

## THIS WEEK:

- **Good Character Evidence; Sequencing of Evidence**
- **Prosecutorial Misconduct; Mistrials**
- **Jury Instructions; Lesser Included Offenses**
- **Jury Questions; Jury Charges**
- **Jury Charges; Judicial Commentary**

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### Good Character Evidence; Sequencing of Evidence

*Mondragon v. State, S18A1040 (1/22/19)*

Appellant was convicted of the murder of Perez and the aggravated assault of Soto. The evidence, briefly stated, showed that the two victims were at a restaurant having a few beers when appellant and a co-worker came in. Soto observed that appellant appeared to be angry. When Soto approached appellant and offered to shake his hand, appellant refused and said, "I'm not one of your friends." Later in the evening, as Perez and Soto exited the restaurant, appellant pulled a .38 caliber revolver from his waistband and shot at them from the passenger side of his co-worker's van. At trial, appellant claimed that he shot Perez and Soto in self-defense.

Appellant contended that the trial court erred by overruling his objection and allowing Soto to testify that he had never seen Perez get into a fight or argument in the four or five years that he had known him. Later, Bartolon (who knew Perez and was also present at the restaurant on the night of the shooting) testified without objection that Perez "was very friendly and very respectful" and that he had never seen Perez get into a fight or have a weapon.

The Court stated that character evidence is generally inadmissible to prove "action in conformity therewith on a particular occasion," but evidence of the peaceful character of an alleged victim may be offered by the State "in a homicide case to rebut evidence that the alleged victim was the first aggressor." OCGA § 24-4-404 (a) (2). But, here, the Court noted, at the time that the State introduced the evidence at issue, appellant had not yet testified that Perez and Soto were the first aggressors and that he shot at them in self-defense. It was therefore error for a trial court to admit evidence of a victim's good character in anticipation of the defendant introducing contrary evidence at trial; the evidence of good character is admissible only *after* the defendant presents his evidence.

Nevertheless, the Court found the nonconstitutional error to be harmless. Appellant's sole defense was that Soto and Perez were the first aggressors and that he was justified in shooting at them, and he did not suggest that he would have asserted any other defense had the State not prematurely introduced evidence of Perez's character. And because appellant always intended to (and eventually did) introduce evidence that Perez and Soto were the first aggressors, any error in admitting evidence of Perez's good character was solely an error of sequencing.

Furthermore, appellant did not even try to explain how a sequencing error could have affected the outcome of his trial. It was undisputed that Soto and Perez were unarmed on the night in question, even appellant's co-worker testified that appellant shot

Perez and Soto without justification, and the lack of stippling on Perez's clothing indicated that he was shot from at least several feet away (which was inconsistent with appellant's claim that Perez and Soto were grabbing and pushing him when he shot them). Thus, the Court concluded, it was highly probable that any sequencing error in admitting Soto's testimony did not contribute to the verdict (and that the admission of Bartolon's similar testimony was not plain error because appellant did not show that it affected his substantial rights).

## **Prosecutorial Misconduct; Mistrials**

*Jordan v. State, S18A1324 (1/22/19)*

Appellant was convicted of murder and other crimes. The evidence, briefly stated, showed that appellant, Linsey, and two others broke into the home of an elderly man, shot him to death and then robbed his home. Appellant was the triggerman.

Appellant argued that the trial court erred when it denied his motion for a mistrial based on the prosecuting attorney's accusation in the presence of the jury that appellant's lawyer was "deceiving" the jury. According to the transcript, the prosecuting attorney made this comment while defense counsel was cross-examining Lindsey and trying to show that it was Lindsey, not Jordan, who actually fired at the victim. In responding to defense counsel's questions, Lindsey acknowledged that he had pleaded guilty to possession of a firearm during commission of a felony for participating in the robbery, but he denied ever touching the gun. Defense counsel then accused Linsey of lying to the court. The prosecutor objected, stating that defense counsel knows the law regarding party to a crime. Defense counsel then objected because the prosecutor was making a speaking objection, at which point, the prosecutor stated, "Well, she's . . . She's deceiving—the jury right now." Appellant then requested a mistrial, but the court denied the motion and gave curative instructions.

Appellant argued that the prosecuting attorney's "deceiving" remark impugned his lawyer's character and credibility and that the court's curative instructions were insufficient to erase the resulting prejudice. The Court disagreed. The Court stated that any argument that unnecessarily impugns the integrity of opposing counsel, even if obliquely, is distasteful and it does not condone a lawyer accusing another lawyer of deceit in the presence of the jury. Nonetheless, the comment at issue here did not strike the Court as especially egregious, considering the context in which it was made. It appears from the transcript that, in trying to convince the jury that Lindsey was the triggerman, defense counsel was pushing an unsound legal theory that Lindsey's pleading guilty to possessing a firearm was inconsistent with his denial of touching the gun. However, under well-established Georgia law, a defendant can be guilty of a crime involving firearm possession as a party to a crime if it is shown that he is the accomplice of the person who was in physical possession of the pistol.

Furthermore, the decision to grant a motion for mistrial lies within the trial court's sound discretion, and the trial court's exercise of that discretion will not be disturbed on appeal unless a mistrial is essential to preserve the defendant's right to a fair trial. And here, the Court found, a mistrial was not necessary to preserve appellant's right to a fair trial. The transcript indicated that the jury did not take the "deceiving" remark seriously. The trial court observed that the jurors "realized that this was a heated exchange because every one of them was smiling." Moreover, the trial court twice instructed the jury to disregard the "heated exchange" in which the "deceiving" comment was made. Finally, the evidence against appellant was very strong. Two witnesses testified to appellant's commission of the crime, and appellant himself, in his statement to the police, confessed to participating in the robbery. Consequently, the Court concluded, the trial court did not abuse its discretion in ruling that the prosecutor's comment did not warrant a mistrial.

## Jury Instructions; Lesser Included Offenses

*Solomon v. State, S18A1195 (1/22/19)*

Appellant was convicted of murder, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon in connection with the fatal shooting of Pinkney. The evidence, briefly stated, showed Pinkney argued with appellant's girlfriend earlier in the day. Appellant and his brother then traveled, with loaded handguns, to a location at which they knew Pinkney was likely to be found. Appellant enticed Pinkney to fight him, which Pinkney reluctantly agreed to, but only if appellant was not armed. Appellant gave his weapon to his brother. As the two began to fight, appellant's brother pulled his weapon and pointed it at Pinkney. When Pinkney got the upper hand and knocked appellant to the floor, appellant's brother shot and killed Pinkney.

Appellant contended that the trial court erred when it refused to charge the jury on involuntary manslaughter predicated on simple assault, and involuntary manslaughter predicated on simple battery, as lesser offenses included in the murder of which he was convicted. Specifically, he argued that his fist fight with Pinkney provided the basis for charging the jury on these lesser offenses. The Court disagreed.

First, the Court noted, the indictment explicitly charged appellant with murder based upon the shooting of Pinkney, not a beating of Pinkney. Thus, the theories of involuntary manslaughter that appellant urged were not, in fact, included within the scope of the murder with which he was charged and of which he was convicted. Moreover, the evidence was undisputed that Pinkney consented to the fist fight, and it was, therefore, neither a simple assault nor a simple battery. Accordingly, there was no evidentiary basis for the lesser offenses on which appellant sought to have the jury charged.

## Jury Questions; Jury Charges

*Barnes v. State, S18A1629 (1/22/19)*

Appellant was convicted of malice murder. During deliberations, the jury submitted the following question to the trial court: "What is malice murder?" In response, the trial court recharged the jury on malice murder, after which appellant objected that less than the entire jury charge had been given. Appellant argued that the trial court should have done more than simply recharge the jury on malice murder, such as offering to repeat the instruction and asking the jury if its question had been sufficiently answered. The Court disagreed.

The Court stated that a trial court has a duty to recharge the jury on issues for which the jury requests a recharge. As a general matter, however, where no such request has been made, the need, breadth, and formation of additional jury instructions are left to the sound discretion of the trial court. Here, the Court found, nothing indicated that the jury was confused after the recharge or that the recharge left the jury with an erroneous impression of the law, and it was within the court's discretion whether to recharge the jury in full or only upon the point or points requested by the jury. In fact, the Court stated, it has never held that the court must engage in a question and answer session with the jury or instruct the jurors individually on how to apply the law to the facts. Consequently, the Court concluded, the trial court did not abuse its discretion in limiting the recharge to the point requested by the jury.

## Jury Charges; Judicial Commentary

*Parker v. State, S18A1589 (1/22/19)*

Appellant was convicted of murder. The evidence showed that appellant and the victim were best friends. Appellant invited the victim, who was much older and not in good health, to come over and drink moonshine. Appellant shot the victim twice, killing him. At trial, appellant claimed self-defense.

Appellant contended that the trial court erred in instructing the jury that "[a] person who fatally wounds another, even in self-defense, is not entitled to hasten the victim's death by continuing to pump bullets into the victim's body." The Court noted that this charge was provided twice to the jury (first as a part of the initial charge and again in a recharge after the jury requested definitions of numerous terms). But because appellant did not object to the charge on either occasion, the Court's review was limited to whether the instruction amounted to plain error.

The Court found that appellant failed to make the necessary showing of harm. First, the Court agreed that the bullet-pumping charge was not well tailored to the evidence because it was undisputed that only two shots were fired at the victim and that appellant did not "pump [multiple] bullets" into the victim's body. But, the Court noted, the State did not suggest otherwise, and appellant was able to argue to the jury in his closing that the bullet-pumping charge "doesn't apply here at all" because there were only "two bullets shot." Second, the bullet-pumping charge on its own did not properly inform the jury that a defendant who is justified in using deadly force is entitled to continue to use deadly force until the reasonably perceived threat of unlawful force is eliminated, and standing alone, that charge was arguably inconsistent with the usual rule of self-defense. But, the Court found, the jury was separately charged that "[j]ustification cannot be based on a deadly assault which has been completely ended, unless the assailant has some further apparent ability to continue it" and that "the doctrine of reasonable fear does not apply . . . where . . . the danger apprehended is not urgent and pressing or apparent at the time of the killing," and these instructions adequately conveyed the idea that justification to use force in defense of self continues for so long as the reasonable perception of the threat persists. Thus, considering the jury charges as a whole, the Court concluded that appellant did not show any likelihood that the jury believed a defendant could be convicted of murder if the fatal shot was fired while he continued to reasonably believe that the force he employed was necessary to defend himself.

Nevertheless, appellant argued, the jury charge on hastening a death violated OCGA § 17-8-57 because it intimated that the trial judge believed that appellant had no reason to fire the second shot at the victim. The Court disagreed. The Court found that the trial court informed the jury that "[w]hat the facts are in this case is a matter solely for you, the jury, to determine," that "[a] person is justified in . . . using force against another person when and to the extent he reasonably believes that such . . . force is necessary to defend himself," and that "[t]he State has the burden of proving beyond a reasonable doubt that the defendant was not justified." Consequently, there was no likelihood that the jury considered the charge on hastening a death as an indication that the trial court believed the State's theory that appellant was not in fear for his safety when he fired the second shot.