion in arrest of judgment. Specifically, he contended that the not-guilty verdict in Count 1 (aggravated child molestation) and the guilty verdict in Count 10 (child molestation), were repugnant because he was found guilty and not guilty of the same crime committed against the same victim at the same time under virtually identical charges. The Court disagreed. The Court noted that *Wiley* “appears to be an outlier in our law”. However, in a recent opinion, *Carter v. State*, 298 Ga. 867 (785 SE2d 274) (2016), our Supreme Court noted that it never had adopted the *Wiley* rationale and that the inconsistent verdict rule had been abolished in *Milam v. State*, 255 Ga. 560, 562 (2) (1986). Since *Milam*, a defendant may no longer attack as inconsistent a verdict of guilty on one count and not guilty on another. This is so because courts do not know and should not speculate on why a jury convicted on one offense and not another; the verdict could be the result of mistake, compromise, or lenity exercised in favor of the defendant. For clarity, the Court noted, the Court of Appeals in *Wiley* identified repugnant verdicts as those involving a conviction and acquittal on identical charges. In *Carter*, the Supreme Court did not reach the applicability of the *Milam* rule on inconsistent verdicts to *Wiley*'s repugnant verdicts, although the Court believed that its holding therein implicitly rejected *Wiley* as a viable precedent. An appellate court generally lacks the power to inquire or speculate as to the jury's rationale because inconsistent verdicts represent error in which it is unclear “whose ox has been gored.” The dissonance that exists in inconsistent verdicts is analogous to that existing in the *Wiley*-defined repugnant verdicts. Thus, the Court held, given the

Supreme Court's disavowal in *Carter* of any acceptance of *Wiley*'s rationale, it found it appropriate to apply *Milam*'s reasoning to repugnant verdicts as defined in *Wiley*. In so doing, the Court overruled *Wiley* and any progeny.

Ineffective Assistance of Counsel

Tezeno v. State, A17A1011 (10/31/17)

Appellant was convicted on two counts of aggravated child molestation, two counts of sodomy, one count of enticing a child for indecent purposes, and one count of solicitation of sodomy. He contended that his trial counsel rendered ineffective assistance. The Court agreed and reversed his convictions. First, the Court found that trial counsel was deficient due to his failure to obtain records of the victim's mother's prior felony convictions and the victim's school disciplinary records. When considering a claim of ineffectiveness, a critical distinction exists between inadequate preparation and unwise trial strategy. Especially in matters of trial tactics and strategic choices, an ineffectiveness claim cannot be judged by hindsight or result. And, tactical decision as to whether or not to present certain evidence for purposes of impeachment, particularly evidence of the witness's prior criminal convictions, generally rests with trial counsel. Here, however, the Court found that appellant's counsel had no opportunity to make such tactical choices because he had not made reasonable efforts to obtain the information in question even though he acknowledged that both pieces of information would have aided appellant's defense. Therefore, the Court agreed with appellant that his counsel was deficient by failing to make reasonable efforts to obtain these records. Second, appellant contended his counsel's performance was deficient due to his failure to adequately challenge the testimony of the State's expert. At trial, the State

called an expert in forensic interviewing of children and child sexual abuse evaluation and treatment. Defense made no objection to her designation as an expert. Her testimony focused on Child Sexual Abuse Accommodation Syndrome (CSAAS). The Court stated that premitting whether trial counsel was deficient in failing to obtain a defense expert that could have aided the defense or been called to the stand to rebut the statements of the State's expert, the performance of appellant's trial counsel in addressing the testimony of the State's expert was deficient. Here, trial counsel's decision to conduct a cross examination so lacking in depth or probity was admittedly not the result of any strategic choice on his part but was rather based solely on his lack of preparation and lack of knowledge about the witness and the scientific basis of her testimony. Trial counsel's testimony at the hearing on appellant's motion for new trial suggested that cross-examination of the witness had been planned and was to be conducted by co-counsel. However, when that co-counsel was unavailable to conduct that examination, appellant's counsel did nothing to ameliorate his own inability to adequately confront this witness and instead allowed the witness's testimony before the jury to pass almost completely unchallenged. Next, appellant contended that trial counsel was deficient in failing to obtain a video of the police interview of an alleged victim who presented similar transaction evidence against appellant. The Court agreed. The Court found that as with the first two deficiencies, this failure was not the product of reasoned strategy. Appellant's trial counsel was aware of such evidence, considered it potentially valuable to his case, yet made no effort to obtain it from the State. He pointed to no reason why he could not have made these efforts or why he elected not to do so. Therefore, the Court found that counsel was deficient by failing to make reasonable efforts to obtain the

recording of this interview before trial. Finally, the Court addressed whether appellant was prejudiced by his trial counsel's deficient performance. The Court found that had the victim's reactions, as related primarily through the mother's testimony, been called directly into question, and had the defense made any effort to draw out limitations in the research on which the State's expert offered her testimony, there was a reasonable probability that the outcome of the trial would have been different. Accordingly, the Court reversed appellant's convictions.

Hearsay; Exceptions for Medical Diagnosis and Treatment

State v. Almanza, A17A1270 (10/31/17)

Almanza was indicted for child molestation, incest, aggravated sexual battery, statutory rape, and aggravated child molestation. Prior to trial, Almanza's alleged victim (Almanza's stepdaughter) and her mother (Almanza's wife) left the county, and the State's subsequent efforts to locate these witnesses were unsuccessful. Consequently, the State filed a motion in limine seeking an order that would allow it to introduce into evidence the testimony of two of the child's treating physicians as to statements made to the doctors by the child's mother and in which the mother related both the child's allegations of abuse and the fact that the child had identified Almanza as her abuser. The trial court entered an order ruling that the doctors would be allowed to testify at trial as to any findings they made during the physical exam of the child and to the mother's statements regarding the fact that the child had reported being sexually abused. However, court further ruled, the mother's statements that identified Almanza as the perpetrator of the alleged crimes did not fall within the hearsay exception found in OCGA § 24-8-803 (4) (medical diagnosis

and treatment). The State appealed. The Court found that OCGA § 24-8-803 (4), the hearsay exception at issue, does not differ substantively from its predecessor, OCGA § 24-3-4. In deciding the admissibility of the mother's statement, therefore, the trial court properly relied on cases decided under the former evidence code. Those cases hold that statements made for the purpose of obtaining medical treatment are admissible to the extent that the speaker is relating the cause of the injury or condition requiring treatment. A medical professional may therefore testify, for example, that the victim reported being raped or assaulted. Additionally, medical personnel may testify as to statements made to them describing the type of weapon used against the victim or the description of the acts that resulted in the victim's injuries. Similarly, treating practitioners may also testify as to alleged acts of molestation or physical abuse reported by a child. The rationale for allowing such testimony under the hearsay exception for medical treatment or diagnosis is that a declarant should be aware that a practitioner's understanding of what happened to the patient is reasonably pertinent to the patient's diagnosis and treatment. Relying on the same rationale, statements identifying the person allegedly responsible for the victim's injuries are not admissible as statements made for the purpose of medical diagnosis and treatment. This limitation includes cases involving the physical or sexual abuse of a child. Moreover, the Court found, to the extent that it is required to look to federal law to interpret OCGA § 24-8-803 (4), the U. S. Supreme Court has not addressed the issue. Also, the Eleventh Circuit in *United States v. Belfast*, 611 F.3d 783, 818-819 (VI) (B) (11th Cir. 2010), held that the rule allows statements related to the cause of the victim's injuries, but not statements that "assign any fault" for the injuries. Nevertheless,

the State argued, the Court should adopt the approach employed by the Eighth, Ninth, and Tenth Circuits to find that the statements at issue fall within the hearsay exception set forth in OCGA § 24-8-803 (4). For a variety of reasons, the Court declined to do so. Accordingly, the Court held that the trial court did not abuse its discretion in concluding that the those portions of the mother's statements in which she claimed that her child had identified Almanza as the child's abuser are not admissible under OCGA § 24-8-803 (4).