

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JANUARY 22, 2016

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**Robert W. Smith, Jr.**  
State Prosecutor

**Austin Waldo**  
State Prosecutor

## THIS WEEK:

- **Rule 404(b); Course of Conduct**
- **Waiver of Right to Counsel; Post Waiver Request for Counsel**
- **Plain Error; Prosecutorial Misconduct**
- **Jury Deliberations; Demonstrative Evidence**

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### Rule 404(b); Course of Conduct

*Paschal v. State, A15A1239 (11/18/15)*

Appellant was convicted of armed robbery, aggravated assault and other felonies, all stemming from a home invasion. He contended that the trial court erred in admitting his 1989 convictions for armed robbery and aggravated assault for the limited purpose of showing his course of conduct. The Court agreed.

The Court noted that the new Evidence Code was applicable at the time of trial. The Court stated that while Georgia courts routinely admitted similar transaction evidence and other acts for purposes of showing course of conduct under the old Evidence Code, the Legislature, in enacting O.C.G.A. § 24-4-404(b), removed “course of conduct” as one of the listed purposes for which other acts may be admitted. Thus, where, as here, a statute is amended to delete words, it must presume that the Legislature intended to make some change to the existing law. Accordingly, since other acts evidence was admissible to show course of conduct under the old Evidence Code and the Legislature omitted course of conduct in enacting O.C.G.A. § 24-4-404(b), the Court discerned that the absence

of such language was a matter of considered choice. Consequently, the Court held, course of conduct is no longer a viable exception with regard to the admissibility of other acts under the new Evidence Code and the trial court abused its discretion in admitting appellant’s 1989 convictions for that purpose. In so holding, the Court noted that the State proffered and the trial court admitted the 1989 convictions only for the purpose of showing course of conduct. Therefore, the Court was not considering whether those convictions might have been admissible for other purposes such as to show proof of motive, opportunity or intent.

Nevertheless, the Court found, appellant’s convictions need not be reversed because the error was harmless considering the overwhelming evidence of guilt.

### Waiver of Right to Counsel; Post Waiver Request for Counsel

*Tyner v. State, A15A1342 (11/20/15)*

Appellant was convicted of two counts each of rape, aggravated sodomy and burglary. He contended that the trial court deprived him of his right to counsel at trial. The Court agreed and reversed his convictions.

The record showed that appellant had appointed counsel represent him throughout pretrial proceedings and during the evidentiary phase of trial. But after the charge conference and the State’s closing argument, appellant requested the right to represent himself and do his own closing argument. After a brief discussion with appellant about the merits of his request, the Court allowed him to do so, but asked his counsel to remain with him at the table. Almost immediately after he

began his closing, appellant drew an objection from the prosecutor for improper arguments. This reoccurred at least four times, at which point, appellant asked that he be relieved of representing himself and that his counsel finish the argument for him. The trial court denied his request to withdraw his waiver of counsel and forced him to finish the trial as his own counsel.

The Court stated that premitting whether the trial court properly acceded to appellant's desire to waive his right to counsel just after the State's closing argument, the record showed that he very quickly discovered that he was overwhelmed by the demands of self-representation, and he asserted a post-waiver request for counsel within minutes of being allowed to represent himself. The record did not, however, show that the request had any impact on the trial court's ability to manage its docket or on its general responsibilities for the prudent administration of justice. Nor did the record show any significant disruption of the trial, given that only a few minutes had passed and that defense counsel had an argument prepared and was standing by and ready to proceed. Furthermore, the record did not show that the trial court weighed the negligible cost of granting appellant's request to withdraw his waiver of his right to counsel against any identified benefit of denying his request, other than preventing him from "toy[ing] with the court." Therefore, the Court concluded, under the circumstances, the trial court's insistence that appellant continue pro se was unjustified, given that closing argument, receiving the verdict, and sentencing are critical stages of the trial. And, because the record revealed that the trial court abused its discretion in denying appellant's post-waiver request for counsel during trial, it is a structural Sixth Amendment violation that requires reversal. Finally, the Court rejected the State's argument of harmless error because a structural error precludes such a harmless error analysis.

### **Plain Error; Prosecutorial Misconduct**

*Gates v. State, S15A1407 (1/19/16)*

Appellant was convicted of malice murder and other related crimes. He contended that the trial court committed plain error by admitting evidence and allowing testimony

regarding firearms that were not the murder weapon. Specifically, he challenged the admission of testimony regarding other guns that he owned (not the murder weapon) and evidence and testimony relating to a .45-caliber handgun (also not the murder weapon) that was found during his arrest.

The Court noted that although appellant did not object to this evidence at trial, under Georgia's new Evidence Code, the rulings related to this evidence are subject to review on appeal for "plain error[] affecting substantial rights." O.C.G.A. § 24-1-103(d). Nevertheless, the Court stated, premitting the question whether this evidence could have been properly admitted under O.C.G.A. § 24-4-404(b), appellant could not affirmatively show that the alleged error probably did affect the outcome of his trial because the evidence against him was overwhelming. Accordingly, it did not reach the level of plain error.

Appellant also argued that the prosecutor engaged in prosecutorial misconduct by making arguments during his closing about appellant's propensity to use guns, and that the trial court committed plain error by allowing the prosecutor to make such arguments. However, the Court stated, Georgia's new Evidence Code, specifically O.C.G.A. § 24-1-103, deals with "ruling[s] which admit[] or exclude[] *evidence*" (emphasis supplied), and it is well settled that closing arguments do not amount to evidence. Furthermore, the published Eleventh Circuit cases that allow for plain error review of improper closing arguments in criminal cases do not do so pursuant to Federal Rule of Evidence 103, upon which O.C.G.A. § 24-1-103 is based, but rather, Federal Rule of Criminal Procedure 52 (b), for which there is no Georgia state equivalent. Therefore, the Court stated, because the Georgia Legislature has not yet made plain error review available for errors relating to alleged improper remarks being made during closing argument, its prior case law relating to the waiver of issues on appeal stemming from improper closing arguments that were not objected to at trial remains unaffected by O.C.G.A. § 24-1-103 of Georgia's new Evidence Code. Accordingly, the Court concluded that appellant waived review of his arguments relating to the allegedly improper closing argument due to his failure to object.

### **Jury Deliberations; Demonstrative Evidence**

*Collymore v. State, S15A1509 (1/19/16)*

Appellant was convicted of felony murder and theft by taking. He contended that the trial court erred by allowing the jury to use a yardstick and a ruler during its deliberations. The Court disagreed.

The record showed that during the presentation of its case, the State called a firearms expert to testify regarding the distance from which the female victim was shot. Based on the absence of gun powder on the victim, the expert opined that the gun had to have been at least three-and-a-half feet away from her when it was fired. It was undisputed that, during the expert's testimony, a yardstick was used to show this distance. Later, after deliberations had begun, the jury requested use of both the yardstick and a ruler, and the trial court allowed use of both, over appellant's objection.

The Court found that the yardstick and the ruler did not have the effect of introducing new evidence. Instead, they were merely standard measuring devices which allowed the jurors to examine evidence, and the accuracy of the devices was never questioned. Moreover, even if there had been error in allowing the measuring devices to go out with the jury, it was uncontested that the same yardstick used by the jury had been previously used during testimony to illustrate the distance being described by the firearms expert. Thus, under the facts and circumstances of this case, the Court found neither error nor harm.