

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 25, 2015

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THIS WEEK:

- **Search & Seizure; Search Warrants**
- **Jury Charges; Ineffective Assistance of Counsel**
- **Sentencing; Merger**
- **Habeas Corpus; Ineffective Assistance of Appellate Counsel**
- **Jury Charges; Alternate Jurors**
- **Kidnapping; Garza**
- **Closing Arguments; Demonstrations**
- **Closing Arguments; Demonstrations of Emotion**
- **Sufficiency of the Evidence; Jury Charges**

Search & Seizure; Search Warrants

Shirley v. State, S15G0671 (9/14/15)

Appellant was charged with possession of child pornography. Appellant unsuccessfully moved to suppress the search warrant, contending that the application failed to allege sufficient probable cause to justify the search. The trial court's order was affirmed on appeal. *Shirley v. State*, 330 Ga.App. 424 (2014). The Court granted certiorari and reversed.

The affidavit supporting the search warrant stated in relevant part as follows: "On January 20, 2011, information was received as a lead by the Federal Bureau of Investigations Safe Child Task Force, of an investigation by the German authorities in reference to a website that they located which was used to distribute Child Pornography. During their investigation[,] several IP addresses were captured, along with files that were accessed on the site. . . . A review of the connections for

the IP address [associated with Shirley] showed that 150 full and thumbnail size images had been accessed. . . . [W]hen asked of his knowledge of someone accessing a German website for the purpose of Child Pornography, Mr. Shirley invoked his privilege to remain silent until he can speak to an attorney."

The Court found that the affidavit was "rife with issues." First, it implied that information was received by the FBI from German authorities; however, the name(s) or type(s) of German authorities was not provided. There was no way of knowing where the information originated. Similarly, an FBI Task Force was named as a source, but there was no detailed description of what that task force did, if anything, with the information from German authorities other than passively relaying it to Georgia police. Exacerbating the level of uncertainty, the affidavit merely stated that the unknown German authorities identified a website "used to distribute Child Pornography." But, the Court stated, there was no way to determine whether the German authorities used German law to classify the contents of the website or whether it used some other law or definition. In any event, there was absolutely no indication that the nebulous German authority analyzed the website with regard to United States and/or Georgia law in order to determine whether the undescribed pictures accessed by appellant's IP address contained "child pornography" as defined in these domestic jurisdictions. This, the Court found, was highly problematic, as there was no indication that anyone, other than the nebulous German authorities, actually viewed any part of the website in question.

Moreover, the Court stated, in affirming the denial of appellant's motion to suppress,

the Court of Appeals relied on the idea that the inclusion of the term “child pornography” may, in and of itself, offer “sufficient indicia of probable cause to issue a warrant . . . in that the meaning of the term ‘child pornography’ and its illegality were sufficiently conveyed so that the judge understood what type of evidence was required.” But, the Court stated, even if it was to adopt this type of standard in Georgia, there was no indication that the FBI did anything other than simply act as a conduit for the German authorities. Nevertheless, the Court noted that if there were some indication in the application that the FBI had separately viewed the website in question and confirmed its contents as containing “child pornography,” or at least some reliable source had provided a description of the pictures contained on the website, the case might have a different result. But, since that did not occur here, the warrant application was insufficient to support probable cause, and the trial court should have granted appellant’s motion to suppress.

Jury Charges; Ineffective Assistance of Counsel

Schmidt v. State, S15A1150 (9/14/15)

Appellant was convicted of malice murder, possession of a firearm during the commission of a crime, and theft by taking. The evidence showed that when appellant was 14 years old, he shot the 14 year old victim in the back of the head as she was sitting at a computer in her home. He contended that the trial court erred by failing to give his requested charge on involuntary manslaughter. The Court disagreed.

Appellant contended that the handgun discharged accidentally as he was attempting to unload it while standing behind the victim with it pointing at her. But, the Court stated, there was no contention that he intended to fire the weapon or that it was intentionally aimed at the victim. Thus, as the trial court rightly determined, the evidence established either that appellant intentionally shot and killed the victim, or that the handgun discharged accidentally, and thus, there was no criminal offense in regard to the shooting. In the circumstances in which the evidence shows either the commission of the completed offense, in this case malice murder, or the commission of no offense, there is no requirement that the trial court charge the

jury on a lesser included offense. Since the trial court charged the jury on accident, it did not err by refusing to also instruct it on involuntary manslaughter during the commission of the misdemeanor of reckless conduct.

Appellant also contended that his trial counsel was ineffective in her representation because she pursued a defense theory of voluntary manslaughter even though there was no evidence to support the contention that he killed the victim out of a “sudden and irresistible passion,” an essential element of voluntary manslaughter. He argued that in pursuing voluntary manslaughter, trial counsel abandoned the viable defense of involuntary manslaughter “in favor of a concocted defense unsupported by the evidence.” The Court noted that the trial court did in fact decline to instruct the jury on voluntary manslaughter because of a lack of evidence to support such an instruction. However, appellant’s claim of ineffective assistance of his trial failed because he could not satisfy the necessary element of prejudice under *Strickland*. Although he contended that he was prejudiced because trial counsel pursued a bogus theory of voluntary manslaughter rather than a valid one of involuntary manslaughter, there was no evidence of involuntary manslaughter, so the failure to pursue involuntary manslaughter as a defense could not have had an effect on the outcome at trial. Consequently, appellant was not prejudiced by the omission. At best, the evidence arguably raised the complete defense of accident, and the trial court instructed the jury on that defense. Therefore, the Court concluded, inasmuch as appellant’s claim of ineffective assistance of trial counsel must fail for lack of prejudice, the Court did not need to consider the performance prong of *Strickland*.

Sentencing; Merger

Noel v. State, S15A1170 (9/14/15)

Appellant was convicted of three counts of felony murder as well as of the three underlying felonies of aggravated assault, aggravated battery, and cruelty to children. The trial court merged the verdicts on the underlying offenses into their respective felony murder verdicts and sentenced appellant to a concurrent term of life in prison for each of the jury’s felony murder verdicts. The Court, sua sponte, noted that the trial court and the parties failed to recognize that a defendant

found guilty of the felony murder of the same victim through the commission of more than one felony may only be sentenced on one felony murder charge and the remaining felony murder charges stand vacated by operation of law. These oversights resulted in appellant being sentenced improperly to three life terms in prison for the murder of one victim and left unresolved sentences for two of the non-murder felonies of which appellant was legally convicted.

Accordingly, the Court found that appellant’s sentences were void and remanded the case for resentencing. In doing so, the Court instructed the trial court and parties that on resentencing, a legal conviction may be entered on only one felony murder verdict, the underlying felony charged in that count will merge into the felony murder conviction as a matter of law, the remaining felony murder verdicts will stand vacated by operation of law, and a determination of whether the remaining non-murder felonies merge as a matter of fact into the felony murder conviction will need to be made.

Habeas Corpus; Ineffective Assistance of Appellate Counsel

Williams v. Rudolph, S15A1041 (9/14/15)

Williams, in his capacity as warden, appealed from the grant of habeas corpus to Rudolph on the grounds that Rudolph received ineffective assistance of appellate counsel. The trial evidence showed that Rudolph had sex with a 12 year old against her will. At the close of Rudolph’s jury trial, the trial court, acting sua sponte, decided to charge the jury on statutory rape as a lesser included offense of rape. Rudolph had not been indicted for statutory rape. Ultimately, Rudolph was acquitted of forcible rape and found guilty of statutory rape, aggravated sexual battery, aggravated child molestation, child molestation, and burglary. The habeas court found that Rudolph was harmed by appellate counsel’s failure to challenge the trial court’s decision to charge Rudolph’s jury with the crime of statutory rape as a lesser included offense of rape. The Court disagreed and reversed.

The Court noted that at the time of Rudolph’s trial, there was Georgia precedent holding that, under certain circumstances, statutory rape might be an included offense

in forcible rape as a matter of fact, even if not always included as a matter of law. *Hill v. State*, 295 Ga.App. 360 (2) (2008). This remained the law at the time that Rudolph's direct appeal was filed and at the time that the appeal was decided in the Court of Appeals in 2011. In 2012, before Rudolph's present habeas action, the Court of Appeals reversed its course, expressly overruled *Hill* and held that statutory rape may never be included in forcible rape, as a matter of fact or law. *Stuart v. State*, 318 Ga.App. 839 (2012). Based on *Stuart*, the habeas court found that appellate counsel rendered ineffective assistance.

But, the Court found, the habeas court's order, due to its reliance on *Stuart*, addressed the claim of ineffective assistance from a perspective and state of the law after Rudolph's appeal had already been decided. This perspective would require Rudolph's appellate counsel to argue beyond existing precedent at the time of his appeal and there is no requirement for an attorney to prognosticate future law in order to render effective representation. At the time of Rudolph's appeal, there was caselaw indicating that statutory rape could be a lesser included offense of forcible rape as a matter of fact. Therefore, examining appellate counsel's perspective at the time of Rudolph's appeal, it was not unreasonable for her not to challenge the trial court's decision to charge Rudolph's jury on the crime of statutory rape. Moreover, at the time of Rudolph's trial and appeal, the law was well-settled that statutory rape could be a lesser included offense of aggravated child molestation premised on sexual intercourse with a child under the age of sixteen. Accordingly, the habeas court's grant of Rudolph's writ of habeas corpus was reversed, and Rudolph's conviction for statutory rape reinstated.

Jury Charges; Alternate Jurors

Allen v. State, S15A1273 (9/14/15)

Appellant was convicted of murder, aggravated assault, and various other offenses. He contended that the trial court erred and improperly commented on the evidence by giving a jury charge which implied that he himself possessed and used the murder weapon in this case, despite the fact that the murder weapon was never recovered. The charge stated: "The state is not required to admit into evidence the offensive weapon

used by *the defendant* in order to prove the defendant guilty of murder or aggravated assault. The presence of an offensive weapon or the appearance of such may be established by circumstantial evidence. Some physical manifestation is required or some evidence from which the presence of a weapon may be inferred, such as the nature, kind and location of the wound inflicted." (Emphasis supplied).

The Court found that the trial court's instruction was legally correct, in that it is true that the State need not admit into evidence the weapon used by the defendant in order for the defendant to be found guilty of the crime involving the weapon. Moreover, even considering that the charge here was given after the charges listing the elements of murder and aggravated assault, it could not be said that the judge was offering an opinion that appellant actually possessed a weapon or that the State did not have to prove the existence of such a weapon through circumstantial evidence. Instead, the Court found, the jury charge, when read in context, still left the jury to decide, based on its own evaluation of the evidence, whether the State had met its burden of proving that appellant actually possessed and used any weapon to shoot and kill the victim. In this connection, the use of the phrase "the defendant" instead of "a defendant" in the charge also would not amount to a comment on the evidence, as, again, the charge made clear that it was up to the jury to decide whether the State had proven the existence of any weapon and that the defendant used such a weapon to commit the crimes at issue.

Appellant also argued that the trial court erred by removing a juror who was unable to reach a decision with the other jurors during deliberations. The Court stated that pursuant to O.C.G.A. § 15-12-172, trial courts may replace a juror with an alternate juror if "a juror dies, becomes ill, [or] upon other good cause shown to the court is found to be unable to perform his duty, or is discharged for other legal cause." Here, the Court found, the record showed that the removed juror (1) stated several times that she did not want to form an opinion about the case, and (2) further stated that she was actually incapable of making the decision in the case because she could not "play God" and because her moral beliefs precluded her from making a decision in the case. The trial court made a proper and

thorough inquiry to the juror's inability to make a decision based on her moral beliefs, and the Court found no abuse of discretion in the trial court's decision to remove the juror.

Kidnapping; Garza

Gonzalez v. Hart, S15A0884 (9/14/15)

Appellant was convicted of family violence battery, two counts of aggravated assault, kidnapping with bodily injury, and two counts of aggravated battery in connection with two incidents involving his ex-girlfriend. The habeas court found that the asportation element of the kidnapping was sufficient under *Garza*. The Court disagreed and reversed.

In relevant part, the evidence showed that appellant was a jealous person and the presence of a male shirt in the victim's apartment precipitated the violent confrontation. Specifically, while in the bedroom, appellant began hitting the victim in the face; he threw her onto the bed, where he choked her around the neck; the victim did not recall whether appellant hit her with an open hand or with a fist, but thought he used his fist because of the bruises she received; appellant and the victim struggled, and she got out of the bedroom; the victim told appellant that she was going to call the police, and he grabbed her cell phone; the victim was moving towards the door of the apartment when appellant reached her, grabbed her by the hair, and then threw her against the wall or door; and appellant then left, taking her cell phone.

The Court found that there was no evidence to support a finding that the movement of pulling the victim back by the hair was anything other than of minimal duration. After the bedroom altercation and appellant's taking the victim's cell phone, she went towards the door, but appellant caught up to her, grabbed her hair, and threw her against the door or wall. Appellant then immediately left the apartment. Thus, the Court found, the act was part and parcel of one violent event. In fact, such movement occurred during the commission of, and as an inherent part of, the first indicted aggravated assault, and the resulting conviction of family violence battery. The alleged kidnapping, i.e., the grabbing of the victim's hair, was inseparable from the family violence battery of throwing the victim against the wall as

that was how appellant accomplished such criminal act. Separating appellant's grabbing the victim's hair from his act of throwing the victim against the wall or door, and labeling it kidnapping starkly illustrated both cumulative punishment under more than one criminal statute for a single course of conduct and the failure to provide fair warning of what type of conduct the kidnapping statute forbids.

Furthermore, the Court found, there was no evidence that pulling the victim by the hair presented a significant danger to her that was independent of the family violence battery, as she was not isolated or somehow exposed to an independent danger outside of the one to which she was already being subjected from the family violence battery itself. The family violence battery and alleged kidnapping with bodily injury were one continuous event. The habeas court held that the hair grabbing presented an independent danger to the victim by isolating her and preventing her rescue; but, the court failed to recognize that appellant immediately left the apartment without returning or instructing the victim to stay in the apartment. Thus, right after appellant grabbed the victim's hair, the attack on her stopped and she was out of danger. Accordingly, the Court concluded, under *Garza*, the evidence was insufficient to show the necessary kidnapping element of asportation.

Closing Arguments; Demonstrations

Crawford v. State, S15A0895 (9/14/15)

Appellant was convicted of malice murder and robbery by force in the strangulation death of the victim. Appellant argued the trial court committed reversible error when it allowed the State during closing argument to use a rope to demonstrate the act of strangulation followed by four minutes of timed silence representing the amount of time it allegedly took the victim to die. Specifically, after tying the rope around a bannister in the courtroom and tugging on it to illustrate the act of strangulation, the prosecutor ended her closing argument with four minutes of silence stating "[t]his is [the victim]'s four minutes." Appellant objected to the State's demonstrations as irrelevant and inflammatory, but his objections were overruled by the trial court.

The Court stated that the State has broad latitude to demonstrate, as part of its closing

argument, that which is authorized by the evidence. Here, there was evidence presented showing that a rope may have been used to strangle the victim and that it would take a person approximately four minutes to die from strangulation. The State's demonstration, therefore, was authorized by the evidence presented at trial. As such a demonstration was not beyond the bounds of permissible argument, the Court found no abuse of discretion in the trial court's decision allowing the demonstration to proceed.

Closing Arguments; Demonstrations of Emotion

Brown v. State, S15A0992 (9/14/15)

Appellant was convicted of felony murder based on child cruelty in connection with the death of a two-year-old. Appellant contended that his trial lawyers were ineffective in failing to object or move for a mistrial when the prosecutor began to cry during his closing argument. The Court noted that the trial transcript did not indicate any such emotional incident, nor did the judge or any of the five experienced defense lawyers who were present comment on one, but at the motion for new trial hearing, the prosecutor acknowledged that he briefly became "noticeably choked up" while describing the victim's many injuries.

The Court stated that it has long recognized that trials often evoke strong feelings, and it would be unreasonable to expect that all emotions be completely frozen during a trial by jury when such effective bridle on emotions cannot be sustained elsewhere. Lawyers should certainly strive to maintain their composure during trials, but the record here indicated that the prosecutor's emotional display was neither extended nor excessive.

Furthermore, although at the motion for new trial hearing, appellant's lead trial counsel said that he should have objected and moved for a mistrial, hindsight has no place in an assessment of the performance of trial counsel. Instead, to prove deficient performance, appellant must show that his attorney performed at trial in an objectively unreasonable way considering all the circumstances and in the light of prevailing professional norms. Courts reviewing ineffectiveness claims must apply a strong presumption that counsel's conduct fell within the wide range of reasonable professional

performance. Thus, decisions regarding trial tactics and strategy may form the basis for an ineffectiveness claim only if they were so patently unreasonable that no competent attorney would have followed such a course.

Here, the Court found that under the circumstances, it could not say that no competent attorney would have made the tactical decision to let the prosecutor's momentary display of emotion pass, rather than objecting and drawing attention to it. Moreover, even if trial counsel had made an objection, the trial court would have been well within its discretion to deny a mistrial. Accordingly, appellant failed to establish prejudice on this claim.

Sufficiency of the Evidence; Jury Charges

Weyer v. State, A15A1258 (8/6/15)

Appellant was convicted of two counts of sexual exploitation of children. The evidence showed that the victims were A.M. and her cousin H.M., two 16-year-olds, who were spending the night with A.M.'s grandmother. Appellant was the boyfriend of the grandmother and had known the two victims for years. Briefly stated, the evidence showed that appellant began texting the two girls and asking each to send him naked pictures of themselves. The "conversation" lasted from one evening until the next morning when the victims went to school. Appellant contended that the evidence was insufficient. The Court disagreed.

Under Georgia's sexual-exploitation-of-children statute, "[i]t is unlawful for any person knowingly to . . . entice . . . any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual medium depicting such conduct." O.C.G.A. § 16-12-100 (b) (1). "Sexually explicit conduct" is defined to include the "[l]ewd exhibition of the genitals or pubic area of any person." O.C.G.A. § 16-12-100 (a) (4) (D). "Visual medium" is defined as "any film, photograph, negative, slide, magazine, or other visual medium," O.C.G.A. § 16-12-100 (a) (5), and "minor" is defined as any person under 18 years old. O.C.G.A. § 16-12-100 (a) (1).

Appellant argued there was insufficient evidence that his intent was to obtain photographs from A.M. and H.M. engaged in such conduct. Specifically, he noted that "sexually explicit conduct" is defined by

statute to include only the lewd exhibition of the “genitals or pubic area” of the minor, and the text messages introduced at trial reflected that he sought photographs of A.M. and H.M.’s breasts and buttocks, not their genitals or pubic areas.

As an initial matter, the Court agreed with appellant that “genitals” and “pubic area” do not include buttocks or breasts. However, the Court found, appellant clearly sought nude photographs of A.M. and H.M. when he wrote to A.M., “NAKED-i want to see your fine asses and tits naked!” Thus, although appellant argued that he wanted photographs of the victims’ breasts and buttocks and nothing more, the jury was not required to leave its common sense at the door in resolving this case. Rather, the jurors were entitled to draw reasonable inferences from the evidence based on their own common-sense understanding of the world. And in reviewing the sufficiency of the evidence on appeal, the Court must look to the evidence as a whole, not a single piece of evidence in a vacuum. Based upon *all* of the text messages and other evidence adduced at trial, a rational jury could have found that appellant was seeking nude photographs that would show all the intimate areas of the victims’ bodies, including their genitals and pubic areas. In other words, a rational jury could have found that appellant was seeking the most explicit photographs he could obtain from A.M. and H.M. rather than photographs limited to specific body parts. Accordingly, there was evidence to support a finding that appellant’s intended motivation was to obtain photographs of A.M. and H.M. engaged in “sexually explicit conduct” as that phrase is defined by the statute.

Appellant also contended that the trial court erred in not defining the word “entice” when requested to do so by the jury and instead instructing the jury that it should assign such words their “ordinary meaning.” The record showed that during its deliberations, the jury sent out a note requesting that the trial court “[d]efine entice.” Before responding to the jury’s request, the trial court consulted with the State and appellant’s trial counsel outside the presence of the jury. The trial court suggested that it instruct the jury that “[w]ords will having their ordinary meaning,” and appellant’s counsel responded, “It sounds good to me.” The court so instructed the jury, but as the jury was leaving the courtroom to

resume deliberating, one juror asked, “Can we get a dictionary?” The trial court declined to provide a dictionary to the jury and reiterated, “The meaning of words come from the ordinary meaning that you use of words from your life experience and the learning that you’ve had in life.” appellant’s trial counsel did not object to any part of the trial court’s supplemental instruction to the jury.

The Court stated that because there was no objection, its review was limited to whether there was plain error. The Court found that “entice” as used in the statute defining sexual exploitation of children is a word of ordinary understanding, and, therefore, the trial court was authorized to instruct the jury simply to apply the ordinary definition of that term. Furthermore, the trial court acted within its discretion in declining the juror’s request for access to a dictionary during deliberations. Indeed, the Court surmised, if a dictionary had been provided, jurors could have then looked up all manner of terms involved in the case, potentially causing prejudice to appellant. Therefore, the Court concluded, appellant failed to prove that the trial court committed any error in its fashioning of a supplemental instruction to the jury regarding the definition of “entice,” and thus, the first prong of the test for plain error had not been satisfied. Accordingly, he was not entitled to a new trial on this ground.