Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 18, 2016

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THIS WEEK:

Jury Instructions; Reckless Conduct

Shah v. State, S16A1083 (10/31/16)

Appellant was found guilty of felony murder and two counts of first degree cruelty to children in connection with the death of her infant daughter, Alejandra. The evidence, very briefly stated, showed appellant had five children, ages 14 and under. The victim was born premature. Appellant's 14-year-old daughter, C.P., was primarily responsible for caring for Alejandra, including feeding and changing the infant, while appellant, who was not employed, took primary responsibility for the care of her two-year-old boy. At some point during the week of July 24, 2011, the air conditioner in the house broke. The victim died on the night of July 31 or early morning of August 1, 2011.

At trial, the State argued that Alejandra died because appellant willfully deprived her of formula on July 31 and August 1 and that the evidence of appellant's gradual starvation of Alejandra during the previous months should be viewed as showing appellant's course of conduct, meaning that her failure to feed Alejandra on the night of her death was not an accident. Appellant's counsel argued that she had not intentionally harmed Alejandra and that the baby's death was accidental, as the State's medical examiner had concluded.

Appellant contended that the trial court erred in not giving her written request for a jury instruction on reckless conduct as a lesser included offense of the cruelty to children charges. The Court agreed. Reckless conduct may be a lesser included offense of cruelty to children, if the harm to the child resulted from criminal negligence rather than malicious or willful conduct. And here, the Court found, there was substantial and uncontradicted evidence that appellant left Alejandra in C.P.'s primary care during the summer, and in C.P.'s almost exclusive care during the hours leading up to the infant's death. Both appellant and C.P. testified that C.P. usually played with Alejandra, changed her diapers, mixed her formula, fed her when she cried, and otherwise tended to her needs. There was evidence that on the night Alejandra died, appellant did not personally check on the infant after 7:00 p.m., again relying on C.P. to feed and tend to Alejandra as necessary, and then told C.P. to check on Alejandra around 10:00 a.m. the next morning, without checking on the infant herself until after 1:00 p.m. It was possible — and appellant certainly hoped — that the jury could find from this evidence that she was not criminally culpable at all because she did not willfully fail to provide sustenance to Alejandra and did not maliciously cause Alejandra pain by leaving her in a hot room, but rather believed that C.P. was appropriately feeding and checking on Alejandra.

However, the Court found, particularly in light of the extreme heat in the house and Alejandra's fragile condition as an infant born very prematurely, it was also possible, and perhaps more likely, that the jury could make a less exculpatory finding. It could find that even if appellant did not intend to harm her baby, the routine and complete reliance of appellant, as the only adult in the home, on C.P., who was only 14 years old and had attention deficit disorder, to be Alejandra's primary caregiver throughout the summer — and sole caregiver for the hours before the baby's death — qualified as "consciously disregarding a substantial and unjustifiable risk" that the baby would not be properly fed and adequately monitored, and this disregard constituted "a gross deviation from the standard of care which a reasonable person would exercise" when responsible for an unusually fragile infant in a dangerous situation.

Moreover, the Court found, the error was not harmless. Although there was some tension between the theory that appellant committed no crime and the theory that she acted with criminal negligence; either position was much better for her than a finding that she acted with malice and willfulness. Indeed, the Court noted, criminal defendants often offer dissonant defense theories, particularly with regard to levels of criminal intent when the result of the defendant's actions was undeniably tragic and the jury may be inclined against finding the defendant entirely innocent. A defendant may strategically decide not to rest her case on a single defense theory, and if the evidence supports alternative theories, neither the State nor the trial court is authorized to preclude the jury from considering them. And here, the evidence that appellant left C.P. in charge of Alejandra' s feeding and care was uncontradicted, and the evidence that appellant willfully deprived Alejandra of sustenance and maliciously let her suffer in a hot room was not overwhelming.

Excited Utterances; O.C.G.A. § 24-8-803(2)

Robbins v. State, S16A1342 (10/31/16)

Appellant was convicted of felony murder, aggravated assault, and aggravated battery in connection with the beating death of his wife, Susan. The evidence showed that after receiving a call from relatives about a domestic dispute between appellant and Susan, Susan's niece, Elizabeth Grimes, went to Susan's RV and found Susan sitting on a couch with a broken and bloody nose. Susan was covered in dried blood and was incoherent, which led Grimes to believe that Susan should be taken to the hospital. While appellant was still sleeping somewhere in the RV, Susan told Grimes about the beating that she had suffered at the hands of her husband, claiming that appellant had been drinking and taking pain pills all night; that appellant became angry when he could not find his lighter and then began beating Susan in frustration; and that appellant continued to beat her intermittently all night. At the hospital, Grimes told police the details about the beating that Susan had told her that morning. She also made the same statements to Susan's daughter. However, at trial, Grimes consistently denied telling police anything about the beating and instead testified that Susan had told her that her injuries had resulted from a fall from her trailer.

Appellant contended that the trial court erred in admitting the testimony of a police detective and Susan's daughter about all of the statements that Grimes had told to them about the beating that had been conveyed to her by Susan. The Court disagreed. Under O.C.G.A. § 24-8-803(2) "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" may be admitted into evidence under the excited utterance exception to the rule against hearsay. In this regard, while the declarant must still be under the stress or excitement that the startling event caused, the excited utterance need not be made contemporaneously to the startling event. It is the totality of the circumstances, not simply the length of time that has passed between the event and the statement, that determines whether a hearsay statement was an excited utterance. And here, the Court found, the evidence revealed that Grimes arrived at Susan's RV in the morning after Susan had possibly been subjected to a beating that took place throughout the entire night. Appellant was still asleep in the RV when Grimes arrived, and Susan was still speaking incoherently from a possible beating that had broken her nose and caused her several other extensive injuries. While the beating itself was not still actively occurring, Susan's alleged attacker was still in the RV, and thus, the Court found no abuse of discretion in the trial court's conclusion that, under the totality of the circumstances, Susan was still suffering under the stress of the all-night beating such that her statements to Grimes were admissible under the excited utterance exception to the rule against hearsay.

However, the Court stated, because Grimes testified at trial that Susan had only told her that she had received her injuries from falling from her RV, this did not answer the question whether Susan's alleged statements to Grimes about the beating could be properly introduced at trial through the testimony of the investigating police officer and the testimony of Susan's daughter. In this regard, the potential hearsay within hearsay as conveyed through the testimony of the police officer and Susan's daughter must be independently evaluated for admissibility. Nevertheless, the Court found that because Susan's prior statements to Grimes about the beating fell within an exception to the rule against hearsay, these prior inconsistent statements could be used as substantive evidence and to impeach Grimes' testimony at trial in which she denied that Susan ever told her about the beating.

Juveniles; O.C.G.A. § 15-11-521(b)

In re M.D.H., S16G0428, S16G0546 (10/31/16)

According to O.C.G.A. § 15-11-521(b), the State must file a petition alleging delinquency against a juvenile who is not detained within 30 days of the filing of the complaint or seek an extension of that deadline from the juvenile court. In *In the Interest of M.D.H.*, 334 Ga.App. 394 (2015), a panel of the Court of Appeals held that the failure to comply with § 15-11-521(b) requires dismissal of the juvenile case, but the dismissal is *without* prejudice. Three days later, a different panel answered the same question the opposite way, concluding that a violation of § 15-11-521(b) requires dismissal *with* prejudice. See *In the Interest of D.V.H.*, 335 Ga.App. 299, 299 (2015). The Court granted certiorari in both cases to determine the question of what happens when the State fails to meet this 30-day requirement.

The Court initially noted that there was no dispute that the State in both of these cases failed to meet the 30-day deadline set out in subsection (b) and also failed to

obtain an extension of the deadline from the juvenile court. But while this deadline is express and unequivocal — the petition "shall be filed within 30 days" — the statute does not articulate what the remedy is for missing the deadline. So, the Court stated, it must determine what remedy the General Assembly meant to impose with this silence.

Relying heavily on *In the Interest of R.D.F.*, 266 Ga. 294 (1996) (the failure to comply with former O.C.G.A. § 15-11-26(a), which established a deadline for setting the adjudicatory hearing in juvenile cases, resulted in dismissal of the case without prejudice), the Court found that dismissal of a delinquency or criminal case with prejudice due to a statutory violation is a severe sanction, as it precludes the State from even trying the alleged offender for conduct that may be a serious violation of the criminal law, and such an extreme result will not be presumed in the absence of clear legislative direction. And here, the Court found, there was no such clear legislative direction.

Thus, the Court stated, timely proceedings are of undoubted importance in juvenile cases. And there are consequences when the State fails to meet the deadlines prescribed in the Juvenile Code. The general concern for timely dispatch of juvenile cases does not, however, mean that the Court should assume that whenever the General Assembly sets a time limit in the Juvenile Code, it intends, by not specifying a consequence for missing the time limit, to impose the most severe remedy possible — one that would preclude the delinquent act alleged from being addressed and the juvenile and criminal law from being enforced. Furthermore, implying such an extreme remedy for what happens in the 30-day complaint-to-petition period established by O.C.G.A. § 15-11-521(b) would be especially odd, given that the Juvenile Code appears to place no time limit on the initial filing of the complaint (except the statute of limitation) or on an extension of the deadline for filing a petition (except the constitutional right to a speedy trial).

Accordingly, the Court opined, "[i]f the General Assembly wishes to impose a harsher consequence than dismissal without prejudice for the State's failure to comply with O.C.G.A. § 15-11-521(b), it can do so by expressly providing for that remedy, as we explained 20 years ago in *R.D.F.* Until that happens, if the State fails to file a delinquency petition within 30 days of the complaint and does not seek and receive an extension of the deadline, the case must be dismissed without prejudice."

Search & Seizure; Mallory

Kennebrew v. State, S16A0844 (10/31/16)

Appellant was convicted of malice murder, armed robbery, and other crimes. He contended that he received ineffective assistance of counsel. The Court agreed and reversed his convictions. First, appellant argued that his counsel rendered deficient performance by failing to pursue a motion to suppress. The evidence showed that the police arrested appellant in his girlfriend's dorm room and searched as incident to arrest two backpacks of appellant found in the dorm room. The Court stated that the incident to arrest exception derived from the interests of officer safety and evidence preservation that are typically implicated in arrest situations. A search incident to arrest may only include the arrestee's person and the area "within his immediate control" i.e., the area from within which he might gain possession of a weapon or destructible evidence. This limitation ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.

Here, the Court found, appellant had already been handcuffed and removed from the dorm room when the police seized his backpacks, and they were not searched until six days later, far away in both time and place from appellant's arrest. There was no danger whatsoever that appellant might gain access to the property at that point to seize a weapon or destroy evidence, and thus, the search of the backpacks was clearly not an incident of appellant's arrest. Therefore, counsel's failure to pursue suppression of the evidence found in the backpacks was deficient performance under *Strickland*.

Appellant also contended that counsel rendered deficient performance by failing to object to the prosecutor's closing arguments. The transcript showed that appellant's trial counsel argued in closing that appellant went to the victim's apartment only to sell the victim a video game system and did not participate in the murder and robbery that ensued. In rebuttal, the prosecutor argued: "If he was there and he had nothing to do with it and he saw everything, then why in the good gracious name did he not go immediately out and call somebody, the police, the sheriff's office, someone? You'll have the [cell phone] records back there. You heard the detective, and I'll ask you to do the same thing, look at [October] 18th. Is there one 911 call? Zip. And he had to be arrested two days later."

The Court noted that this case was tried under the old Evidence Code and that the State's argument was a text-book violation of *Mallory v. State*, 261 Ga. 625, 630 (1991) which established a bright-line rule prohibiting the State from commenting on a defendant's pre-arrest silence or failure to come forward. Therefore, counsel also rendered deficient performance in this regard as well.

Finally, the Court addressed whether there was prejudice as well as deficient performance. The Court found that the 12-gauge shotgun shells, .40-caliber Smith & Wesson bullets, and knife that the police found in the unconstitutional search of appellant's backpacks were important to the State's effort to prove that he participated in the crimes and was not merely present when the murder occurred. This was demonstrated by the State's focus on this evidence in its closing argument, where the prosecutor emphasized that appellant was "the one with the .40 calibers. He's the one with the shotgun shells that are the same as the shells in [his co-defendant]'s house. He's the one that has the knife." The jury then sent two notes to the court during deliberations, first asking for the shotgun shells found in appellant's backpack and the shotgun shells found at the co-defendant's residence, presumably for comparison, and then asking for the .40-caliber bullets from the backpack and "any handgun shells from [the co-defendant's] house," also presumably for comparison. In addition, the State tried to supplement its evidence by improperly arguing that appellant's guilt was proved by his not volunteering his defense to the police before his arrest. The other evidence connecting appellant to the commission of the crimes was not overwhelming, and the defense offered a plausible alternative

explanation for why appellant was with his co-defendants at the victim's apartment. In sum, appellant showed enough prejudice to undermine the confidence in the outcome of the trial as to him. Accordingly, the Court concluded that appellant carried his burden to show that his trial counsel provided ineffective assistance as defined in *Strickland* and reversed his convictions.

Authentication; Statements

State v. Smith, S16A1069 (10/31/16)

Smith was indicted on felony murder and other charges. The trial court entered an order suppressing evidence of an oral admission, written statements, and video recordings of any statement made to law enforcement officers while in custody. The State appealed.

At the *Jackson-Denno* hearing, the State sought to admit a video disc of the investigating officers' interview of Smith the day after the crimes occurred. The investigator was asked to authenticate a video disc, but he could not say that the disc marked as an exhibit was the same disc his department submitted to the prosecutor and which he has already reviewed. A second disc was marked and a break was taken so that the investigator could audition that disc. After going back on the record, the investigator testified he had auditioned the disc and that it reflected everything that occurred during the Smith interview. However, the Court found, under cross-examination, his authentication was equivocal.

The Court stated that the evidentiary rule regarding authentication of evidence is set forth in O.C.G.A. § 24-9-901. With respect to authenticating a video recording of a defendant's custodial statement, the State must show it is a fair representation of the statement, and may authenticate the recording by any witness familiar with the subject depicted on the recording, as is the case with any other video recording presented as evidence at a criminal trial. Given the equivocal testimony of the investigator with respect to whether the video disc being offered into evidence was one he had reviewed, the State failed to carry its burden of proving the video recording was a fair representation of Smith's interview. Thus, the Court determined, it could not say that the trial court's decision to exclude the video recording of Smith's confession was an abuse of discretion.

The State also challenged the trial court's finding that the State failed to prove by a preponderance of the credible evidence that the statement of defendant was freely, voluntarily, knowingly, and understandably made and entered, and the statement was made and entered without any undue influence, compulsion, duress, promise of benefit, or fear of injury. The Court noted that the investigator testified there were one or two other investigators who were present at the Smith interview. The investigator also testified that Smith never requested an attorney prior to or during the interview, that Smith was never offered a hope of benefit or reward if he gave a statement to the investigators, and that the statement was not the product of duress or compulsion, fear of threat, or undue influence.

However, the Court noted, the investigator's testimony did not hold up under cross-examination. For example, although the investigator was present at the interview and claimed to have reviewed the video recording earlier in the morning of the hearing, he could not recall whether a third investigator, who was mentioned by name by Smith's counsel, was also present. Smith's counsel asked the investigator whether he told Smith in the course of the interview that if he cooperated he would be willing to tell the victim's father that he showed remorse. Again, even though he claimed to have reviewed the video recording that day, the witness could not recall whether he made this statement to Smith. In response to questioning, he further testified that if he did make that statement he could not say if his motive would have been to induce Smith to make statements he had not otherwise volunteered to make. Although no evidence was presented that the witness did, in fact, make such a representation to Smith, the Court could not say that the witness' uncertainty and inability to deny such a representation, considered with the evidence as a whole, was insufficient to create doubt about the witness' credibility. And, given the exclusion of the video recording, his testimony was the only evidence offered that Smith's statement met constitutional standards that it was given voluntarily, knowingly, and understandingly, and without promise of benefit or threat of injury. Accordingly, the Court found, the trial court was authorized to make determinations of fact and credibility that would support the order granting Smith's motion to suppress, not only as to the video recording but also as to Smith's written statement and the testimony of the interrogating officer relating to his statement.

Ineffective Assistance of Counsel; Racial Animus

Capps v. State, S16A1071 (10/31/16)

Appellant was convicted of malice murder. The evidence showed that appellant, who was Caucasian, approached his victim, an African-American, to purchase drugs. After the exchange, the victim bent down to put the money from the deal in his pocket and appellant pulled a gun and shot him.

Appellant contended that his trial counsel rendered ineffective assistance of counsel for not objecting to, and thereby attempting to exclude, testimony from an eye witness, which he characterized as inadmissible "testimony of a similar transaction involving an unrelated murder." The testimony at issue was the recounting of appellant's talking to the witness about appellant's family's history of killing African-Americans and that appellant had himself killed an African-American and was ready to kill again. Specifically, the witness testified that appellant "told me that his father killed - his grandfather killed the first n****. He killed the second - his daddy killed the second n****. His brother killed the third n****. He killed one and he was ready to kill another one, but I always thought he was just talking." On cross-examination, defense counsel asked the witness, "So his motive in your mind for shooting this gentleman was just because he wanted to shoot somebody?" The witness replied, "[t]hat's what I'm figuring," and "[t]hat's what [appellant] always said."

The Court stated that in the trial of an individual charged with murder, evidence of motive for the homicide is relevant and, therefore, admissible. This is so even if the evidence incidentally places the defendant's character in evidence. Here, the Court found, it was plain that the complained-of evidence was not admitted as proof that appellant had committed a prior murder, subject to the substantive and procedural requirements of admission of such evidence, but rather was properly admitted as evidence of appellant's racial animus toward African-Americans as a possible motive for his killing of the African-American victim in this case. Thus, trial counsel's failure to make a meritless objection was not evidence of ineffective assistance.

O.C.G.A. § 20-2-1182; First Amendment Challenge

West v. State, S16A1369 (10/31/16)

Appellant was charged with violating O.C.G.A. § 20-2-1182, which provides as follows: "Any parent, guardian, or person other than a student at the public school in question who has been advised that minor children are present and who continues to *upbraid, insult, or abuse* any public school teacher, public school administrator, or public school bus driver in the presence and hearing of a pupil while on the premises of any public school or public school bus may be ordered by any of the above-designated school personnel to leave the school premises or school bus, and upon failure to do so such person shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed $500.00." (Emphasis added). Appellant filed a general demurrer challenging the constitutionality of the statute based on the overbreath doctrine of the First Amendment. The trial court denied the demurrer and the Court granted an interlocutory appeal.

The Court stated that according to Webster's Dictionary, to upbraid is to "criticize severely: find fault with" or to "reproach severely: scold vehemently,"; an insult is "to treat with insolence, indignity, or contempt by word or action" or "a gross indignity offered to another either by word or act: an act or speech of insolence or contempt,"; and, abuse is defined as "to attack or injure with words: reproach coarsely; disparage" or "language that condemns or vilifies, usually unjustly, intemperately, and angrily." Thus, the plain language of O.C.G.A. § 20-2-1182 makes it a misdemeanor for any person not a student — after being advised that pupils are present and continuing to speak critically, reproachfully, indignantly, or disparagingly towards any public school teacher, administrator, or bus driver in the presence and hearing of a pupil — to remain on the school premises or bus after being ordered to leave by a school official.

The Court stated that while it may be able to conceive of a statement that constitutes an "upbraid, insult, or abuse" that could be classified as "fighting words" and thus not subject to First Amendment protections, it could also just as easily formulate statements punishable by the statute which would not be likely to cause an average addressee to fight. Furthermore, though ostensibly seeking to prevent disruptions to education or school activities, the statute neither ties the prohibited expression to the disruption of normal school activities nor limits the prohibitions to specific, fixed times, such as when school is in session. Also concerning, the statute does not proscribe all speech that might be boisterous or disruptive; instead, O.C.G.A. § 20-2-1182 prohibits only that speech directed at public school officials which may be perceived as negative or unfavorable and it is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. The practical effect of the plain language of O.C.G.A. § 20-2-1182 is that any person — may it be a parent, school system employee, or concerned citizen while on school premises or a school bus — who dares to speak critically to school officials at any time in the presence of minors must leave the premises when so ordered by a school official or face arrest and prosecution for a misdemeanor. Though the statute ostensibly only criminalizes the speech after the speaker refuses to leave school premises, the result is the same: the speaker is silenced, either through his or her absence on the school premises or school bus or through subsequent prosecution, based on the content of his or her speech, be it at a high school football game or a parent-teacher conference.

Therefore, the Court concluded, although the statute may have a legitimate application, it also makes unlawful a substantial amount of constitutionally protected speech. And, the Court noted, while it has the authority to narrow a statute to avoid unconstitutional infirmities under our system of separation of powers, it does not have the authority to rewrite statutes. According, the Court held that though well intentioned, the statute neither regulates unprotected speech nor is appropriately tailored to meet its intended objective and is therefore overbroad.

Juror Conduct

Crew v. State, S16A1003 (11/7/16)

Appellant was convicted of malice murder, armed robbery and other crimes related to the death of a professional boxer. Although he had two co-defendants, Sinkfield and Ware, he was tried separately. He contended that a juror, Shaneka Brown, engaged in irregular conduct that deprived him of a fair trial. The Court disagreed.

The record showed that after opening statements, Brown wrote a note to the trial court informing the court that she knew Sinkfield after she heard his nickname used during the trial. The trial court questioned Brown outside of the presence of the other jurors, and Brown stated that she knew Sinkfield because he was her nephew's uncle, and that her nephew had mentioned to her that Sinkfield was in jail for "something about him and a boxer." However, Brown said that she knew nothing more specific about the matter, that she did not spend time with Sinkfield, and that she would not talk to any of the jurors about the fact that she recognized the nickname. Under further questioning, Brown also stated that she would remain fair and impartial and decide appellant's case based on the evidence presented. Following the initial exchange between the trial court and Brown after opening statements, appellant's counsel argued to the trial court that Brown should *not* be dismissed as a juror, because appellant, and not Sinkfield, was on trial, and because Sinkfield was not going to be a witness in the case.

Following the trial, however, counsel for Sinkfield sent a letter to the trial court indicating that Sinkfield had spoken with Brown on the phone during appellant's trial. At the hearing on appellant's motion for new trial, neither Sinkfield nor his counsel testified. However, Brown did testify, stating that Sinkfield only had her phone number for purposes of getting in touch with her nephew or Brown's sister (the mother of Sinkfield's nephew). Brown also testified that Sinkfield called her and said to her that he knew that she was on the jury in appellant's case, but Brown immediately told Sinkfield that she could not discuss the trial and handed the phone to her sister. Brown did not know where Sinkfield was calling her from, as she never accepted any collect call from him, and she did not recognize the number from which Sinkfield was calling when she picked up the phone. Brown did not initiate any contact with Sinkfield, and, although Sinkfield tried to call her on more than one occasion, any time he called, Brown handed the phone immediately to her sister or nephew. She did not discuss the case with Sinkfield, her sister, or anyone else, and she reaffirmed at the motion for new trial hearing that she had no vested interest in

appellant's case and made her decision in the case based on the law presented by the trial court and the evidence presented at trial.

The Court stated that there is a presumption of prejudice to the defendant when an irregularity in the conduct of a juror is shown and the burden is on the prosecution to prove beyond a reasonable doubt that no harm has occurred. Thus, the Court's inquiry must be directed to whether this error is so inherently prejudicial as to require a new trial, or whether it is an immaterial irregularity without opportunity for injury. Under the circumstances presented here, the Court found no action by the juror that was presumptively so prejudicial as to infect the verdict and require that appellant be given a new trial. Rather than actively engaging in conduct that was so prejudicial to appellant as to infect the verdict, Brown endeavored to fulfill her duty to remain an impartial juror and avoid outside influences in order to base her decision in the case solely on the law and the evidence presented at trial. Thus, the Court found nothing in Brown's actions that could be characterized as juror misconduct which rose to a level of constitutional significance.