

## THIS WEEK:

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### Jury Charges; Accomplice Corroboration

*State v. Johnson, S18A1275 (2/18/19)*

Appellant was convicted of felony murder and related charges. The trial court granted Johnson's motion for a new trial, finding that it plainly erred by not giving a jury charge on accomplice corroboration. The State appealed.

The evidence showed that the victim was riding in a car with Johnson and two other friends, Reaux and Williams. During the car ride, Johnson and the victim began arguing. During the course of the argument, Johnson pulled out a gun and shot the victim multiple times. At trial, Reaux's girlfriend testified that in the early morning hours following the shooting, Reaux knocked on her bedroom window and came inside. Reaux told her that he and Johnson had killed the victim, that Johnson had "turned around and shot [the victim]," and that they had pushed him from the car following the shooting.

The State argued that a new trial should not have been granted because an instruction on accomplice corroboration is not clearly required where a witness other than the accomplice introduces an accomplice's statement implicating a defendant's guilt. Johnson argued that a new trial is warranted because the testimony of his alleged accomplice was the only evidence establishing Johnson's participation in the crime, and, thus, the trial court plainly erred in failing to instruct the jury that accomplice testimony requires corroboration.

The Court noted that since Johnson did not object at trial, its review was limited to plain error. The Court found that Johnson did not affirmatively waive this issue at trial, so the first prong is met. As to the second prong, the trial court's instructions deviated from a legal rule, OCGA § 24-14-8, which "unequivocally" required corroboration of accomplice testimony in felony cases. Instead, the trial court charged the jury that "the testimony of a single witness, if believed, is generally sufficient to establish a fact. Generally, there is no legal requirement of corroboration of a witness provided that

you find the evidence to be sufficient.” By failing to give the required accomplice corroboration charge, the trial court did not provide the jury with proper guidelines for determining Johnson's guilt or innocence and this was clearly erroneous.

As to the third prong, the Court found that because virtually all of the incriminating evidence flowed from Reaux, the outcome of the trial court proceedings was “likely affected” by the trial court's failure to provide an accomplice corroboration charge to the jury, and a proper instruction would likely have resulted in a different verdict. And consequently, as to the fourth prong, the Court held that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

Accordingly, the Court concluded, because the trial court plainly erred when it failed to instruct the jury on the necessity of corroboration regarding Reaux's accomplice testimony, the trial court did not err in granting the motion for new trial.

## **Sufficiency of the Evidence; Indictments**

*Miller v. State, S18A1519 (2/18/19)*

Appellant was convicted of malice murder, two counts of aggravated assault, and two counts of false imprisonment in connection with the shooting death of his daughter, Colleen Miller Grant, and an attack on Grant's grandson, Sawyer Dockery. The evidence, very briefly stated, showed that Grant and Dockery were staying at appellant's home. One day, appellant got drunk and was very belligerent. Sometime after midnight, Grant went to wake up Dockery, was “freaking out,” and told him to get dressed. They then ran into Grant's room. Grant called 911, telling the dispatcher that police needed to hurry and that appellant had a gun. Grant and Dockery braced themselves against the bedroom door to keep it closed. Appellant began banging on the door while Grant and Dockery struggled to keep it closed. Appellant then shot through the door multiple times. One bullet struck Dockery in the leg. Dockery, afraid of being shot again, retreated from the door, pulling Grant into the bedroom closet. Appellant then entered the room asking, “Where are you, b\*\*ch?” As soon as Grant left the closet, appellant shot her. As she lay on the floor, appellant reloaded his gun and shot her five more times. Eventually, appellant left the bedroom and went back downstairs. Dockery was able to sneak out of the house and meet the police outside.

Appellant argued that he could not have falsely imprisoned Dockery and Grant in the bedroom because they both entered the room of their own volition. The Court agreed. A person commits the offense of false imprisonment when, in violation of the personal liberty of another, he arrests, confines, or detains such person without legal authority. At no point did appellant arrest, confine, or detain either Dockery or Grant. Rather, Dockery and Grant chose to flee into Grant's bedroom and barricade themselves there, trying to keep appellant out of the room. Thus, the Court concluded, this evidence was insufficient to sustain the two convictions.

Appellant also argued that the indictment violated his due process rights because it failed to give him notice of the deliberate interval theory between aggravated assault on the two victims and the murder of Grant. The Court disagreed. To satisfy due process, an indictment must put the defendant on notice of the crimes with which he is charged and against which he must defend. Due process requires that the indictment contain all the essential elements of the crime. Here, the indictment tracked the language of the statute, included all essential elements of the offense, and was, therefore, definite enough to advise appellant of what he had to defend against.

Furthermore, the Court stated, to the extent appellant argued that the indictment should have been more specific as to the timing in which the offenses were committed, such an argument amounts to a special demurrer, which must be brought before trial, or it is waived. Consequently, because appellant failed to file a special demurrer, he waived his right to a perfect indictment.

### **Witnesses; Post-hypnotic Testimony**

*Winters v. State, S18A1234 (2/18/19)*

Appellant was convicted of felony murder. The evidence, briefly stated, showed that in 1987, the victim and Leary were sitting in the victim's car in a bar parking lot. Leary had rolled down her window to smoke a cigarette. Appellant approached the vehicle, reached into the car across Leary, said "you owe me," and fired two shots at the victim.

Appellant argued that the trial court erred in admitting Leary's post-hypnotic statement. The Court noted that during the initial investigation, Leary told law enforcement that appellant "reached across the seat" before shooting the victim. After making that statement, but before trial, Leary underwent hypnosis. Later on at trial, Leary testified regarding the same moment: "There was a hand placed across my face." The trial court admitted the statement over appellant's objection.

The Court stated that the rule regarding the admissibility of statements by a witness who has undergone hypnosis is clear: the witness's post-hypnotic testimony cannot differ from her pre-hypnotic statements. In short, the testimony will simply be considered frozen as of the date of the hypnosis. This rule, however, is not about semantics but substance; it does not compel the witness to parrot her previous statements as if reading from a script. This standard instead limits the witness's testimony to the "substance" of her pre-hypnotic statements.

Here, the Court found, the substance of Leary's pre-hypnotic statement and her posthypnotic statement was essentially the same and contained the same principal facts and details. In her pre-hypnotic statement, she said that a man reached across the passenger seat. In her post-hypnotic statement, Leary said that, when she was in the passenger seat, a man put his hand across her face. Thus, the Court concluded, the trial court did not abuse its discretion in admitting Leary's testimony.

### **Closing Arguments; Contradictory Theories**

*Battle v. State, S18A1445 (2/18/19)*

Appellant was convicted of malice murder, aggravated assault, and first-degree cruelty to children in connection with the death of her three-year-old daughter, Jazmine. The record showed that appellant and her boyfriend, Johnson, were indicted for malice murder, felony murder based on aggravated assault, felony murder based on first-degree cruelty to children, aggravated assault, and first-degree cruelty to children. Johnson was tried from July 11 to 14, 2011; appellant testified for the State at his trial. The jury found him not guilty of malice murder, hung on the two felony murder counts, and found him guilty of aggravated assault and cruelty to children. Appellant was then tried from August 22 to 25, 2011; Johnson did not testify at her trial. The jury found appellant guilty on all counts.

Appellant contended that the State impermissibly changed theories when it argued at Johnson's trial that she was trustworthy but argued at her own trial that she was not. The Court disagreed. The Court noted that appellant was compelled to testify at his trial by an order of testimonial immunity, but was not given a deal for her testimony. Appellant also testified at her own trial, in a way that was generally consistent with her testimony at Johnson's trial. The same prosecutor tried both cases. And in both cases, appellant's testimony was an important part of the State's proof, as she could testify directly about the beating Jazmine received on the day of her death.

In closing argument at Johnson's trial, the prosecutor highlighted why the jury should find appellant's account of Johnson's actions credible. The closing argument minimized appellant's role to some extent, but the prosecutor pointed out that appellant was still criminally culpable. And although the prosecutor focused his argument on the theory that Johnson was the defendant who inflicted the fatal injuries, he also mentioned the possibility of party to a crime liability.

At appellant's trial the next month, the prosecutor adjusted his characterization of her testimony, now asserting in his closing argument that appellant was trying to minimize her involvement. The prosecutor also again argued party to a crime, although this time focusing on appellant's culpability.

The Court stated that there is no general legal prohibition against the State using contradictory theories against different defendants before different juries in separate criminal trials. And while it recently assumed that there could be a due process problem if the State uses inherently factually contradictory theories in *Lawson v. State*, 296 Ga. 1, 9, (2014) (quoting *United States v. Hill*, 643 F3d 807, 834 (11th Cir. 2011)), the Eleventh Circuit's opinion in *Hill* actually casts doubt on whether such a due process right exists.

But even assuming that such a right exists, the Court saw no violation here. Although the prosecutor modified his arguments between Johnson's trial and appellant's, at both trials the prosecutor argued that appellant was criminally culpable and that she and Johnson were parties to the crimes against Jazmine. The adjustment in the prosecutor's argument about appellant's credibility reflected not "inherently factually contradictory theories," but rather a permissible change to focus on the defendant being tried. It was reasonable, for example, for the prosecutor to shift from arguing that appellant had no motive to lie at Johnson's trial to arguing that she had a motive to minimize her involvement at her own trial. Likewise limiting discussion of appellant's culpability to a passing remark that she had also been charged and would get her day in court made sense at Johnson's trial, but would be an odd closing argument for appellant's own trial. Therefore, the Court held, the prosecutor's differing approaches to Johnson's and appellant's trials did not warrant reversal of her convictions.

## **Statute of Limitations; Tolling Provisions**

*Riley v. State*, S18A1048 (2/18/19)

Appellant was convicted of murder, burglary and possession of a knife during the commission of a felony. The evidence, briefly stated, showed that 1986, the victim was found stabbed and strangled on her kitchen floor. A single bloody fingerprint was the only physical evidence that investigators had to link a suspect to the crime scene. Appellant was seen hanging around the victim's house and he was included on a list of 12 to 15 possible suspects who lived nearby. The police also obtained his fingerprints for comparison, along with the fingerprints of five other suspects. But because the fingerprint

collected at the crime scene was only a partial fingerprint, and due to the limitations of available technology at the time, the GBI crime lab was unable to match the fingerprint with any suspects. A quarter-century later, in 2012, improved fingerprinting techniques allowed investigators to definitively match the bloody fingerprint to appellant. Shortly thereafter, he was arrested.

Prior to trial, appellant filed a plea in bar arguing that the charges for burglary and possession of a knife during the commission of a felony were barred by the statute of limitation. The trial court found that the person unknown exception applied and denied the plea in bar. Appellant argued that the trial court erred.

The Court stated that it was undisputed that the State did not indict appellant on the non-murder charges until more than 26 years after the commission of the offenses. Because the applicable statute of limitation for burglary and possession of a knife during the commission of a felony is four years, appellant properly presented, under OCGA § 17-3-1 (c), a prima facie case that the statute of limitation had run. Thus, its analysis must focus on whether the statute of limitation was tolled by the person unknown exception under OCGA § 17-3-2 (2).

The Court stated that it must interpret OCGA § 17-3-2 (2) which required it to decide when a person ceases to be “unknown” under the statute and becomes “known.” The Court held that OCGA § 17-3-2 (2) to mean that a statute of limitation is tolled with respect to an “unknown” person until the State possesses sufficient evidence to authorize the lawful arrest of that person for the crime charged. The amount of actual knowledge required to lawfully arrest an individual is the familiar “probable cause” standard. The test of probable cause requires merely a probability — less than a certainty but more than a mere suspicion or possibility. Thus, when a defendant makes a prima facie case that the statute of limitation has expired, the State has the burden of proving that it lacked probable cause to arrest the defendant for a time sufficient to deem the indictment or other charging document timely.

The Court further stated that this interpretation provides meaning to both the statute of limitation and the tolling provision. It focuses on the actual knowledge of the State and limits exposure when the State does not or cannot close a case within the limitation period after obtaining probable cause to arrest a suspect.

But, the Court found, the trial court here did not engage in this analysis. Therefore, the Court vacated the trial court's judgment on appellant's non-murder charges, and remanded the case for the trial court to consider, under this new legal standard and the facts of this case, when the State had sufficient information to establish probable cause to arrest appellant for the non-murder offenses and to proceed accordingly.

## **Video and Stills; Authentication**

*Moore v. State, S18A1429 (2/18/19)*

Appellant was convicted of malice murder and possession of a firearm during the commission of a felony. The evidence showed that appellant shot the victim outside of a shopping mall. After the shooting, investigators took witness statements, gathered physical evidence, and obtained security camera video recordings from the mall. Appellant did not object to the admission of the mall surveillance video recordings and still photographs taken from those videos at trial, but contended that its admission was plain error. The Court disagreed.

Under Georgia law, generally, a videotape is admissible where the operator of the machine which produced it, or one who personally witnessed the events recorded, testifies that the videotape accurately portrayed what the witness saw take place at the time the events occurred. Here, the Court found, the record showed that the State presented the testimony of eyewitnesses to the events to authenticate the two mall surveillance video recordings, State's Exhibits 3 and 4, and the still images taken from them. With respect to State's Exhibit 3, an eyewitness to the shooting testified that the video accurately depicted the mall and Subway sandwich shop next door to the makeup studio where she was working on the day of the shooting. The video also accurately showed the movements of several people, including herself, who were involved in the events associated with the shooting. With respect to State's Exhibit 4, a witness testified that she was familiar with the video, had viewed it prior to trial, and that it fairly and accurately depicted what happened on the day of the shooting, including the movements of the individuals involved in the shooting, including herself. Several still images taken from the videos also displayed date and time stamps that corresponded to witness testimony about the date and time of the shooting. Thus, the Court held, given that the State adduced evidence sufficiently authenticating the mall surveillance videos, they were admissible. Therefore, appellant failed to show error — much less, plain error — in the court's admission of that evidence.

## **Jury Arrays; Improper Character Evidence**

*Grant v. State, S18A1060 (2/18/19)*

Appellant was convicted of malice murder and possession of a firearm during commission of a felony. He first argued that he was denied a fair trial because the jury array was selected in a manner that deprived him of a fair cross-section of the community as required by the Sixth Amendment, Fourteenth Amendment and OCGA § 15-12-40.1. The Court disagreed.

To challenge the composition of a randomly selected jury array, a defendant must prove that persons were systematically excluded on the basis of race or other cognizable grouping. And here, the Court found, appellant failed to meet this burden because he failed to present any evidence of systematic or purposeful discrimination. To support his claim, appellant relied solely on the fact that the race of 111 of the 162 jurors of the array was marked as undetermined. Appellant argued that this lack of information showed that the composition of the array amounted to “discrimination by random process,” and that the State failed to show a fair cross-section. But, the Court stated, appellant misunderstood the burden of proof — he, not the State, bears the burden of proof on this issue. The lack of information upon which appellant relied proved nothing, and appellant accordingly could not prevail.

Appellant also argued that the trial court erred in denying his motion for a mistrial when the State elicited Agent Smith's explanation of the Automated Fingerprint Identification System (AFIS) at trial. At trial, the State asked Agent Smith what happens in the course of an investigation when a fingerprint is found. He explained: “[Y]ou can just take that fingerprint and enter it in the database against known people who have been arrested, it's called AFIS, which is the Automated Fingerprint Identification System. It's basically a database. There's one in Georgia and there's one that — there is one at the state level and one at the federal level. And it searches against that database. And if it matches someone, then the examiner will actually do a one-to-one comparison to confirm what the computer has matched. And then they say this print has been individualized.”

Appellant objected to this testimony and moved for a mistrial, claiming that this improperly put his character at issue. He argued the only “logical inference” from the testimony was that he was included in that database and had a prior criminal history. However, the Court found, this statement was just a general explanation of what an officer would do in the course of his investigation when a fingerprint was found at the scene. Nothing in any of his testimony indicated to the jury that appellant had ever been convicted of a crime or was in the AFIS system. And no subsequent testimony connected appellant to the AFIS system. Therefore, the Court held, the trial court did not abuse its discretion in denying appellant’s motion for a mistrial.

## **Continuing Objections; Courtroom Closures**

*Beasley v. State, S18A1252 (2/18/19)*

Appellant was convicted of malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a crime. Appellant contended that the trial court erred in instructing the jury on the defense of habitation form of justification because the “habitation must be the defendant's, not the victim's.” The Court noted that at the charge conference, trial counsel objected that the “habitation” that will support this type of justification must be the defendant's and not the victim's — the same argument he raised on appeal. But, the Court stated, that was not the basis for his objection after the trial court charged the jury. Thus, the Court stated, whether appellant was entitled to ordinary appellate review of his claim that the challenged instruction should not have been given at all depended on whether the record showed that his request for a “continuing objection” at the charge conference was granted. An objection cannot be viewed as continuing unless the trial court specifically grants a continuing objection, or when the trial court on its own initiative clearly designates an objection as continuing.

The record showed that at the charge conference, the State requested that the trial court instruct the jury that a person is justified in using force against another person when and to the extent that the person reasonably believes that such force is necessary to prevent or terminate another's unlawful entry into or attack upon a residence. Appellant objected, contending that the charge was inappropriate because his defense was not that he used force against a person coming into his residence, the evidence did not support the charge and that the particular charge was “for the use of a defendant, not a victim.” The trial court asked why the charge could not apply to both the defendant and the victim, and appellant elaborated on his position that the instruction was never intended to apply to a deceased victim, eventually stating that if “the court decide[d] to give it, [he'd] ask it be a continuing objection.” The Court then took a recess.

After the recess, the prosecutor informed the trial court that he had found a Court of Appeals case that supported the giving of an instruction on the victim's use of force against the defendant when necessary to prevent or terminate an unlawful entry or attack upon the victim's residence, so the instruction at issue applied in appellant's case. The trial court agreed with the State and indicated that it would give the charge. Appellant did not ask for a ruling on his request for a continuing objection. Accordingly, the Court found that the record did not show that the trial court specifically granted appellant a continuing objection, or that the trial court on its own initiative clearly designated his objection as continuing. Therefore, the objection, which he asked to be continuing, did not preserve this issue for ordinary appellate review. And because his request for a continuing objection was not granted, appellant was required to object with specificity after the court charged the jury, pursuant to OCGA § 17-8-58, but he failed to do so.

Nevertheless, the Court reviewed the jury charge for plain error. Premitting the other three prongs, the Court concluded that appellant failed to show that any alleged error in giving the instruction was obvious, given that it has not decided the issue and that, in *Robison v. State*, 277 Ga. App. 133 (2006), the Court of Appeals rejected an argument that the trial court erred in giving a jury instruction on OCGA § 16-3-23, where the habitation being defended was the victim's and not the defendant's. Thus, because *Robison* remains good law, there was no obvious error, and therefore, no plain error existed.

Appellant also argued that his trial counsel was ineffective for failing to object to the trial court's temporary closing of the courtroom to the public during the trial. The Court noted that the trial court closed the courtroom to question a male juror who reportedly knew people in the courtroom that day who were associated with appellant. After the male juror testified that he had told another juror about his relationship with appellant's associates, the trial court excluded the male juror. After a recess for lunch, the trial court polled the jury and found that no juror had been improperly influenced by the excluded juror.

The Court found that because appellant did not question trial counsel at the motion for new trial hearing regarding an alleged courtroom closure involving the questioning of jurors, in the absence of testimony to the contrary, counsel's actions are presumed strategic. Moreover, not objecting to the temporary closure was not patently unreasonable trial strategy under the circumstances of this case. A competent attorney might reasonably decide that a temporary closure would benefit his client in this situation. For example, the attorney might think it beneficial to his client to be able to question jurors about their possible intimidation by his client's associates without having those associates present during the questioning. Doing so might aid his efforts to obtain a favorable jury composition. Accordingly, counsel did not render deficient performance and appellant's claim of ineffective assistance failed.

### **Rule 401; OCGA § 17-8-57**

*Roberts v. State*, S18A1440 (2/18/19)

Appellant was convicted of felony murder during the commission of an aggravated assault with a deadly weapon and possession of a firearm during the commission of a crime in connection with the shooting death of King. The evidence, briefly stated, showed that appellant and King argued in a night club. The two then left the club and got into a physical fight across the street from the club. Later that same night, appellant shot King while King and another man sat in a car outside the nightclub.

Appellant argued that the trial court abused its discretion when it refused to admit evidence of a dice game under OCGA § 24-4-404 (b) ("Rule 404 (b)"). Specifically, appellant sought to admit evidence under Rule 404 (b) that—at an illicit dice game around the block from the nightclub a week before King's murder—King, appellant, and others who frequented the area were present, there was a heated argument, and King pulled a gun on one of the participants other than appellant. Appellant argued that this evidence, together with the fact that thousands of dollars in cash changed hands during the dice game, was admissible as proof that a third person had as much motive to kill King as appellant had.

However, the Court stated that it need not decide whether Rule 404 (b) applied in these circumstances, because appellant failed to show how the evidence he sought to admit was relevant under Rule 401 by offering, for example, that the third

person who supposedly had a motive to kill King was also present at or near the nightclub on the night of the murder. Indeed, appellant named that third person for the first time at the hearing on his motion for new trial, at which time he provided only a nickname. Therefore, the Court concluded, appellant offered nothing more than speculation and conjecture that a third person could have been involved in King's murder, and—regardless of the applicability of Rule 404 (b)—the trial court did not abuse its discretion in excluding evidence that King pulled a gun on a third person at the dice game.

Appellant next contended that the trial judge committed plain error when he violated OCGA § 17-8-57 by commenting on the evidence of a surveillance video that was played for the jury at trial. The surveillance video played at trial was about one minute long and showed that a person walked up to—and then quickly ran away from—King's side of the car. After the video was played the first time, the trial judge ordered that it be played again. Before it was played a second time, however, the judge instructed the jury that “this is not one of these items that you're going to be allowed to have a computer and the tape and look back and forth and back and forth at a hundred times, so understand that it's going to be important that you get your sense of whatever you are to glean from this video tape here in the courtroom.” The video was then played a second and a third time. Afterwards, a second clip, which “zoomed in on the picture,” was also played two times. The trial judge immediately instructed the jury that “I do not have that video played for you to emphasize that over any other evidence, I just knew that ... it was a bit grainy, it was hard to make out some images and I wanted to give you an opportunity to first get a sense of what you're looking at and then look at whatever level of detail you thought relevant, if at all.”

Appellant argued that the judge's first instruction indicated that the jury should pay special attention to the video as compared to other evidence. This emphasis on the importance of the video, Appellant contended, amounted to an opinion on the weight of the evidence and hinted that, contrary to the defense of mistaken identity that appellant offered at trial, the video was valuable because it in fact showed appellant committing the crime. The Court disagreed.

Premitting whether the trial judge erred in its commentary about the surveillance video, the Court found that appellant failed to establish the second prong of the plain-error test: that any error was “clear and obvious beyond reasonable dispute” because argument ignored the context in which the comment was made. Here, the trial judge encouraged the jury to pay attention to the surveillance video, but, his comments did not pertain to the substance of the video; they pertained to the process the judge intended to use with respect to that piece of evidence. To that end, the judge informed the jurors that they would not be given a computer during deliberations—which meant that they would not be able to review the surveillance video on their own—and concluded by explaining that the jury's review of the video must take place “here in the courtroom.” Given the context in which the comments were made, it was hardly clear and obvious that the jurors would have viewed the judge's instructions as commenting on the weight of the evidence as opposed to providing a straightforward explanation that they would not have additional opportunities to review the video during deliberations. And that type of explanation is a permissible clarification of procedure that does not address the credibility of witnesses or any fact at issue in the trial. And the Court stated, understanding the nature of the judge's comments as a “clarification of procedure” was also consistent with his later instruction to the jury that the short video was not replayed to emphasize it over any other evidence, but to give jurors an opportunity to examine any details that they “thought relevant, if at all.”

Moreover, the Court found, appellant also failed to meet the third prong of the plain-error test because he did not show how he was harmed. Even if the trial judge's comments had constituted a clear and obvious violation of OCGA § 17-8-

57, they had no likelihood of affecting the outcome of the trial—both because of the strong evidence against appellant at trial, including eyewitness identifications of him as the shooter, and because of the judge's prompt instruction denying any purpose to emphasize the surveillance video over other pieces of evidence and reaffirming the jury's role in evaluating the video's relevance, if any. Moreover, the trial judge's instructions about the video could reasonably be viewed as potentially helping appellant's mistaken-identity defense, since the judge pointed out that he was replaying the video because it “was a bit grainy” and that “it was hard to make out some images.”

## **Battered Person Syndrome; PTSD**

*Virger v. State, S18A1538 S18A1539 (2/18/19)*

Appellant and her husband, Virger, were tried together for crimes related to the beating and death of Diarra, a 13-month-old child who lived with them. Virger was convicted of malice murder, appellant was convicted of felony murder, and both were convicted of other offenses.

Appellant contended that the trial court erred by excluding testimony from an expert witness that she has battered person's syndrome (BPS) and post-traumatic stress disorder (PTSD). The Court disagreed.

The record showed that a week before the trial began, appellant, citing *Pickle v. State*, 280 Ga. App. 821 (2006), filed a notice of her intent to present the expert testimony of Dr. Marti Loring for the purposes of negating appellant's intent to commit the crimes and supporting her coercion defense. The trial court denied the request. After appellant testified at trial, she “renew[ed] [her] request” to allow Dr. Loring to testify, arguing that the testimony would “explain the evidence [that had] been introduced by the State” and “[appellant's] conduct in the context of this trial.” Appellant also briefly mentioned that the expert testimony could explain voicemail and text messages between appellant and Virger. The trial court again denied the request.

The Court noted that in *Smith v. State*, 247 Ga. 612 (277 SE2d 678) (1981), it first recognized BPS as a scientifically established theory and held that expert testimony regarding BPS may be admissible in murder cases to assist the jury in evaluating a defendant's claim of self-defense. In 1993, the General Assembly codified this holding by amending the self-defense justification statute, OCGA § 16-3-21 to address the use of BPS evidence in subsection (d). Since then, the Court stated that it has clearly and consistently held that the only defense theory that BPS is admissible to support is a justification defense based on self-defense against the victim. But here, as the trial court recognized, appellant did not assert a claim of self-defense — nor could she, as she was obviously under no threat from the 13-month-old victim. And, evidence of violent acts or abuse committed against the defendant by someone other than the victim — including expert testimony about psychological conditions caused by such abuse — is inadmissible to support a justification defense based on self-defense.

In fact, the Court stated, Georgia's appellate courts have similarly rejected attempts to extend the use of evidence regarding the defendant's BPS or other psychological conditions to support other affirmative defenses that traditionally and statutorily require application of an objective, reasonable-person standard, including the defense of coercion. Accordingly, the Court held, the proffered expert testimony regarding appellant's BPS and PTSD also was not admissible to support her defense of coercion.

Nevertheless, appellant contended, the expert testimony was admissible because it would have explained to the jury her “conduct” after Virger beat Diarra. The Court noted that during the trial, when appellant renewed her request to allow Dr. Loring's testimony after appellant testified, she also asserted generally that the expert would explain text and voicemail messages between appellant and Virger. During the subsequent proffer, Dr. Loring testified about how “nasty text messages” may be typical between an individual with BPS and her abuser. That and similar pieces of testimony might have been admissible for the sole purpose of explaining appellant's behavior in order to support her credibility as a witness. But that was not clearly the purpose for which appellant offered the evidence when she “renew[ed]” her request to admit Dr. Loring's testimony. Appellant did not inform the trial court that she no longer sought to use the expert testimony for the purposes she had proposed during the pretrial proceeding, and she cited no authority before or during the trial to support its admission on other grounds. Thus, the Court found, under these circumstances, the trial court fairly understood appellant to be renewing her original motion to admit Dr. Loring's testimony for the purposes of negating appellant's intent to commit the crimes and supporting her coercion defense.

Moreover, the Court noted, in that motion and the lengthy pretrial hearing on the issue, appellant repeatedly argued to the trial court, relying on *Pickle*, that Dr. Loring's testimony would present a “comprehensive defense” that would “negate criminal intent as to all the counts.” Appellant mentioned “conduct” only in the context of asserting that the BPS evidence would “explain her conduct and negate mens rea.” Thus, the purpose of the expert evidence was to negate the intent elements of the crimes with which she was charged. Appellant wanted Dr. Loring to explain to the jury not what she did or failed to do regarding Diarra's injuries and resulting pain (appellant's conduct), but rather “why she did what she did” (appellant's mental condition at the time of her conduct). And therefore, the Court concluded, in accordance with its longstanding precedent, the trial court correctly rejected the admission of the expert testimony for that purpose.

Finally, the Court stated, evidence of a criminal defendant's mental disability at the time of the alleged offense may be admissible to support the defenses of insanity, see OCGA § 16-3-2, delusional compulsion, see OCGA § 16-3-3, or self-defense based on BPS in a murder or manslaughter prosecution, see OCGA § 16-3-21 (d). But, for more than 150 years, it has consistently upheld the exclusion of evidence of a defendant's diminished mental condition when offered to support other defenses or to negate the intent element of a crime. Georgia takes a more restrictive position on this issue than many other jurisdictions, where the admission of evidence relating to a defendant's deficient mental condition to support defenses other than those based on diminished mental capacity or to negate a required element of a crime has been authorized by statute or judicial decision in at least some circumstances. However, “[i]f Georgia's longstanding law is to be changed to allow the admission of expert testimony in criminal cases to negate intent or otherwise support a mental capacity defense other than the ones now authorized by statute, that change should come from the General Assembly.”