

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JANUARY 23, 2015

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## THIS WEEK:

- **Sufficiency of the Evidence; Sentencing**
- **Mutually Exclusive Verdicts**
- **Search & Seizure**
- **Character; Statements**
- **Giglio Evidence; Voir Dire**
- **Judicial Commentary; O.C.G.A. § 17-8-57**
- **First Offenders; Character**
- **Felony Murder; Underlying Felony Offenses**

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### ***Sufficiency of the Evidence; Sentencing***

*McNeely v. State, S14A1570 (1/20/15)*

Appellant was convicted of two counts of felony murder and other offenses related to shoplifting and the deaths of two individuals arising from an automobile collision when the getaway car ran a stop light. The collision occurred when appellant and her accomplice, who was driving, were fleeing and attempting to elude a police officer after they had been confronted for shoplifting. Appellant argued that the evidence was insufficient to support her conviction for attempting to elude because she was not the driver of the vehicle in which she was riding, nor did she have authority to bring the driver's vehicle to a stop. The Court disagreed.

The Court found that appellant testified and admitted shoplifting, and further admitted she had a prior record of shoplifting, that she had only recently been released from prison, and that she knew getting caught the day of these events would be a parole violation that would send her back to prison. The evidence

showed appellant avoided detention and questioning by store personnel and that she physically assaulted one of the store employees who confronted her. When appellant saw her accomplice was about to pull out of the store parking lot, she fled the scene to jump into the car. When questioned in the hospital after the collision, appellant denied her involvement with the shoplifting. Thus, the Court concluded, these circumstances served as ample corroboration of the accomplice's testimony that appellant urged her to drive fast and ordered her to run the stop light in order to avoid being apprehended by the pursuing police officer. Thus, she could be convicted as a party to the crime of fleeing and attempting to elude. Similarly, the Court also found that the evidence was sufficient to support a finding that appellant was engaged in reckless driving as a party to the crime even though she was not the actual driver of the vehicle.

Nevertheless, the Court found that the trial court erred in imposing a separate sentence of five years imprisonment for the fleeing and eluding conviction. Appellant's convictions for felony murder and feticide were based on the underlying felony of fleeing and eluding the police. As the State acknowledged in its brief, the underlying felony for a felony murder conviction merges with felony murder for purposes of sentencing.

### ***Mutually Exclusive Verdicts***

*Griffin v. State, S14A1485 (1/20/15)*

Appellant was convicted of involuntary manslaughter based on misdemeanor battery as a lesser included offense of malice murder, felony murder, two counts of cruelty to

children, aggravated battery, and aggravated assault. He contended that the verdicts were mutually exclusive. Specifically, appellant argued that the verdicts were inconsistent because the jury considered the blow to the victim's chest a misdemeanor for the purposes of the involuntary manslaughter verdict and a felony offense for the purposes of the felony murder verdicts.

The Court stated that verdicts are mutually exclusive where a guilty verdict on one count logically excludes a finding of guilt on the other. While guilty verdicts on involuntary manslaughter and felony murder are not mutually exclusive as a matter of law, a mutually exclusive verdict may be rendered in a particular case where the offenses underlying the felony murder and involuntary manslaughter convictions reflect that the jury, in order to find the defendant guilty of both offenses, necessarily reached two positive findings of fact that cannot logically mutually exist. A mutually exclusive verdict results when the jury finds that the defendant acted with both criminal intent and criminal negligence at the same instant regarding the same victim involving the same act.

Here, the Court found, in addition to involuntary manslaughter based on simple battery, appellant was found guilty of felony murder predicated on cruelty to a child, felony murder predicated on aggravated battery, and felony murder predicated on aggravated assault. Because the predicate offense for involuntary manslaughter was simple battery, it did not require proof of criminal negligence, and the intent element of simple battery was not at all logically inconsistent with the mens rea required for the greater offense of aggravated assault, aggravated battery, or cruelty to children. Accordingly, appellant's verdicts were not mutually exclusive.

## Search & Seizure

*State v. Colvard, S14A1347 (1/20/15)*

Colvard was indicted for murder and the related crimes of aggravated assault, theft, concealment of a death, and drug and firearms possession. The trial court granted his motion to suppress and the State appealed. The evidence showed that Colvard lived with his uncle (hereinafter "Uncle") in an apartment; Uncle consented to a search of the common areas of the unit; within the apartment was a

locked bedroom used exclusively by Colvard; the door had been locked by Colvard and Uncle did not have a key; Uncle could not go into the bedroom when the door was locked; testimony was conflicting as to whether Uncle told the police officer that the officer could enter the bedroom; it did not appear that the bedroom door was securely fastened; a police officer gained entry to the bedroom by placing a knife between the door lock and its frame causing the door to pop open; and police officers entered the bedroom and discovered firearms in a bag in a closet, one of which apparently was the murder weapon.

The Court noted that the State may show that a warrantless search was justified based upon a third party giving permission to search; however, the third party must have common authority over or other sufficient relationship to the premises or effects sought to be inspected or it must be shown that the police could have reasonably believed that the third party did have such authority. Such common authority is derived from mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched. Here, the Court found, the trial court weighed all the evidence and concluded that the police could not have objectively believed that at the time of the search they had obtained valid authorization to enter the locked bedroom. Therefore, even though the evidence was conflicting, since there was evidence to support the findings by the trial court, the findings cannot be determined to be clearly erroneous and the decision of the trial court was upheld.

The State further contended that the trial court erred in granting Colvard's oral motion to suppress his confession because it maintained that the confession was not acquired as a result of an unlawful search inasmuch as "based on a totality of [Uncle's] responses and actions during his interaction with the police, the police reasonably and objectively believed that [Uncle] had the authority to consent to the search, making the search valid." However, the Court found, since it concluded that the trial court's judgment to the contrary was not error, i.e., that the warrantless search was not

lawful because there was no valid third party consent, the State failed to provide any basis upon which to find error in the resulting determination that Colvard's confession and other information contained in his statements constitute "fruit of the poisonous tree," and consequently, must be suppressed.

## Character; Statements

*Wallace v. State, S14A1371 (1/20/15)*

Appellant was convicted of murder and other crimes. He contended that the trial court improperly allowed a co-defendant to testify about his character. The record showed that when asked why she and another co-defendant did not want appellant to know where they went after the murder, she testified that they "don't trust [Wallace]." Appellant's lawyer asked to approach the bench, the jury was excused, and the lawyer moved for a mistrial. Finding that the witness' answer only incidentally placed appellant's character into evidence, the trial court denied appellant's motion for mistrial but cautioned the prosecutor to "steer clear of that area." Appellant's lawyer neither renewed the motion for mistrial nor asked for any additional corrective action. To the contrary, he told the trial court that he was "not requesting any type of curative instructions or anything like that." The trial court agreed not to highlight the issue any further, the jury returned, and the prosecutor resumed her examination without revisiting the issue.

The Court stated that where a defendant objects and moves for a mistrial during the examination of a witness, and the trial court denies the motion but takes some corrective action, if the defendant is dissatisfied with that action, he must renew the objection or motion; otherwise, the issue is waived. Therefore, the Court found, because appellant failed to renew his motion for mistrial following the trial court's cautionary direction to the prosecutor and instead announced his decision not to request any further corrective action, appellant waived this issue on appeal. But, the Court further found, even if the trial court's warning to the prosecutor did not amount to corrective action that triggered an obligation on appellant's part to renew his motion for mistrial, there was no error. The trial court did not abuse its discretion when it denied appellant's motion for mistrial, as the

testimony about not trusting appellant was ambiguous and did not indicate that he had committed a crime. Moreover, the testimony was relevant to explain the actions of the two co-defendants after witnessing appellant shoot the victim, and it was not inadmissible because it incidentally put appellant's character in issue.

Appellant also contended that the trial court erred when it failed to suppress his custodial statement as involuntary. Specifically, he argued, his statement was involuntary because he was under the influence of cocaine that he had ingested, was fidgety, was seen breaking items in the interrogation room, and did not waive his *Miranda* rights in writing. The Court disagreed.

The Court found that appellant did in fact tell a detective at the time of his interview that he had ingested cocaine a few hours before he provided the statement. But, the detective testified that appellant did not appear to be under the influence of cocaine or any other drugs, alcohol, or medication, that he appeared to understand his rights and waived them orally, and that he was coherent and answered questions appropriately. Thus, the mere fact that appellant may have been somewhat intoxicated at the time of the interview does not automatically render evidence thereof inadmissible. Although appellant at times showed some agitation that the detective indicated was normal for such an interview, there was no evidence that he broke items in the interrogation room. And, contrary to his assertion, appellant was not required to waive his *Miranda* rights in writing. Therefore, the Court concluded, the detective's testimony was sufficient to show that appellant knowingly and voluntarily waived his *Miranda* rights and gave his statement, and the trial court did not err when it admitted the statement.

### **Giglio Evidence; Voir Dire**

*Nwakanma v. State*, S14A1442, S14A1443 (1/20/15)

Nwakanma and Francis were tried together and convicted of murder and other crimes. Nwakanma contended that the prosecution failed to reveal a deal between the State and a co-defendant and failed to correct critical misstatements of fact about the existence of a deal during the

co-defendant's testimony. The Court stated that it is settled that the State has a duty to reveal any agreement, even an informal one, with a witness concerning criminal charges pending against that witness, and a failure to disclose such an agreement constitutes a violation of the due process requirements of *Brady v. Maryland*. In addition, the State may not knowingly use a witness's false testimony that he received no promise of consideration in exchange for his testimony, and the prosecutor's failure to correct such testimony that he knows to be false denies the defendant his right to due process of law.

The record showed that at a pretrial hearing in this case, both the prosecutor and the co-defendant confirmed that there was no plea agreement or deal with the State but that the co-defendant nevertheless would waive his Fifth Amendment rights and testify against his co-defendants. At trial, he testified that there was no plea bargain or deal for his testimony, that he did not understand any future deal to depend on how he testified, that he did not expect to gain any benefit or leniency from his testimony, and that he decided to testify to clear his conscience when his co-defendants would not admit what they had done. In an effort to show that he did have a deal when he testified, Nwakanma pointed to the prosecutor's testimony at the hearing on the motion for new trial that the lawyer for the co-defendant continually asked for reduced charges and a lesser sentence in exchange for his testimony and that the prosecutor said he would keep an open mind toward future discussions.

But, the Court found, this testimony did not suggest the existence of even an informal agreement. And the prosecutor indicated that there was no specific agreement to discuss a possible plea after completion of the trial. Moreover, the co-defendant's attorney testified that the only plea offer he had received—for a sentence of 25 years—had been rejected before the co-defendants' trial, that there was no deal, that there were no specific conversations with the prosecution about how the resolution of his client's case would be addressed after his testimony, and that the lawyer had given his client the admittedly risky advice to testify "blindly," simply hoping for a better offer after the trial. Thus, the Court found, because the evidence refuted Nwakanma's claim that there was a deal between the co-defendant and

the State, there was likewise no factual basis for Nwakanma's claim that the testimony about his motivation for testifying was false. To the extent that Nwakanma argued that the State engaged in misconduct by eliciting that testimony and making arguments about it to the jury, there was no reason to conclude that the co-defendant's characterization of his subjective motivation was false or that the prosecutor knew it to be untrue. Indeed, the Court noted, the prosecutor testified that, "[i]f you're asking what [the co-defendant] was thinking, I don't know that I could answer that question. But all I can tell you is . . . [w]e told him there was no plea offer and that it was important for him to tell the truth." In addition, the co-defendant was extensively cross-examined about his motivations. Under these circumstances, the Court concluded, there was no due process violation.

Francis argued that the trial court erred when it refused to allow his lawyer to ask prospective jurors the following question: "Given that there are four defendants on trial in this case, do any of you think that you might be unable to consider and apply the evidence separately to each defendant?" The Court stated that as to the proper scope of voir dire, the single purpose for voir dire is the ascertainment of the impartiality of jurors, their ability to treat the cause on the merits with objectivity and freedom from bias and prior inclination. A trial court is vested with a broad discretion to limit the scope of voir dire with regard to abstract or technical legal matters. Francis's question about considering and applying the evidence separately to each co-defendant was of a technical legal nature as it was a subject of the instruction by the court at the conclusion of the trial. Accordingly, the Court found, there was no abuse of the trial court's broad discretion to limit the scope of voir dire.

### **Judicial Commentary; O.C.G.A. § 17-8-57**

*Grissom v. State*, S14A1431 (1/20/15)

Appellant was convicted of felony murder and other offenses. The record showed that at the conclusion of the State's case, the trial court engaged in a colloquy with trial counsel, though in the presence of the jury, regarding documentary evidence that had been tendered

by the State but not yet admitted into evidence. In an apparent attempt to speed the admission of this evidence, the trial judge instructed counsel that she would consider all pre-trial objections to the evidence to be “preserved for interest of appeal and not waived by your failure to stand and object to that long list of exhibit numbers.” Appellant, citing *Gibson v. State*, 288 Ga. 617 (2) (2011), argued that the trial court’s statement improperly referenced the availability of appellate review, thus intimating that appellant would be found guilty and would need to appeal his forthcoming conviction, in violation of O.C.G.A. § 17-8-57. Further, he contended that the reference to an appeal could have led the jury to feel its responsibility was lessened because of the possibility that a conviction could be appealed.

The Court noted that a violation of O.C.G.A. § 17-8-57 mandates a grant of a new trial. But, the Court found, the facts of this case were materially distinguishable from those in *Gibson*, in which the trial court’s reference to the defendant’s right to appeal was made to the jury in response to a question sent to the court during jury deliberations. Here, the Court found, the comment about preservation of pre-trial objections to evidentiary exhibits for appeal was made by the judge to counsel, and the rule which prohibits an expression or intimation of opinion by the trial court as to what has or has not been proved, does not generally extend to colloquies between the judge and counsel regarding the admissibility of evidence. Accordingly, the Court determined there was no reversible error resulting from the trial court’s reference to the preservation of objections for appeal with respect to admitted documentary evidence.

### **First Offenders; Character**

*Rivers v. State*, S14A1411 (1/20/15)

Appellant was convicted of felony murder and possession of cocaine with intent to distribute. The evidence showed that there were a group of people selling drugs on a corner when another group arrived at a house close by. Sullivan got into an argument with Perrymond, one of the drug dealers. After the argument subsided, appellant, one of the drug dealers, punched the victim, a member of the group who just arrived, in the face. The

victim fell, hitting his head on concrete. He subsequently died from his injuries.

During trial, Sullivan testified that he was not the aggressor in his altercation with Perrymond. Appellant sought on cross-examination to impeach Sullivan by offering evidence of Sullivan’s 1995 first offender plea to a charge of aggravated assault. The trial court ruled the first offender plea could not be used as impeachment evidence. The Court found no abuse of discretion because a first offender status is not considered an adjudication of guilt. Thus, a first offender plea cannot be used to impeach a witness on general credibility grounds. A first offender plea may be used to demonstrate a witness’ bias or motive to testify in favor of the State while the offender remains under that sentence; however, appellant made no argument that Sullivan’s plea was being offered for that purpose and his sentence had long ago expired. And, even assuming, as appellant argued, that a first offender plea may be used against a witness in a criminal case to disprove or contradict facts to which the witness testifies, inasmuch as Sullivan was not the victim of the charged crimes and Perrymond was not the defendant, evidence of Sullivan’s prior act of violence against a third party was not admissible and, quite simply, was not pertinent to the critical fact in question in appellant’s justification defense, whether appellant’s action in striking the victim was justified.

Appellant also argued that the trial court improperly allowed the State to cross-examine Larkin, his girlfriend. The record showed that the prosecutor asked whether Larkin had “put money on” appellant’s prison account while he was awaiting trial and whether on the night of the crimes she had two black eyes. Defense counsel objected and made multiple motions for a mistrial, arguing that the State’s questions impermissibly placed appellant’s character into evidence. Counsel also asked the trial court to poll the jury for possible prejudice.

The Court noted that it is proper for the State when cross-examining a defense witness to bring out the relationship between the witness and the accused for the purpose of showing bias or to show the probability that the witness is testifying out of fear or under duress. Here, the Court found, the State’s questions were properly intended to establish the close, personal relationship between Larkin and appellant and to show

that she may have been testifying out of fear or intimidation. In conducting such a cross-examination, the State did not place appellant’s character in issue in the sense that the evidence must be proscribed, even though the evidence may have incidentally done so. Similarly, evidence that an accused has been confined in jail in connection with the case at issue does not place his character in evidence. Accordingly, the challenged questions did not improperly place appellant’s character in issue and appellant was not entitled to a mistrial. Consequently, the trial court did not abuse its discretion by refusing to poll the jury to determine whether admission of this evidence may have prejudiced appellant.

### **Felony Murder; Underlying Felony Offenses**

*Funck v. State*, S14A1293 (1/20/15)

Appellant was convicted for felony murder while in the commission of criminal attempt to possess cocaine. The evidence showed that appellant and his girlfriend planned to steal drugs from a drug dealer. They borrowed a van; the girlfriend drove and appellant sat in the passenger seat. They saw the victim, who agreed to sell them crack cocaine. After the victim handed the drugs to appellant through the van window, the girlfriend drove off. The victim held onto the side of the car, but appellant kicked him as the van was moving and picking up speed. The victim fell and was run over and killed by the van. Appellant contended that his counsel was *per se* ineffective for failing to timely file a valid demurrer to the indictment, i.e., within ten days of arraignment, in that the felony murder charge was based upon the charge of criminal attempt to possess cocaine, which is not inherently dangerous or life-threatening so as to be a valid underlying felony as a matter of law and under the circumstances of this case. The Court disagreed.

The only limitation on the type of felony that may serve as an underlying felony for a felony murder conviction is that the felony must be inherently dangerous to human life. For a felony to be considered inherently dangerous, it must be dangerous *per se* or it must by its circumstances create a foreseeable risk of death. In determining whether a felony meets this definition, the Court does not consider the elements of the

felony in the abstract, but instead considers the circumstances under which the felony was committed.

Here, the Court found, the circumstances of this case well illustrate the validity of a charge of felony murder premised upon the criminal attempt to possess cocaine. Appellant and his girlfriend co-defendant's plan to obtain cocaine by robbing the supplier of the drugs, and their plan going awry, was the proximate cause of the victim's death. Therefore, the committed felony of criminal attempt to possess cocaine directly and materially contributed to the subsequent immediate cause of the death. Furthermore, the plan to rob an individual dealing in illegal drugs carried with it a foreseeable risk of danger and death.

Thus, a timely pretrial demurrer to the indictment on the basis urged would not have been successful. The failure to make a meritless motion cannot provide the basis upon which to find ineffective assistance of counsel. Consequently, appellant's claim of his trial counsel being ineffective in this regard cannot prevail.