

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 8, 2017

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Todd Ashley
Deputy Director

Robert W. Smith, Jr.
General Counsel

Lalaine Briones
State Prosecution Support Director

Sheila Ross
Director of Capital Litigation

Sharla Jackson
Domestic Violence, Sexual Assault,
and Crimes Against Children
Resource Prosecutor

Gilbert A. Crosby
Sr. Traffic Safety Resource Prosecutor

Jason Samuels
Sr. Traffic Safety Resource Prosecutor

William Johnson
Adult Abuse, Neglect, and
Exploitation Prosecutor

Gary Bergman
State Prosecutor

Kenneth Hutcherson
State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

- **Jury Charges; Burden of Proof**
- **Right to be Present; Critical Stages of Proceedings**
- **Prosecutorial Misconduct; GCIC Records of Jurors**
- **Jury Pools; Jury Tampering**
- **Right to Counsel; Appeals**
- **Statements; Miranda**
- **District Attorneys; Conflict of Interest**

Jury Charges; Burden of Proof

Daniel v. State, S17G0107 (8/14/17)

Appellant was convicted of burglary. The evidence showed that appellant was found on a screened porch attempting to get inside the home through a door that led into a child's bedroom. Appellant had breached a fence surrounding the property and had cut or damaged a portion of the screen on the porch door in an attempt to gain access to the home. A door leading to the interior of the home was not damaged, although the door's hinge pins had been raised as a result of the break-in attempt. When ordered to show his hands, appellant exited the porch, walked towards the officer, and responded, "You got me." Although there were valuable items on the porch and inside the home, the residents determined that nothing was missing or moved. Situated in a neighborhood of occupied homes, the house was not boarded up and did not appear to be abandoned.

The trial court refused to give appellant's requested charge on the lesser included offense of criminal trespass. The Court of Appeals

affirmed. *Daniel v. State*, 338 Ga. App. 389 (2016). The Court of Appeals noted that appellant "did not testify at trial or present any other evidence negating any element of the crime of burglary." The Court granted certiorari to address whether, in a prosecution for burglary, a defendant must present affirmative evidence to counter a permissible inference of specific intent in order to receive a jury instruction on a lesser-included offense of criminal trespass.

The Court stated that where a criminal defendant has pleaded not guilty and thereby disputed every element of the crime, that criminal defendant is under no obligation to prove, or disprove, anything. The law is absolutely clear that a criminal defendant carries no burden of proof or persuasion whatsoever. Consequently, appellant was under no obligation to prove or disprove any element of burglary, the charge for which he was indicted, and any suggestion to the contrary in the decision by the Court of Appeals was incorrect.

Nevertheless, the trial court did not err in refusing to give the requested charge. In the context of criminal trespass, the Court noted that it has interpreted an unlawful purpose to be "a purpose to violate a criminal law." Although appellant posited that seeking shelter or sleeping were possible unlawful purposes that would support his requested instruction, the Court found that the record did not contain any evidence of any of those purposes (even assuming that, without more, sleeping or seeking shelter are unlawful purposes). Thus, the Court found, "[i]f a criminal trespass instruction is required here, it is required in every burglary case, no matter what evidence is (or is not) in the record. That would be contrary to well-established Georgia law." While criminal trespass may be a lesser included offense of bur-

glary, it is not necessarily one. Absent evidence that a defendant made an unauthorized entry for an unlawful purpose other than to commit a theft or felony, a charge on criminal trespass is unwarranted. And, although a defendant is not required to present any evidence, whether to “negate” an element of a charge or otherwise, this does not mean that the jury must be instructed on any charge the defendant requests. Here, there was no evidence to support the requested criminal trespass charge because appellant did not cite any evidence that he was on the porch for an unlawful purpose other than theft. Therefore, the Court concluded, the trial court did not err in refusing to instruct the jury on criminal trespass.

Right to be Present; Critical Stages of Proceedings

Brewner v. State, S17A1103 (8/14/17)

Appellant was convicted of murder and other offenses. He contended that he was denied his constitutional right to be present when the trial court ruled on the State’s motion to admit evidence pursuant to OCGA § 24-4-404 (b) and when the court, in his absence, excused a prospective juror due to a family emergency. The Court disagreed.

First, the Court noted, it could be argued that appellant was in fact present when the trial court “announced” its decision, as he was present at all times during trial when the evidence in question was being introduced. But even if this were not so, appellant’s claim failed for the simple reason that a trial court’s announcement of a legal ruling on a motion is not a “critical stage” of the proceedings at which the right to be present attaches. The Court noted that appellant cited no authority, and it is aware of none, holding that a defendant is constitutionally entitled to be present at the time a court issues a ruling. Were it otherwise, trial courts would be compelled to announce all rulings in open court in the defendant’s presence, meaning that they would be forbidden from ever issuing rulings by written order. That is plainly not the case. Accordingly, there was no denial of any right to be present in connection with the admission of the 404 (b) evidence.

Second, appellant had the right to be present during the trial court’s exchange with the prospective juror. Even so, the right to be present belongs to the defendant, and he is

free to relinquish it if he so chooses. Here, the record reflected that during jury selection on the first day of trial, the trial court dismissed a prospective juror during the lunch break after receiving a note from the juror requesting excusal due to a family emergency. Immediately following the lunch break, the trial court noted in open court, where appellant himself as well as the prosecutor and appellant’s counsel were present, that it had made a “command decision” to excuse the juror because of the emergency. The court asked both defense counsel and the prosecutor whether there was “anything we need to talk about with regard to [the juror],” and both responded in the negative. Appellant did not express any disagreement with his counsel’s assent to the trial court’s decision, either contemporaneously with the trial court’s statement or at any other time during the trial proceedings. Accordingly, the Court held, appellant waived any right to be present and cannot now assert error in this regard.

Prosecutorial Misconduct; GCIC Records of Jurors

Coleman v. State, S17A0818, S17A0819 (8/14/17)

Appellants Coleman and Mallory were convicted of malice murder. Coleman contended that the trial court erred when it denied his motion for a mistrial after the prosecution elicited purportedly inadmissible hearsay testimony from a jailhouse informant. The record reflected that the prosecutor asked the informant whether he had encountered any trouble in jail as a result of his agreement to testify, upon which the informant responded: “I’ve had people say that [Coleman] wanted them to come beat me up because I got him some time.” The informant also stated that he was involved in a fight where someone said “this is for [Coleman].”

Assuming the testimony was in fact inadmissible, the Court found no err. Whether to declare a mistrial is a question committed to the discretion of the trial judge, and the denial of a mistrial is reversible error only if it appears that a mistrial was essential to preserve the defendant’s right to a fair trial. Here, a mistrial was not necessary to preserve Coleman’s right to a fair trial because almost immediately after the informant uttered the offending statements, the trial court conferred with

the parties and then gave a lengthy curative instruction to the jury, telling the jurors that the informant’s testimony was inadmissible, that it did not prove that Coleman had done anything, and that they should “disregard that evidence in its entirety, not hold it against Mr. Coleman in any way, [and] not weigh it or consider it in any manner in your deliberations in this case.” And, the Court noted, it ordinarily presumes that a jury follows such instructions. Furthermore, the Court noted, the trial court also rebuked the prosecution in front of the jury, stating: “I’m rebuking the state in your presence, and telling them they are not to go into this. It was inappropriate for the state to ask a question that resulted in that answer being given.” Thus, the Court concluded, in this light, any harm stemming from the informant’s purportedly inadmissible statements was substantially mitigated, and the trial court did not abuse its discretion in refusing to grant a mistrial.

Mallory contended that he was entitled as a matter of due process to the GCIC records of prospective jurors. But the Court found, Mallory never requested such records under OCGA § 35-3-34, which provides a means by which private persons (including defense lawyers) may request and (in some circumstances) obtain GCIC records. Mallory also never challenged the constitutionality of OCGA § 35-3-34 in the trial court, and thus, he failed to preserve any question about its constitutionality for the Court’s review. Consequently, the Court found, because OCGA § 35-3-34 provides a means by which Mallory might have sought to obtain GCIC records — but he failed to request records under the statute or to challenge the statute as constitutionally inadequate — his claim that his lack of access to such records violated due process was not viable.

Moreover, the Court noted, Mallory raised his lack of access to GCIC records in the context of his *Batson* challenge, after the prosecution used the GCIC records of one prospective juror to support its reasons for striking that juror. Yet, the Court noted, Mallory did not explain how having the GCIC records of prospective jurors would have helped him in jury selection generally, aside from the conclusory assertion that a lack of those records “impeded [him] in the exercise of his strikes,” nor did he explain how having such records would have enabled him to prevail on his *Batson* challenge. Although Mallory argued

that GCIC records often contain inaccuracies, he did not explain how any such inaccuracies undermined his *Batson* challenge, given that *Batson* is only about racial discrimination — it does not prevent the prosecution from relying on inaccurate (but race-neutral) information in striking jurors.

In any event, the Court stated, a defendant is not entitled to discover directly the information obtained by the State in preparing for its jury selection. And it is well-settled that there is no general constitutional right to discovery in a criminal case. Thus, no due process violation occurred merely because the State had access to certain information during jury selection that the defense did not.

Jury Pools; Jury Tampering

Williams v. State, S17A0783 (8/14/17)

Appellant was convicted of malice murder and other related offenses. He argued that the trial court erred in denying his request to “shuffle” the jury pool — i.e., call them in an order different from that set by the jury clerk — claiming that it would have ensured a better representation of the community and promoted the jury’s impartiality. The Court noted that although appellant cited to cases in which it concluded that a trial court did not abuse its discretion in manipulating the jury pool, he pointed to no law *requiring* such action. Therefore, the Court rejected his claim.

Appellant also argued that the trial court erred in denying his motion for a mistrial when the State questioned him about allegations of jury tampering by a third party. The record showed that during a break in the trial, a sergeant in charge of courthouse security informed the court that Lawson, the boyfriend of juror Harvey, had approached the sergeant and reported that someone later identified as Tate had offered to pay Lawson to convince Harvey to acquit appellant. With the consent of appellant and the State, the trial court dismissed Harvey from the jury, citing an earlier incident in which Harvey was in the courtroom rather than the jury room when the parties arrived for court proceedings, and left open the possibility of exploring the jury tampering issue at a later time.

During its cross-examination of appellant, the State asked him whether he was aware that his friend Tate attempted to bribe a juror. Defense counsel objected and moved

for a mistrial. The State argued it had a good-faith basis for asking the question based on Lawson’s statements to court security, and denied that it was making an allegation that appellant was associated with the bribery. The court denied appellant’s motion for a mistrial, told the prosecutor to drop further questioning on the matter, and instructed the jury that the State’s question was not evidence and should be ignored. The court also explained to the jury that it had previously excused Harvey from the jury because she was in the courtroom when she should have been in the jury room.

Appellant argued that the court’s curative instruction was insufficient to eliminate the prejudice of the State’s improper questioning. The Court disagreed. The State’s question was limited to one sentence and was promptly objected to by counsel. The court instructed the jury to ignore the question, that the State’s question was not evidence, and that juror Harvey had been dismissed for matters unrelated to jury tampering. Given the strength of the case against appellant, and the fact that the jury acquitted appellant on three charges, the Court found it highly improbable that the State’s single question contributed to the jury’s verdict.

Right to Counsel; Appeals

Brown v. State, S17A0826 (8/14/17)

Appellant was convicted of malice murder. She contended that she had been denied her right to the appointment of appellate counsel. Specifically, she argued that her last attorney worked for the public defender’s office but abandoned the case without notification, and that after her appeal was docketed, she submitted to that office an application for an attorney which had not yet been acted on. However, the Court found, the record showed that appellant retained trial counsel and paid him out of her personal funds, and both attorneys who represented her on her motion for new trial were from the same private law firm. The trial court also explicitly informed appellant that she had the right to counsel for her motion for new trial and for her appeal and that if she could not afford an attorney, she must notify the court so that it could provide her with sufficient counsel. But the record did not contain any request for leave to proceed as a pauper, any attempt to establish appellant’s indigency, or any request for the appointment of counsel.

The Court noted that it is true that an indigent has the right to appointed counsel to assist him or her on direct appeal and an individual desiring an appeal need not, once a responsible state authority knows of the desire to appeal and knows of the status of indigency, specifically request appointment of appellate counsel. Nevertheless, where, as here, a defendant is represented by retained counsel at trial and on motion for new trial, it must be made known to the trial court or some responsible state official that the defendant is indigent and cannot afford retained counsel to pursue an appeal. If the trial court has no reason to believe that the defendant is indigent and cannot afford the services of retained counsel for the purpose of appeal, it is under no duty to inquire as to the defendant’s indigency and may presume that his retained counsel will protect his appellate rights.

Moreover, the Court found, the trial court specifically informed appellant of her right to appointed counsel in the event of indigence for her appeal as well as her motion for new trial. Thus, the Court held, in these circumstances, and in the absence of any proof of indigency or request in the trial court for appointed counsel, the trial court had no reason to make a determination as to whether appellant was indigent and entitled to appointed counsel on appeal. Therefore, the Court concluded, appellant was not deprived of her right to appellate counsel and a remand for appointment of such counsel was neither necessary nor appropriate.

Statements; Miranda

Johnson v. State, S17A0768 (8/14/17)

Appellant was convicted of malice murder and other related offenses in connection with the death of a two-year-old. The evidence showed that after appellant was in custody for approximately two weeks, he asked to speak to Investigator Buchmeyer. She arrived with Investigator Scott. Appellant asked Buchmeyer for his Social Security card and told her that she had “ruined his social life.” When Buchmeyer asked how his social life had been ruined, appellant responded that he was swinging the victim around when she accidentally hit her head hard on an open dresser drawer. Appellant said he had not mentioned the incident with the dresser before because he did not think it was important. Buchmeyer testified that no threats were made against

appellant. Appellant, on the other hand, testified that his statement about swinging the victim around was a “complete lie,” and that he told the lie because he felt threatened and intimidated by Investigator Scott. According to appellant, Investigator Scott had a reputation “for beating people.” Appellant did not testify, however, that Investigator Scott actually threatened him.

Appellant contended that the trial court erred by admitting his statement that he was swinging the victim around when she hit her head on the dresser. Specifically, he argued that during the time he made that statement he was in custody, but that he had not been re-advised regarding his *Miranda* rights. Additionally, he contended that Investigator Scott threatened him with violence and that his statement was therefore coerced. The Court disagreed.

The Court found that appellant’s *Miranda* claim failed for several reasons. First, appellant himself initiated the discussion by requesting to meet with Investigator Buchmeyer. And appellant’s statement that he was swinging the victim when she hit her head was spontaneous, unsolicited, and not prompted by the investigators’ express questioning of him. In fact, the investigators made no reference at all to any information regarding the case; their question regarding how they had ruined appellant’s social life was a direct response to appellant’s unsolicited statement that they had done so. Appellant nevertheless freely offered the statement that he had been swinging the victim around when she hit her head.

As to appellant’s claim that his statement was coerced, the Court found that the record did not support his claims that he was threatened. Even appellant himself testified only that he had *heard* that Investigator Scott had beaten an inmate — not that Scott had actually threatened appellant with violence. Therefore, the Court held, the trial court was plainly authorized to conclude that appellant’s *Miranda* rights were not violated and that the statements he made to Investigator Buchmeyer were admissible.

District Attorneys; Conflict of Interest

Battle v. State, S17A0714, S17A1301 (8/14/17)

Appellants Battle and Carter were convicted of malice murder, felony murder, and other related counts. Battle contended that

the district attorney should have disqualified himself and his office from prosecuting the case because the murder victim was the son of a longtime employee of the district attorney’s office. Battle argued that because of the employment, the district attorney had a personal interest in the case that created the appearance of impropriety and a conflict of interest.

The Court found that the issue was untimely raised because Battle did not raise it pre-trial or at trial, but first made the claim in his amended motion for new trial. However, the Court stated, premitting the timeliness of the contention, it fails on the merits. The evidence at the hearing on Battle’s amended motion for new trial was that the victim’s mother worked as support staff on a trial team on the fourth floor of the district attorney’s office. The lead prosecutor on the case testified that he did not have a personal relationship with the mother prior to the actual prosecution; they had “no real occasion to cross paths in the office”; his unit tried about 65 murders each year; the case was a major one and major cases normally did not go down to the trial division on the fourth floor but were handled by attorneys on the seventh floor; there were more than 100 lawyers in the office; after the murder, he considered the relationship with the mother to be like that of any parent of a victim on a homicide case that he handled; there was “nothing out of the ordinary” about his communications with the mother; he never spoke with the district attorney in general about any connection with the mother; and he was not directed to do anything differently in handling the case.

The district attorney testified that at the time he read the case file, he was unsure that he “even correlated” that a parent of the victim might have been an employee; he knew the mother only professionally as an employee in the office; he never interacted with her outside of the office; he knew that the employee’s son had died, but when he reviewed a case file, he intentionally excluded certain information, so it might not have been apparent to him that the employee’s son was the victim in the case; he did not recall any particular conversation with the prosecutors about the case; his personal interest in this case was the same as that in every case he had; he would have ensured that the mother had no part in the investigation of the case and he made sure that she had no part in its actual prosecution; he did not direct

the lead prosecutor to do anything differently, and he would not have done so; he went to the victim’s funeral as he had attended the funerals of victims in other homicide cases that he had prosecuted; and it was not unusual for prosecutors from the district attorney’s office to attend the funeral of the victim in a case.

The Court stated that undoubtedly, a conflict of interest or the appearance of impropriety from a close personal relationship with the victim may be grounds for disqualification of a prosecutor. But, here the evidence showed that neither the district attorney nor the assistant district attorney directly prosecuting the case had any conflict of interest or personal relationship with the victim or his mother or any personal interest in obtaining the sought convictions.