

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 1, 2016

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THIS WEEK:

- **Expert Witness Reports; Juror Misconduct**
- **Expert Witnesses; Verdict Impeachment**
- **Attempt to Elude; Party to a Crime**
- **Directed Verdicts; CODIS**
- **Rape Shield Statute; Cross Examination**
- **Interference with Government Property**
- **Jury Trials; Waiver**
- **Merger; Sentencing**
- **DUI; Voluntary Consent**
- **Hijacking an Automobile**

Expert Witness Reports; Juror Misconduct

Murphy v. State, S16A0150 (6/20/16)

Appellant was found guilty of five counts of felony murder, aggravated battery, arson in the first degree, and cruelty to a child, all of which were related to a motel fire resulting in the deaths of five people. The evidence showed that because she was upset with a drug dealer who would not “front” her drugs, she poured an accelerant on and set fire to a stack of mattresses placed in a stairwell directly under the second floor motel room where the drug dealer lived. Evidence showed that Ronsonol brand lighter fluid may have been used by appellant in starting the fire.

As part of its case in chief, the State called Dr. Najam, a forensic chemist, to provide expert testimony pertaining to the fire’s ignition point and the presence of an accelerant, otherwise known as an ignition source, on the mattresses stored under the motel stairs. Because testing showed that Ronsonol contained a light

petroleum distillate and the samples taken from the mattresses and concrete in the rear stairwell of the motel indicated the presence of a medium petroleum distillate, the prosecutor asked Dr. Najam whether a light petroleum distillate under attack of fire could change into a medium petroleum distillate. He responded that it was possible. On-cross-examination, Dr. Najam admitted that his written report did not contain any reference to his opinion that the exposure of a light petroleum distillate to intense heat could alter the chemical composition of the light petroleum distillate. He also clarified that he was not rendering an opinion that Ronsonol lighter fluid was the ignition source at the motel fire, only that it was a possible ignition source.

Appellant contended the trial court erred by allowing Dr. Najam to provide his opinion regarding the change in composition of a light petroleum distillate when exposed to sufficient heat because this aspect of his opinion was not reduced to writing and made available to defense counsel at least ten days prior to trial as required by O.C.G.A. § 17-16-4(a)(4). The Court found that the State had a duty to disclose the challenged portion of Dr. Najam’s expert opinion which the prosecutor admitted she learned of before trial. O.C.G.A. § 17-16-4(a)(4) requires the prosecuting attorney, no later than 10 days prior to trial or as otherwise ordered by the court, to disclose to the defense a written report or summary of its expert’s findings and conclusions. Thus, although the State may have been permitted to elicit Dr. Najam’s hypothetical opinion by asking him to assume facts admitted into evidence at trial, it still was required under O.C.G.A. § 17-16-4(a)(4) to provide timely notice of Dr. Najam’s opinion to defense counsel.

However, the Court stated, the State's failure to comply with O.C.G.A. § 17-16-4(a)(4) does not result in the automatic exclusion of the testimony at issue. The State is prohibited from introducing such evidence only upon a showing of both prejudice to appellant and bad faith by the State. Pretermitted the question of whether the State acted in bad faith, the Court concluded that appellant failed to meet her burden of showing she was sufficiently prejudiced by the State's failure to provide timely notice. It was undisputed that Dr. Najam was included on the State's witness list and that his written report, which included his opinion that the tested samples indicated the presence of a medium petroleum distillate and that Ronsonol lighter fluid contained a light petroleum distillate, were provided to defense counsel prior to trial. Although Dr. Najam's opinion pertaining to the State's theory of the transformation of a light petroleum distillate was not included in the State's disclosure, appellant made no showing of what additional evidence she would have presented or how the defense strategy would have materially changed had she been given timely notice of this undisclosed opinion, an opinion with which her own fire investigation expert essentially agreed. And Dr. Najam's opinion merely indicated the possibility of such a transformation. Therefore, the trial court did not abuse its discretion by allowing Dr. Najam to testify regarding the changing characteristics of a light petroleum distillate exposed to intense heat.

Appellant also argued that her convictions must be reversed because of the actions of one juror during jury deliberations. The record showed that the defense learned through its post-trial investigation that a juror, juror Toale, lit a cigarette lighter during jury deliberations to show jurors that fire travels upward. On motion for new trial, appellant asserted that Mr. Toale's demonstration constituted an experiment which improperly introduced to jurors extrajudicial information, and she offered four juror affidavits in support of her argument.

The Court noted that at the time of trial, the former Georgia Evidence Code was still in effect and thus, appellant's reliance on O.C.G.A. § 24-6-606(b), a provision in the new Evidence Code, which allows a juror to testify "whether extraneous prejudicial information was improperly brought to the

juror's attention," therefore, was misplaced. Under the law in effect at that time, as a general rule, jurors were not allowed to impeach their own verdict, and for this reason, judges could, in most circumstances, act within their discretion and decline to consider juror affidavits offered for the purpose of impeaching a verdict. At the same time, the general rule prohibiting the use of juror affidavits to impeach a verdict could not override a defendant's right to a fair trial.

But, the Court stated, it was unnecessary to decide here whether the trial court abused its discretion by refusing to consider the proffered affidavits because its review of the affidavits and the record showed that Mr. Toale's use of his lighter during deliberations did not introduce prohibited extrajudicial information to the jury. Mr. Toale stated in his affidavit that he had prior experience investigating fires and that he lit his lighter in the jury room to illustrate that fire generally flows upward, the same opinion offered by experts for both the State and defense at trial. It is not error for jurors to bring their past experiences and learning into deliberations to provide context and insight that allow the evidence and arguments presented at trial to be thoroughly examined. Here, Mr. Toale's actions did not introduce prohibited extrajudicial information into the deliberations. Instead, the Court found, it exemplified the use of one juror's experience-based knowledge to assist other jurors in their examination of the evidence and their understanding of the theories offered by expert witnesses at trial.

Appellant also challenged the verdicts based on the post-trial affidavit of juror Burton, a juror who requested during deliberations to be excused from service because her child was sick. Ms. Burton stated in her affidavit that she changed her vote to guilty after the trial court denied her request to be removed because she wanted to get home to her child. Appellant argued that the trial court's refusal to excuse Ms. Burton from service coerced her to change her vote from not guilty, thus coercing the verdicts in this case.

A trial judge is authorized by O.C.G.A. § 15-12-172 to replace a juror who "dies, becomes ill, [or for some] other good cause shown to the court is found to be unable to perform his [or her] duty. . . ." The record in this case showed that upon receiving a note

from Ms. Burton indicating her desire to be removed from the jury, she was questioned by the trial court. Her answers revealed that her son had missed two therapy sessions due to her jury service, and he likely would miss another session if deliberations continued. The State argued that Ms. Burton should be released, and defense counsel, after initially stating that she should not be removed, eventually agreed to "leave it with the Court." Based on its review of relevant law and Ms. Burton's responses, the trial denied Ms. Burton's request.

The Court found no abuse of discretion in the trial court's decision not to release Ms. Burton from jury service. Ms. Burton's reason for wanting to be removed and her answers to the trial court's questions gave no indication that her ability to perform her duties as a juror would be impaired if she was not excused and she did not claim that an emergency existed. Moreover, the Court added, it did not find any merit in the argument that the trial court's decision not to release Ms. Burton coerced the jury's verdicts. Nothing in the trial court's statements denying Ms. Burton's request intimated (1) that she should sacrifice her honest beliefs for reasons other than those based on the trial or the arguments of other jurors or (2) that a unanimous verdict was required. And while Ms. Burton's affidavit showed that her verdicts may have been motivated, at least in part, by her desire to be home with her child, verdicts may not be impeached merely by showing that not all of the jurors reaching a unanimous verdict were motivated by exactly the same considerations. Nothing coming from a juror, either directly or indirectly, in the way of a narrative with respect to the manner in which a verdict was arrived at, will be heard to impeach the same. Accordingly, because there was no merit to appellant's contention that the verdicts were coerced, the trial court did not err by denying her motion for new trial on this asserted ground.

Expert Witnesses; Verdict Impeachment

Muthu v. State, A16A0293 (4/26/16)

Appellant was convicted of two counts of DUI and failure to maintain lane. He first argued that the trial court erred when it restricted his expert witness from testifying that acid reflux disease could render a breath test result unreliable, and thus, deprived him from introducing testimony to support his

primary defense. The evidence showed that the court qualified the expert in standardized field sobriety, forensic breath alcohol testing, and the Intoxilyzer 5000. The expert was asked: “If a person had [gastroesophageal reflux disease, known as] GERD and the lower sphincter allowed stomach contents into the esophagus, can that cause an affect [sic] on the breath test?” The State objected, and the trial court ruled, “Well, but this witness is not being qualified to testify to medical matters. He is qualified to testify as to the breath testing machines . . . this witness can’t testify to medical issues related to a particular person.”

The Court found no error. The Court noted that in explaining its decision to sustain the objection, the trial court stated: “It’s not in evidence that he [appellant] was experiencing GERD at the time that this test was taken . . . [s]o . . . asking him to answer that question is asking him to assume facts that are not in evidence.” Thus, the Court found, the trial court did not prevent appellant from presenting his defense. Rather, the court prohibited him from introducing testimony about matters outside the scope of the witness’ expertise, or about facts not in evidence. For an expert to give his opinion based upon a certain state of facts, those facts must be supported by evidence admitted into the record.

Appellant also argued that the trial court erred when it refused to consider the post-conviction affidavit of a juror stating that the verdict was not unanimous. At the hearing on his motion for new trial, appellant sought to introduce the testimony of a person who had served as a juror during his trial. The trial court determined that the juror’s testimony and affidavit would amount to an impeachment of the verdict by a juror. Accordingly, the trial court did not permit the juror to testify, nor did it consider her affidavit.

The Court found that neither appellant nor the juror’s affidavit alleged that any extraneous prejudicial information was improperly brought to the juror’s attention, that any outside influence was improperly brought to bear upon the juror, or that there was an error in entering the verdict on the verdict form. Instead the juror’s affidavit addressed the deliberations amongst the jurors. This evidence is explicitly excluded by the plain language of O.C.G.A. § 24-6-606(b). Therefore, the trial court did not err when it refused to consider the juror’s affidavit.

Attempt to Elude; Party to a Crime

Sapp v. State, A16A0682 (4/27/16)

Appellant was convicted of attempting to elude a police officer and obstruction. He challenged the sufficiency of the evidence on the attempting to elude conviction under O.C.G.A. § 40-6-395(a). The evidence showed that appellant was traveling as a passenger in a van that was seen leaving the scene of a knife fight. An officer activated its blue lights and siren, but the van “attempted to flee” from him. At one point, the officer saw appellant exit the vehicle and continue fleeing on foot. The police officer decided to follow appellant instead of the van and “[g]ave several loud verbal commands to stop and get on the ground to [appellant] and he refused to do so.” Appellant ran into a backyard gathering and when the police officer arrived, appellant began to run towards him with his hands clenched into a fist. The police officer then used his taser on appellant and arrested him.

Appellant, citing *Carter v. State*, 249 Ga. App. 354, 357 (5) (2001), argued that as a passenger in the vehicle, he could not be convicted of attempting to elude. The Court disagreed. A passenger can be convicted as a party to the crime of fleeing or attempting to elude a police officer, if he flees the scene on foot after the police have stopped the fleeing vehicle. And here, the Court noted, the police officer testified that he saw appellant flee once he exited the pursued vehicle, and appellant testified that he ran around the corner because he believed “the patrolman would stay with the injured party, inside the van, and then I would get— and get me away on home to my girlfriend, where I was supposed to be.” He also testified he was “intending to flee.” The Court held that this evidence was sufficient to show that appellant was a party to the crime of fleeing or attempting to elude the police officer. In so holding, the Court distinguished *Carter*, finding that in *Carter*, there was no evidence that the defendant passenger fled from the vehicle being pursued by the police.

Directed Verdicts; CODIS

Watson v. State, A16A0228 (5/2/16)

Appellant was convicted of robbery as a lesser included offense of armed robbery and theft by receiving stolen property. He contended that the trial court erred in denying

his motion for a directed verdict made after the State’s case-in-chief. The evidence showed that three men participated in a smash-and-grab at a jewelry kiosk at a mall. In the process, one of the perpetrators left blood on the display case and from broken glass inside the display case. CODIS issued a “hit” indicating that appellant was a match for the DNA profile obtained from the blood swabs. The trial court initially held that the DNA test results were inadmissible because appellant did not receive a timely copy of the results prior to trial. However, after appellant called a co-defendant who testified that appellant was not one of the three perpetrators, the trial court allowed the State to introduce the CODIS report regarding the DNA profile that matched appellant and was recovered from the display case.

Appellant argued that the trial court erred in denying his motion for a directed verdict and that the Court’s review of this issue should be limited to the evidence introduced during the State’s case-in-chief. Specifically, he contended that the Court should overrule *Bethay v. State*, 235 Ga. 371 (1975) holding that a court reviewing the denial of a motion for a directed verdict is not limited to considering only the evidence presented in the case-in-chief, but may consider all the evidence in the case. But, the Court stated, it has no authority to overrule or modify decisions of the Supreme Court of Georgia. Moreover, appellant made no argument that the trial court erred in allowing the State to present the rebuttal evidence. Therefore, appellant failed to provide a legal basis precluding the Court’s consideration of the DNA evidence. And, having reviewed all the evidence, the Court held that the trial court did not err in denying appellant’s motion for a directed verdict.

Rape Shield Statute; Cross Examination

Morgan v. State, A16A0351 (5/2/16)

Appellant was convicted of one count of child molestation. He contended that the trial court erred by excluding the victim’s alleged false accusation of molestation that she made against her stepfather. The Court disagreed.

O.C.G.A. § 24-4-412 provides that evidence relating to past sexual behavior of the victim shall not be admissible, either as direct evidence or on cross-examination. But, such

evidence may be admissible to show the victim's lack of credibility where the victim has made prior false allegations of child molestation. The reason for this exception is that the evidence does not involve the victim's past sexual conduct, but rather, the victim's propensity to make false statements regarding sexual misconduct. Before such evidence is admitted, however, the trial court must make a threshold determination outside the presence of the jury that a reasonable probability of falsity exists.

Here, the Court noted, the trial court made a determination that the facts the victim had alleged were indeed true, as they were independently verified and thus, excluded the evidence. Appellant's argument was essentially that the victim lied because she attached the term "molestation" to the facts she alleged. However, the Court found, there was no evidence that she actually applied the label of "molestation" to the allegations. Rather, the Court found, appellant's trial counsel attempted to put this characterization into the investigator's mouth. Moreover, the Court stated, even if the victim had used the term "molestation", a victim's imprecise use of terminology does not render truthful allegations false.

Interference with Government Property

Harper v. State, A16A0471 (5/5/16)

Appellant was convicted of interference with government property, terroristic threats and other crimes, all arising out of a series of incidents at a county detention center. He contended that the evidence was insufficient to support his interference conviction. The Court disagreed.

The evidence showed that after appellant had been moved to an isolation cell because of disciplinary problems, he covered a ceiling-mounted security camera and the inside of his cell door, including a viewing window, with feces. The security camera and the jail cell were the property of the Sheriff's Office. With the lens obscured by feces, the camera was unable to record video. When officers entered the cell, appellant threw a cup of feces at one of the officers. After the incident, the befouled equipment and surfaces were cleaned by an inmate worker.

O.C.G.A. § 16-7-24(a) provides that "[a] person commits the offense of interference with government property when he destroys,

damages, or defaces government property[.]" Appellant contended that the evidence was insufficient to show that his conduct rose to the level of defacing government property, as charged in the indictment, in that, although there was evidence that he "dirtied" the property at issue, the property was then "simply cleaned." The Court noted that although "deface" is not statutorily defined, the plain and ordinary meaning of "deface" in both legal and lay parlance is to mar the face or impair the surface appearance of the object. Just as, when a thing is damaged, the damage may be repairable or irreparable, the Court concluded that the appearance of a thing may be impaired permanently or temporarily. The fact that the camera and cell surfaces could be cleaned and restored to their previous appearance did not preclude the jury from finding that appellant defaced them by wiping feces on them. Accordingly, the Court held, the evidence was sufficient for the jury to find the elements of interference with government property.

Jury Trials; Waiver

Brown v. State, A16A0390 (5/3/16)

Appellant was convicted following a bench trial of theft by taking. He contended that his waiver of jury trial was not knowingly and intelligently made and that the trial court erred by refusing to allow him to revoke his waiver. The Court disagreed.

The Court found that the trial court engaged in an extensive colloquy with appellant prior to the execution of his waiver and informed appellant of his rights and the effect of the waiver of those rights. Contrary to appellant's statement that his then counsel had assured him the State was seeking only restitution, the trial court informed appellant of the possible punishments he was facing, and appellant acknowledged his understanding of those possible punishments. Appellant stated clearly that he understood that he was waiving the right to have his case heard by a jury and that a judge would try his case, and that he also understood that there was a possibility he could be sentenced to a maximum of 12 years if he were convicted, after which he reaffirmed he wanted to waive a jury trial. The trial court also asked appellant if he had been promised anything, threatened or coerced into waiving his rights, and appellant responded "No, sir." Appellant signed a consent waiver form

following the hearing, in which he reaffirmed his knowledge of the rights he was waiving and that the judge would impose sentence on him if he was found guilty. Accordingly, the Court held, the record demonstrated that appellant voluntarily, knowingly, and intelligently waived his right to a jury trial.

The Court also found that there was no merit to appellant's contention that the trial court erred by denying his request to revoke his waiver on the morning of the scheduled bench trial. A defendant may revoke a prior waiver of trial by jury as long as the defendant exercises his right to revoke the waiver in a timely manner and in such manner as to not substantially to delay or impede the cause of justice. Here, appellant's case had been pending for four years by the time of trial, and appellant had waited until the morning of trial when witnesses were present to seek to revoke his waiver. Additionally, the record reflected that appellant's bond had been revoked and bench warrants issued on four occasions between the time appellant was indicted and his case was called for trial. Although it appeared that on two of those occasions the bench warrants were dismissed when valid reasons for appellant's failure to appear were revealed, the other two were unexplained. In view of appellant's repeated failures to appear in court, the timing of the requested revocation, and the fact that his purported reasons for seeking to revoke his waiver, including that he had not understood that a judge, rather than a jury would be deciding his case, were at odds with his acknowledgments at the waiver hearing and on the waiver consent form, the trial court was authorized to deny his request to revoke his waiver and proceed with a bench trial.

Merger; Sentencing

Tinson v. State, A16A0486 (5/12/16)

Appellant was convicted of aggravated child molestation, rape, incest, and two counts of sexual battery. He argued that the trial court erred by not merging his rape and incest convictions for sentencing purposes because those convictions were predicated on the same act of penetration. The Court disagreed.

The Court stated that in considering whether crimes merge for sentencing purposes, it applies the "required evidence" test, which considers whether each statute requires proof of an additional fact that

the other does not. Utilizing this test, the Court found that appellant's rape and incest convictions did not merge because each crime requires proof of an additional fact that the other does not. To establish the crime of rape, the State had to prove that appellant lacked consent, which is not an element of incest. To establish the crime of incest, the State had to prove that the victim was of a certain relation to appellant, which is not an element of rape. In so holding, the Court noted that the cases cited by appellant were distinguishable in that they find the merger of different crimes, aggravated child molestation and rape.

DUI; Voluntary Consent

State v. Flores-Gallegos, A16A0339 (5/11/16)

The State appealed from the trial court's order suppressing Mario Flores-Gallegos' intoxilyzer test results. The evidence, briefly stated, showed that Flores-Gallegos caused a two-car collision, the investigating police officer suspected Flores-Gallegos of DUI. The officer spoke with Flores-Gallegos in English, and Flores-Gallegos agreed to perform field sobriety tests. The officer then arrested him for DUI and read him his implied consent warning. When the officer asked Flores-Gallegos for a breath test pursuant to the warning, Flores-Gallegos responded, "No English." The officer transported Flores-Gallegos to the police precinct where he again read him the implied consent warning, after which a second officer "presented the test to him for - - if he'd like to take it." Flores-Gallegos nodded and gave two breath samples while still handcuffed. The trial court found that under the totality of the circumstances, including the fact that Flores-Gallegos stated he did not understand English, *Williams v. State*, 296 Ga. 817 (2015), required a finding "that the defendant did not give *actual, knowing and voluntary* consent to the administration for the State's breath test." (Emphasis supplied).

The Court found that "knowing consent" is not required under our law. The State must show under *Williams* only that the accused acted "freely and voluntarily" in giving "actual consent." While the trial court considered the totality of the circumstances in concluding that Flores-Gallegos acquiesced to the breath test, as *Williams* instructs, it did so by employing an improper standard. Therefore,

the Court vacated the trial court's judgment and remanded the case for the trial court to consider Flores-Gallegos' motion to suppress under the proper standard.

Hijacking an Automobile

Whaley v. State, A16A0569 (5/4/16)

Appellant was convicted of hijacking a motor vehicle and other offenses. He contended that the evidence was insufficient to support his hijacking conviction. The evidence, briefly stated, showed that the victim drove his vehicle to a school to meet appellant and his co-defendant, who were friends of the victim's passenger. The victim parked his car in the school lot and then walked behind the school where appellant and his co-defendant assaulted him, tied him up, took his car keys and drove his car away.

Appellant contended that the evidence was insufficient because the State failed to prove that the victim's car was taken from the person or presence of the victim, given that appellant took the car keys from the victim while behind the elementary school, but then fled and retrieved the car from the school parking lot. O.C.G.A. § 16-5-44.1(b) provides that "A person commits the offense of hijacking a motor vehicle when such person obtains a motor vehicle *from the person or presence of another* by force and violence or intimidation or attempts or conspires to do so." (Emphasis supplied.) The Court noted that the term "immediate presence" used in the armed robbery statute has been held to extend "fairly far," and robbery convictions have been upheld even out of the physical presence of the victim. Further, the concept of immediate presence is broadly construed if the object taken was under the victim's control or responsibility and the victim is not too distant. And here, the statute only requires presence, not immediate presence. Accordingly, because the evidence showed appellant took the car keys directly from the person of the victim upon threat of violent injury and then retrieved the victim's car that was parked in a lot on the side of the school where the attack had just occurred, the jury was authorized to find that appellant took the car from the victim's "presence" for purposes of the offense of hijacking a motor vehicle.