Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING APRIL 5, 2019
Issue 14-19

THIS WEEK:

- ***Crawford*; Hearsay**
- **Emotional Witnesses; Jury Charges**
- **Statements; Voluntariness**
- **Rule 606; Impeaching or Sustaining Jury Verdicts**

Crawford; Hearsay

McCord v. State, S18A1045 (3/4/19)

Appellant was convicted of malice murder, feticide, and tampering with evidence in connection with the stabbing death of the victim and her unborn child. The evidence, briefly stated, showed that the victim, who was pregnant, was working at a convenience store. Shortly before 11:00 p.m., while she was in the back office of the store, the victim was stabbed 31 times - 29 times with a bladed instrument and twice with a thin, cylindrical object, like an ice-pick — and died within minutes from blood loss. About 15 minutes after the attack, two store customers, Collins and another man, discovered the victim's body and called the police. Collins, who was upset and crying when the police arrived, told responding Officer Poole that he had been in the store earlier that night, panhandling for money, cigarettes, and alcohol, and that the victim had been nice to him. He said that during his previous visit to the store, he saw a man and woman with the victim and that the man was arguing with her. Collins said that the man gave him a pack of cigarettes and told him to go elsewhere for alcohol. Collins said that he saw the victim and the man go into the back office; moments later, he heard a loud banging. The woman told Collins that "they are either fighting or having sex." After the scene had been secured, Officer Davis also spoke with Collins, who by this time was seated in the back of a patrol car. Collins repeated his account of what he had seen and gave the officer the pack of cigarettes that the man had given him. Collins died prior to trial.

Appellant first contended that the trial court erred in admitting Collins' statements to the two officers on confrontational grounds. The Court noted that statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. Whether the "primary purpose" of a communication between police and a declarant is part of an "ongoing emergency" is a matter of "objective fact" for the court to evaluate. Here, the police arrived at the crime scene within minutes of Collins's discovery of the victim's body. Collins was aware that the killing had occurred recently and that he had been present in the store at or close to the time of the killing. The victim's cause of death was then unknown, but it was apparent that she had died violently. Collins spoke with Officer Poole as other officers moved through and around the store with pistols drawn, looking for suspects who might be armed, who might be in the immediate vicinity, and who might pose a threat to others. Collins, who was visibly shaken and upset by the incident, told Officer Poole what he had just witnessed as they were securing the scene.

Officer Davis questioned Collins in the police car after police had secured the scene with the intent "to obtain information for a ["be on the lookout"] alert for the suspect and any vehicle linked to the suspect." Although the alert was never issued,

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the Court concluded that Officer Davis's questioning was meant to quell the ongoing emergency presented by an armed attacker at large.

The Court found that Collins's statements were nontestimonial in that they were not intended to establish or prove a past fact; rather, they were intended to describe current circumstances that required immediate police action - securing a crime scene and determining whether an armed killer might still be in the vicinity. With respect to the statements that Collins made to Officer Davis in the patrol car, even assuming that those statements were testimonial, they were cumulative of the statements made to Officer Poole and any error was harmless.

Next, appellant contended that the statements to the two officers were inadmissible hearsay. The trial court found the statements were admissible under the present-sense-impression exception. Pretermitting whether the trial court was correct, the Court stated that statements were uttered to the officers at the scene while he was emotionally traumatized. Thus, they were admissible as excited utterances under OCGA § 24-8-803 (2), which provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." And, citing *United States v. Jiminez*, 564 F3d 1280, 1288-1289 (III) (11th Cir. 2009), even when the trial judge admits testimony for a stated reason that is improper under the Rules of Evidence, the decision generally will be upheld so long as the testimony is properly admissible on other, non-stated grounds apparent from the record.

Emotional Witnesses; Jury Charges

Favors v. State, S18A1394 (3/4/19)

Appellant was convicted of malice murder and other offenses. The evidence showed that Reese was on the phone with the victim when the victim was shot. At trial, Reese recounted hearing the victim beg for his life after being held at gunpoint and then shot repeatedly. The State then admitted a recording of the 911 call Reese placed shortly after he heard the victim being shot. While the recording played, Reese became emotional. The trial court stopped the playing of the recording and dismissed Reese and the jury from the courtroom. Appellant contended that the trial court abused its discretion by declining to issue a charge to the jury regarding sympathy immediately following the emotional outburst by Reese. The Court disagreed.

The appropriate response to a witness' show of emotion is a matter addressed to the trial court's discretion. The Court noted that the "grim reality" is that emotional outbursts are reasonably to be expected by one who is a close friend of a murder victim. And, while appellant characterized Reese's emotional outburst as "severe," the Court found nothing in the record to indicate that Reese became hysterical or made any prejudicial comments. Additionally, the trial court stopped the trial and allowed the witness to compose himself, and it was unlikely that the witness' emotional response without more prejudiced appellant's defense. Moreover, any prejudice to appellant's defense was cured when the trial court in its charge to the jury at the conclusion of the evidence instructed as follows: "You are not to show favor or sympathy to one party or the other. It is your duty to consider the facts objectively without favor, affection, or sympathy to either party." Thus, the Court found that the trial court did not abuse its discretion in its handling of this episode during the trial.

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Statements; Voluntariness

Price v. State, S18A1491 (3/4/19)

Appellant was convicted of malice murder. He contended that his statement to law enforcement was involuntary under Georgia law and, consequently, inadmissible. Specifically, appellant argued that an investigator suggested that she was going to personally discuss the case with "the judge," that appellant would not see the "light of day," and, further, that appellant's hands had tested positive for gunshot residue even though the results of that test were not yet available.

As an initial matter, the Court noted that while appellant had been advised of his *Miranda* rights numerous times on the day in question, his interview was non-custodial; the video-recorded statement plainly reflected that both appellant and law enforcement understood that appellant was free to leave at any time during the interview. The video showed that during the course of the interview, investigators implored appellant to tell the truth and to help himself, which was not improper. Though an investigator intimated that she would go directly to "the judge" concerning appellant's honesty and make a recommendation as to whether appellant would "get out," it is permissible for the police to tell a suspect that the trial judge may consider his truthful cooperation with the police. These remarks, which were framed in terms of what the investigator wanted to be able to tell the judge, did not render the statement involuntary. Also, the Court found, the investigator's vague references to appellant "getting out" was, at most, a possible "collateral benefit" since no one promised appellant that he would not be charged with a crime or that he would receive reduced charges, sentencing or punishment if he made incriminating statements.

Next, the Court found, with respect to an investigator suggesting during the interview that appellant would never "see the light of day" if he were not truthful, this too was an exhortation to tell the truth, not a promise of a lighter punishment. Moreover, the remark amounted to no more than an explanation of the seriousness of appellant's situation. And, regarding the deception concerning the gunshot residue on appellant's hands, the Court found that there was no indication that this ruse was intended to elicit an untrue confession or that it offered a slightest hope of benefit or remotest fear of injury. As such, it, too, was permissible.

Finally, though appellant was interviewed over the course of approximately six hours, he was offered food and drink, and nothing in the video suggested excessively lengthy interrogation, physical deprivation, brutality, or other such hallmarks of coercive police activity that would result in the remotest fear of injury. Accordingly, the Court concluded, after examining the totality of the circumstances, the trial court did not err in finding that appellant's statement was voluntary.

Rule 606; Impeaching or Sustaining Jury Verdicts

Beck v. State, S18A1593 (3/4/19)

Appellant was convicted of felony murder and possession of a weapon during the commission of a crime. He contended that he was denied a fair trial because jurors considered extrajudicial information regarding sentencing in reaching a verdict. At the motion for new trial hearing, eleven of the twelve jurors testified regarding this issue. Three jurors, C.C., A.J., and M.H., testified that the jury discussed sentencing during deliberations. C.C. and M.H. testified that the sentencing discussions did not affect their verdicts, but A.J. gave inconsistent testimony on this point. Moreover, when C.C. was asked by defense counsel whether the sentencing information came from other jurors, she responded: "No. No. It was given to

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us and I don't know, I don't remember who. It was, I don't know whether, I don't know. We, it, nobody brought it, like brought it to court to say hey look what I found. No. But, I cannot remember how that was done. I don't remember." The eight other jurors testified that they did not consider sentencing during deliberations. In denying the motion for new trial, the trial court relied expressly on C.C's and M.H.'s testimony that the sentencing discussions did not affect their verdicts and also on its finding that A.J.'s testimony about sentencing discussions affecting her verdict was not credible because of inconsistencies in her testimony.

The Court noted that OCGA § 24-6-606 (b), governs what is or is not admissible to sustain or impeach a verdict. The Eleventh Circuit has held that except for testimony concerning extraneous prejudicial information or improper outside influence, Rule 606 (b) (1) prohibits a juror from providing testimony or other evidence about anything that happened or occurred during deliberations, including a juror's mental processes or the reasons the jury reached a particular verdict. In fact, Rule 606 (b) embodies a nearly categorical bar on juror testimony, with only three specific exceptions providing the subject matter on which a juror is allowed to testify: (1) extraneous prejudicial information was improperly brought to the jury's attention; (2) an outside influence was improperly brought to bear on any juror; or (3) a mistake was made in entering the verdict on the verdict form.

Moreover, the difference between the old and new Evidence Code matters in this case, but neither the parties nor the trial court addressed Rule 606. And here, the Court found, Juror C.C. offered some evidence from which the trial court could conclude that extraneous prejudicial information was brought to the jury's attention when she testified that sentencing information did not come from other jurors and that it was "given to" them. Although the trial court determined that Juror A.J.'s testimony was not credible, it made no finding about Juror C.C.'s credibility and made no finding as to whether "extraneous prejudicial information" was, in fact, brought before the jurors. Instead of following the guidelines set forth in Rule 606 (b), the trial court relied on juror testimony about internal jury deliberations to conclude that, even if such information came before the jury, it was not prejudicial. But, the Court stated, that type of testimony generally is barred by Rule 606 (b) and may not be used in determining whether extraneous information is prejudicial. Therefore, the Court held, under these circumstances, it was appropriate to vacate the denial of the motion for new trial and remand for the trial court to apply the new evidentiary rule to appellant's claim that he is entitled to a new trial. On remand, if the trial court determines that extraneous information was provided to the jury, it will have to evaluate prejudice without the benefit of evidence of internal jury deliberations.