

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 18, 2014

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THIS WEEK:

- **Jury Charges; Insanity**
- **Search & Seizure**
- **Due Process; Jury Charges**
- **Voir Dire; Batson**
- **Ineffective Assistance of Counsel; Similar Transactions**
- **Similar Transactions; Jury Charges**

Jury Charges; Insanity

Choisnet v. State, S14A057 (7/11/14)

Appellant was tried for the murder of his elderly father. He pled not guilty by reason of insanity. The jury found him guilty but mentally ill.

Appellant contended that the trial court erred in its instructions to the jury on the insanity defense. The Court stated that under Georgia law, the affirmative defense of insanity may be established by showing that, at the time of the act constituting the crime, the defendant either (1) “did not have mental capacity to distinguish between right and wrong in relation to such act” or (2) had a mental disease causing “a delusional compulsion as to such act which overmastered his will to resist committing the crime.” O.C.G.A. §§ 16-3-2, 16-3-3. A “delusional compulsion” insanity defense requires that the delusion alleged be one that, if it had been true, would have justified the defendant’s actions. In other words, the delusional compulsion defense is available only when the defendant is suffering under delusions of an absurd and unfounded nature and was compelled by that delusion to act in a manner that would have been lawful and right if the facts had

been as the defendant imagined them to be. Thus, juries must be instructed regarding the legal concept of justification in order to be equipped to make the determination of whether the defendant’s conduct would have been a “lawful and right” response had the alleged delusion represented reality.

Here, the Court noted, the trial court’s instructions on delusional compulsion insanity did not include any explanation as to what would constitute a legal justification for a criminal act. However, appellant’s counsel neither made a request in this regard nor objected to the trial court’s failure to incorporate this concept into the jury charge. Therefore, the standard of review was that of plain error.

The Court found that assessed against this onerous standard, appellant’s claim could not prevail. Even granting that the failure to elaborate on the concept of justification would have constituted error, and even assuming such error “plain” despite the fact that the issue was unsettled at the time of trial, the error did not likely affect the outcome of the trial or seriously affect its fairness or integrity. Specifically, the evidence was far from clear as to whether appellant acted as the result of any delusional compulsion. Though there was no dispute that appellant suffered from serious mental illness and there was some evidence indicating that he feared his father would kill him and his mother, not even appellant’s own expert was willing to testify to a reasonable degree of medical certainty that he was actually delusional at the time he stabbed, beat, and strangled his father. Rather, appellant’s expert witness opined only that appellant “may have” been experiencing a psychotic break and it was “possible” that he was hallucinating at the

time. The State's expert witness, by contrast, opined flatly that he did not believe appellant's conduct was involuntary or compelled. Thus, even with proper instruction as to what type of delusional belief would constitute sufficient legal justification to commit murder, it was unlikely the jury would have reached a different verdict. Therefore, the Court found no plain error in the trial court's failure to charge the jury on the legal concept of justification.

Appellant also argued that the trial court erred by refusing his request to remove from the jury's consideration the option of finding appellant guilty but mentally ill and, specifically, for including this option in its charge to the jury. The Court noted that apparently for strategic reasons, appellant's counsel sought to offer the jury the choice only between a verdict of "guilty" and one of "not guilty by reason of insanity." The trial court properly declined this request, given the statutory mandate under O.C.G.A. § 17-7-131(b)(1) that, for all felony cases in which the insanity defense is interposed, "the jury . . . shall find whether the defendant is: (A) Guilty; (B) Not guilty; (C) Not guilty by reason of insanity at the time of the crime; [or] (D) Guilty but mentally ill at the time of the crime." (Emphasis added.). Consistent with the requirement that the jury be offered these options, the jury must also be properly instructed in this regard. Consequently, the trial court did not err.

Search & Seizure

State v. Terrell, A14A0012 (6/25/14)

Terrell was charged with VGCSA. The State appealed from the trial court's grant of his motion to suppress. The evidence (including video of the stop) showed that an officer on patrol received a radio communication from an investigator who identified a particular vehicle as being suspected of drug activity and asked if the officer could observe a reason to justify a traffic stop of the vehicle. The officer located the vehicle and noticed a crack in the windshield sufficient to partially obstruct the driver's view. The officer initiated a traffic stop, and the vehicle pulled into a gas station. The vehicle was driven by Kelsey Lambert, and Terrell was in the passenger seat. As a backup officer arrived, the first officer requested Lambert's driver's license and took it back

to his patrol car to run a check on it. As the license check proceeded, the officers discussed how they might obtain consent to search the vehicle. Approximately three minutes after the stop began, the license check was complete, and after forty seconds of further discussion between the officers, an officer began writing out a warning citation for the cracked windshield. As that officer wrote the warning, the backup officer approached Lambert's vehicle and asked Terrell for his identification, which Terrell provided, telling the officer he was on parole for a drug violation. The officer had Terrell's identification run a check on GCIC. After that process was completed, the first officer returned to Lambert's vehicle to give her the written warning. He then requested her to exit her vehicle so he could explain the citation to her and get her signature. After returning her license, the officer told Lambert she was free to go and then immediately asked her for consent to search the vehicle. Lambert responded that she had somewhere to be, but after the officer replied that it would only take "five minutes at the most," she agreed to the search of her vehicle. Up to that point, the entire stop had taken approximately ten to eleven minutes. Thereafter, before the vehicle search began, an officer requested Terrell to exit the vehicle, and he did, throwing a Styrofoam "QuikTrip" cup into a nearby trash can. The search of the vehicle and pat down of Terrell revealed no contraband. After Lambert and Terrell drove off, the officer retrieved the Styrofoam cup and found drugs inside of it.

The State argued that the trial court erred in determining, based on *Weems v. State*, 318 Ga.App. 749 (2012), that the search violated the Fourth Amendment because the officers obtained the consent to search after unreasonably prolonging the traffic stop. The Court agreed. The Court found that this case presented a different factual scenario not controlled by *Weems*. Here, the Court found, the officer completed the tasks related to the investigation of the traffic violation and returned Lambert's license to her in approximately ten minutes. At that point, upon returning Lambert's license and telling her she was free to go, the officer "immediately" requested consent to search Lambert's vehicle, and as found by the trial court, Lambert consented. At that moment, Lambert's license had been returned, she

had been told she was free to leave, and the encounter had de-escalated into a first-tier encounter. And, because the request to search occurred contemporaneously with the conclusion of the traffic stop, it did not unreasonably prolong the stop. Therefore, the facts differed from *Weems*, which merely stands for the proposition that an officer may not, after concluding an otherwise valid traffic stop, continue to detain a person without reasonable articulable suspicion. Here, the Court found, under the facts as found by the trial court, the detention related to the traffic stop had ended, and the immediate request to search did not prolong the detention or otherwise violate the principle articulated in *Weems*. Accordingly, the trial court erred by ruling that Lambert's consent was obtained after an unlawful detention.

Due Process; Jury Charges

Easter v. State, A14A0358 (6/25/14)

Appellant was convicted by a jury of burglary and aggravated assault. The jury reached no verdict on a lesser included offense charge of criminal trespass. Appellant contended that the trial court's jury charges violated his due process rights by allowing the jury to convict him of committing aggravated assault by a method not alleged in the indictment. The jury agreed and reversed his conviction.

O.C.G.A. § 16-5-21(a)(2) defining aggravated assault provides that a person commits that crime "when he or she assaults. . . [w]ith a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury." The indictment at issue charged appellant with committing an aggravated assault on the victim "with a crowbar, an object which when used offensively against another person is likely to result in serious bodily injury." However, when charging the jury, the trial court read O.C.G.A. § 16-5-21(a)(2) in its entirety, thereby including the "deadly weapon" reference which was not a part of the indictment. Moreover, in conjunction with the jury charge on aggravated assault, the trial court further instructed the jury that while a crowbar was not a "deadly weapon per se," it was for the jury to decide whether it constituted such a weapon in this case,

given the evidence presented at trial. That evidence showed that appellant had engaged in a pattern of harassing and violent behavior towards the victim; that his violence towards her had escalated in recent days; that he entered her house that night wearing rubber gloves and armed with a crowbar; that he hid himself and lay in wait for the victim; and that when she confronted him, appellant began moving towards the victim with the crowbar raised. Given this evidence, and reading the jury charge as a whole, the Court concluded that the charge allowed the jury to find that appellant had committed aggravated assault by a method not charged in the indictment, i.e., by using a deadly weapon rather than merely an object likely to result in serious bodily injury.

Appellant also argued that the trial court erred in charging the jury that it must first decide his guilt as to burglary before considering the lesser included offense of criminal trespass. Appellant acknowledged that he did not object to the jury charge at trial. Thus, the Court found, the charge would provide a grounds for reversal only if it constitutes plain error. To demonstrate plain error with respect to a jury charge, it must be shown that the instruction was erroneous, that the error was obvious, and that there was a reasonable probability that the erroneous instruction affected the outcome of trial.

Citing *Kunselman v. State*, 232 Ga.App. 323 (1998), appellant argued that the trial court's instruction to the jury in his case that "[i]f you check the block not guilty for burglary, *only then* would you move on to the lesser included offense of criminal trespass," constituted plain error and required the Court to reverse his conviction for burglary. (Emphasis supplied) The Court disagreed.

The Court noted that since the decision in *Kunselman*, our Courts have repeatedly held that sequential jury charges which employ mandatory language such as "only if" or "then" do not constitute reversible error, plain or otherwise, unless the charge as a whole compels the jury to reach a unanimous verdict on the greater offense before it may consider the lesser offense. The jury charge in this case, when read as a whole, cannot be fairly interpreted as requiring the jury to reach a unanimous verdict of acquittal on the burglary charge before considering the lesser offense of criminal trespass. Although the

trial court did give a charge on unanimity, that charge was not given in conjunction with the sequential charge and it simply required that the jury's final verdict, as reflected on the verdict form, be unanimous. Moreover, the jury returned a verdict of not guilty on the charge of criminal trespass and guilty on the charge of burglary. The trial court refused to accept this verdict, and sent the jury back to deliberate further. At that time, the trial court instructed the jury "my instructions to you earlier today in the charge was that if you find beyond a reasonable doubt, all 12 of you, that the defendant *is guilty* of burglary, then you must move on and skip over criminal trespass. You could only address criminal trespass if you found him not guilty of burglary." (Emphasis supplied.) Thus, the trial court made clear to the jury that they should consider criminal trespass only if they could not reach a unanimous verdict of guilt as to burglary.

Accordingly, the Court held, viewing the charge as a whole and in light of all the relevant case law, the charge in this case did not violate appellant's rights. The court here did not instruct the jury that it had to reach a unanimous verdict of acquittal on the greater offense before it could consider the lesser offense. Instead, the instructions merely required a unanimous verdict as a whole.

Voir Dire; Batson

Richardson v. State, A14A0409 (6/26/14)

Appellant was convicted of VGCSA and misdemeanor obstruction. Appellant argued that the trial court erred by denying his challenge under *Batson v. Kentucky* because he proved that the State engaged in purposeful racial discrimination in its use of peremptory strikes. The Court stated that under *Batson*, the opponent of a peremptory challenge must make a prima facie showing of racial discrimination. At that point, the burden then shifts to the State to offer a race-neutral reason for the strike. Finally, the trial court must determine if the opponent of the strike has proven discriminatory intent. The trial court's ultimate finding in this regard is entitled to great deference on appeal. To satisfy its burden to offer a race-neutral reason for the strike, the State need only articulate a facially race-neutral reason for the strike. Step two does not demand an explanation that is persuasive, or even plausible. At this second

step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

Appellant alleged that the State failed to offer race-neutral reasons for striking two prospective jurors. As to the first juror, the prosecutor explained that she struck this juror because "[h]e raised his hand when [she] said, who doesn't want to be here. He started to raise his hand. He was also a witness for a defendant in the criminal court, the military court, and [she and co-counsel were] concerned about his bias." Appellant contended that this explanation "strains credibility." But, the Court found, even if the prosecutor's explanations are not compelling, the trial court's ultimate finding is entitled to great deference on appeal, and appellant failed to demonstrate that it was clearly erroneous.

As to the second juror, the prosecutor explained that she struck her because "[s]he's a distribution manager. [The assistant district attorney and co-counsel were] not sure how much education [the juror] has. She also appeared to be nervous. [Co-counsel] was watching as [the assistant district attorney] was speaking with the jury and he felt that [the juror's] demeanor was—" Co-counsel elaborated that this juror "was kinda nervous. She trembled and finally toward the end she turned around, took her sweatshirt and made it like a snuggie and relaxed up against the back wall not paying attention." The assistant district attorney added, "And for the record, it's not cool in here." The Court stated that a peremptory strike based on a juror's demeanor during voir dire may be deemed to be race-neutral. Accordingly, in light of the race-neutral reasons given by the State, the trial court did not err in denying appellant's *Batson* challenge.

Ineffective Assistance of Counsel; Similar Transactions

Humphrey v. Williams, S14A0395 (7/11/14)

In 2002, Williams was convicted of sexually molesting his 13-year-old stepdaughter and her 14-year-old friend in 2000, after a trial at which his 20-year-old daughter was allowed to testify, as a similar transaction, that Williams touched her sexually four times in one night in 1993,

when she was 11 years old and living with him in Florida. In 2004, Williams filed a pro se petition for habeas corpus alleging, among other claims, that his attorney at trial and on direct appeal, provided ineffective assistance of counsel. Williams claimed that defense counsel conducted a deficient pretrial investigation by failing to obtain Florida court records showing that the alleged similar transaction never took place. Specifically, the evidence showed that in 1993, a Florida court, hearing a custody battle between Williams and Jessica's mother, determined that Jessica's allegations were untrue and returned Jessica to Williams' custody. Williams argued that if defense counsel had conducted a competent investigation and found those records, his daughter's testimony would have been excluded before trial or successfully impeached at trial, creating a reasonable probability that the trial verdict would have been more favorable to Williams. The habeas court agreed and the Warden appealed.

An ineffective assistance of trial counsel claim has two components: the defendant must show both that his lawyer's performance was deficient and that this deficiency prejudiced the defense. To establish deficiency, the defendant must show that his lawyer discharged his duties in an objectively unreasonable way under prevailing professional norms in light of all the circumstances, and overcome the law's strong presumption that the challenged action might be considered sound trial strategy. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. However, strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

The Court found that defense counsel knew that the State planned to call Jessica at trial to testify that Williams sexually molested her in Florida in 1993 when she was 11 and that the purpose of this testimony was to show Williams's intent, course of conduct, modus operandi, or common scheme to

support testimony by the two victims that he sexually molested them in 2000 when they were 14 and 13, respectively. Defense counsel also understood that the outcome of the trial hinged on whether the jury found the testimony of the victims to be credible, presenting the jury with "a classic 'he said, she said' dilemma." Based on what Williams (and later other witnesses) told him, defense counsel believed that the Florida court had concluded that the alleged similar transaction in 1993 never happened and that the court had ordered Jessica to be returned to Williams's custody. Defense counsel, however, made no effort whatsoever to investigate the documentary basis for that judicial decision, although any competent lawyer knows that courts produce documents reflecting (and usually explaining) such decisions. The filings in the 1993 Florida court case regarding Jessica presented an obvious source of information and evidence for presentation at the similar transaction hearing to try to exclude her testimony altogether and for impeachment if Jessica was allowed to testify at trial. The Florida court records would have given the trial court and the jury something to corroborate the witnesses, something beyond the "he said, she said" accounts of the 1993 events. Moreover, those Florida records were in a county directly across the state line from the county in which Williams was tried, were readily available, as revealed by the fact that Williams—operating pro se and from a Georgia prison—was able to obtain them with little difficulty.

The trial record further confirmed that Williams had told defense counsel that useful records about the 1993 incident existed and asked the lawyer to obtain them; this issue came up in open court after the evidence was closed, and the trial court offered to continue the case for a day or two so that defense counsel could obtain the documents. By that point, of course, it was too late to have the trial court exclude the similar transaction evidence. Moreover, defense counsel clearly did not recognize the import of the Florida records, because he then argued—and convinced Williams—that a continuance was unnecessary because "the information [Williams] wanted subpoenaed, we feel is already in the case sufficiently." But obtaining the Florida Court records even at that late point in the trial might at least have allowed the defense to put the documents before the jury and prevented the

State from mischaracterizing the truth in its closing argument. Under these circumstances, the Court agreed with the habeas court that defense counsel's investigation of the alleged similar transaction was professionally deficient.

The Court then addressed whether the failure to obtain these records prejudiced Williams. The Court held that the habeas court incorrectly found prejudice because presentation of the Florida court records at the similar transaction hearing would have resulted in the automatic exclusion of the similar transaction evidence based on the doctrine of collateral estoppel. First, there was no prior judgment of acquittal in this case, because criminal charges were never brought against Williams in connection with Jessica's allegations. Second, under the "dual sovereignty doctrine" that successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause, even if Williams had actually been charged and acquitted in a Florida criminal prosecution premised on Jessica's 1993 allegations, collateral estoppel would not have required the exclusion of the similar transaction testimony in his Georgia trial.

Nevertheless, the Court found prejudice based on its review of the record. Jessica's similar transaction testimony eroded Williams's credibility and severely weakened his defense, i.e., that he was a disciplinarian and that his stepdaughter and ex-wife "wanted him gone" and that he did not commit a crime and that the rape [of the 14 year old friend] never occurred. Defense counsel's failure to obtain the Florida records enabled the prosecutor to insinuate falsely on cross-examination of the defense witnesses that Jessica and her younger brother were returned to Williams without any kind of court order to that effect, and to claim falsely in closing argument that Jessica did not make shifting allegations of sexual abuse against Williams and that "[t]here is not the first bit of evidence that Jessica was not believed by a Florida court." Thus, the Court found, the habeas court properly concluded that Williams met his burden to show prejudice by establishing that there is a reasonable probability that, but for Defense counsel's deficient performance, the outcome of the trial would have been more favorable to Williams. Moreover, the Court found, the evidence was not overwhelming

since the State presented no forensic evidence of the alleged molestations and the limited physical evidence presented by the State was not compelling.

Similar Transactions; Jury Charges

Griffin v. State, A14A0189 (6/25/14)

Appellant was convicted of two counts of aggravated battery and one count of child molestation. The victim in the case was a girl between the ages of 3 and 5. The State presented similar transaction evidence regarding a 7 year old victim.

Appellant contended the trial court erred when it provided the jury with a “comprehensive list” of possible purposes for which to consider the similar transaction evidence. Specifically, appellant argued that the trial court, prior to the presentation of the similar transaction evidence, instructed the jurors that they could consider the evidence to show “the identity of the perpetrator, state of mind, knowledge or intent of the defendant in the crimes charged in the case[.]” However, the Court found, the record actually showed that the trial court instructed the jury prior to the presentation of similar transaction evidence that it could consider such evidence “for the limited purpose of showing . . . identity, motive, bent of mind or course of conduct[.]” The Court found that these are all appropriate purposes for considering similar transaction evidence, and the trial court’s instruction was consistent with the specific purposes for which the State sought to admit the similar transaction evidence.

However, the Court noted, in its charge to jury at the end of trial, the trial court also instructed the jury that the similar transaction evidence “may be considered for the limited purpose of showing . . . the identity of the perpetrator, state of mind, knowledge or intent of the defendant in the crimes charged in [this] case[.]” Since appellant did not object to this charge, the Court noted that its review was limited as to whether it amounted to plain error.

The Court found that there was no error in giving a broader charge encompassing multiple purposes so long as the trial court had held a similar transaction hearing, had made a determination regarding admissibility, and had given an instruction when the

evidence was admitted which limited the jury’s consideration of the extrinsic act evidence to legitimate purposes. Also, a trial court’s instruction which encompassed more than the State’s stated purpose for admission was not error because the additional purpose cited in the charge was “permissible.” Furthermore, there is no error in a charge authorizing the jury to consider the evidence for more legitimate purposes than that for which it was proffered at the similar transaction hearing when the additional purpose was permissible and relevant to the State’s prima facie case. Here, because the trial court gave an appropriate limiting instruction prior to the admission of the similar transaction evidence, and because the purposes cited in the trial court’s final charge were permissible and relevant to the State’s case, the Court found no plain error in the trial court’s charge to the jury.