

THIS WEEK:

- **Prior Difficulties; Rule 403**
- **Replacement of Jurors with Alternates; Good Cause**
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- **Search & Seizure; BOLOs**
- **Motion for New Trial; Abandoned Arguments**
- **Perjury; Mistake of Fact**

Prior Difficulties; Rule 403

Maqrouf v. State, A18A1850 (3/6/19)

Appellant was convicted of cruelty to a child in the first degree for kicking his five-year-old daughter, S. M. The evidence showed that appellant and his wife, Zahoor, have two daughters – S. M. and a two-year-old. At a gas station Zahoor owned, appellant kicked S. M. in the stomach, launching her across the room. When Zahoor intervened, appellant slapped her and struck her in the back. Zahoor did not call the police immediately after the incident. Instead, a day or two later, she called a detective with whom she was familiar after she saw appellant enter their two-year-old daughter's room in the middle of the night, get into bed with the child, and then “ejaculate[] himself” with one hand while fondling his daughter under her underwear with his other hand.

Appellant argued that the trial court erred by admitting Zahoor's testimony that she observed him molesting their two-year-old daughter as evidence of prior difficulties. The Court agreed.

The record showed that appellant filed a motion in limine to prevent the State from presenting evidence of the molestation. At the hearing, the State told the judge that the victim was the same in the molestation as this case. The court apparently let the evidence in as evidence of prior difficulties.

The Court stated that unlike similar transactions, prior difficulties do not implicate independent acts or occurrences, but are connected acts or occurrences arising from the relationship between the same people involved in the prosecution and are related and connected by such nexus. Although the Supreme Court of Georgia has affirmed the admission of prior difficulties between a defendant and a person other than the victim in the charged case, the Court explained that such evidence was admissible “to draw together the preceding and subsequent acts and give color of cause and effect to the transaction and to show a continuous course of conduct.”

Premitting whether the evidence was relevant, the Court found that the evidence did not satisfy the requirements of OCGA § 24-4-403 (“Rule 403”), which provides: “Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” In conducting the Rule 403 balancing test, it must

consider whether the trial court properly considered all the circumstances surrounding the other act evidence, including the similarities between the charged act and the other act, the remoteness in time between the charged act and the other act, and the prosecution's need for the similar act evidence.

And here, the Court found, although the two acts occurred within a day or two of each other, they were not similar. Although both acts were committed against his young daughters, one involved kicking the five-year-old while arguing with his wife, and the other was an act of sexual molestation against his younger daughter. And contrary to the State's argument, Zahoor's testimony that she was only motivated to report the assault against S. M. after witnessing him molest their other daughter is not probative of whether he committed the charged crime against S. M. Further, Zahoor was allowed to testify as to a pattern of family violence explaining why she delayed calling the police. Therefore, the State failed to demonstrate a need for the similar act evidence, and the probative value of the subsequent molestation was minimal.

Next, the Court, the Court found that the danger of interjecting unfair prejudice was a much greater risk. This was particularly true here in light of the nature of the crime appellant allegedly committed against his two-year-old daughter.

Finally, the Court addressed whether the admission of the evidence amounted to harmless error. The Court found that although both Zahoor and S. M. testified that appellant kicked S. M., and the State introduced photographs of bruises on S. M., appellant denied the charges at trial. Furthermore, the jury acquitted him of family violence battery against Zahoor, despite her testimony that he slapped and struck her. And Zahoor's testimony that she observed appellant molesting their two-year-old, as well as her "suspicions" about his inappropriate feelings towards the child, was extremely prejudicial in the eyes of the jury. Based on this record, the Court concluded it was highly probable that the erroneous admission of the challenged other acts evidence contributed to the verdict. Nevertheless, because the evidence was sufficient to support appellant's conviction, he may be retried.

Replacement of Jurors with Alternates; Good Cause

Ware v. State, S18A1295 (3/11/19)

Appellant was convicted of felony murder during the commission of an armed robbery. He contended that the trial court erred when it removed a juror during deliberations and replaced her with an alternate juror. The Court disagreed.

The record, briefly stated, showed that on the first day of trial, the court informed the jury that the trial may take five days with an "outside possibility that the case could run over til[] the first part of next week." The juror at issue (hereinafter "the Juror") did not indicate a hardship. The trial took longer than expected and deliberations did not begin until late the following Monday. On Tuesday, the Juror had airline tickets for Wednesday for a wedding on Saturday. The court instructed her to check on changing her flight. The Juror reported back Wednesday that it would cost \$600.00 to do so. Defense counsel objected to replacing her with an alternate and offered to pay for her flight change fee. The State objected to that as inappropriate, even if the Juror never learned the source of the funds. The court noted that it was possible deliberations could go into Saturday in any event. Eventually, at the request of the Juror, the court excused her and replaced her with an alternate.

Appellant contended that there was not good cause under OCGA § 15-12-172 to excuse the juror as unable to perform her duty, especially given defense counsel's offer to pay the additional costs for a change of flights with the juror being told only that the money came from the court. The Court stated that a trial court may replace a juror with an alternate whenever the juror "upon other good cause shown to the court is found to be unable to perform his duty." OCGA § 15-12-172. And the court has broad discretion to determine whether it is appropriate to remove a juror. The trial court may remove a juror even after deliberations have begun, so long as the facts presented to the court show some sound basis upon which the court exercises its discretion to remove the juror.

Here, the Court found, based on the trial court's statements and questioning during voir dire, the Juror had a reasonable expectation that she would be discharged prior to her scheduled flight. And even assuming (without deciding) that defense counsel paying for the cost of the juror's changed flight through the court would have been proper, it would not necessarily have resolved her scheduling conflict if deliberations had continued beyond two more days, as the court acknowledged was possible. Also, the Court noted that other jurisdictions have held that "good cause," may encompass any of the inevitable vagaries of the many trial participants' complex lives, including prearranged business or personal travel plans, whether they come to light during voir dire or not. Thus, a trial court's broad discretion is properly exercised in such cases after due consideration of the totality of the circumstances surrounding the juror's travel plans.

In this case, the trial court considered and weighed the relevant circumstances, including the length of the trial that exceeded expectations, the juror's financial concerns and desire to be excused, the sensitive nature of defense counsel's proposal to pay the juror's increased expenses even if the court acted as a conduit for such payment, and the potential for a repeat of the scheduling conflict later in the week. Accordingly, the Court concluded, under the circumstances, the trial court did not abuse its discretion by replacing the juror during deliberations with an alternate juror.

Verdict Forms; Ambiguous Verdicts

Jackson v. State, A18A1643 (3/12/19)

Appellant was indicted for seven counts of theft by conversion (breach of a fiduciary duty). The State nolle prossed count 5 at trial and he was convicted of the remaining counts. He contended that his convictions on counts 1, 2, 4, 6, and 7 must be vacated because the jury found him not guilty of theft by conversion (appellant did not contest his conviction for count 3).

The Court noted that the verdict form included four questions on each of the six counts as follows: As to Count 1: Theft by Conversion, we the jury find the defendant: (Guilty OR Not Guilty); Also as to Count 1: As a Fiduciary, we the jury find the defendant: (Guilty OR Not Guilty); Also as to Count 1: If Not Guilty above, we the jury find the defendant: (Guilty of Theft by Conversion of an amount exceeding \$500.00 OR Not Guilty); Also as to Count 1: If Not Guilty above, we the jury find the defendant: (Guilty of Theft by Conversion of an amount less than \$499.99 OR Not Guilty).

On Counts 1, 2, 4, 6, and 7, the jury found appellant guilty only "[a]s a fiduciary" and marked "not guilty" on the other questions. On Count 3, the jury found him guilty of theft by conversion, guilty of theft by conversion as a fiduciary, and guilty of theft by conversion of an amount less than \$499.99.

The Court stated that when an ambiguous verdict is returned by a jury, the trial court may refuse to accept the verdict and require the jury to continue its deliberations. However, after a verdict has been received, recorded, and the jury dispersed, it may not be amended in matter of substance, either by what the jurors say they intended to find or otherwise. If after applying these principles, it is determined that the verdict returned is a mere nullity, it has the legal effect of an acquittal.

The Court found that construing the verdict form in order to give the defendant the benefit of the doubt, as it must, it was “constrained to find that the verdict returned is a legal nullity as to Counts 1, 2, 4, 6, and 7.” Although the jury found appellant guilty “as a fiduciary,” they specifically found him not guilty of theft by conversion in any amount. These findings are at best ambiguous, and a fair reading of the verdict readily includes the possibility that the jury found appellant was acting in a fiduciary capacity for the victim corporation but was not guilty of theft by conversion. However, merely acting as a fiduciary is not criminal. Accordingly, the Court reversed appellant's convictions on Counts 1, 2, 4, 6, and 7. But, the Court stated, appellant's “remaining conviction on Count 3 will stand.”

Search & Seizure; BOLOs

State v. Perry, A18A2110 (3/13/19)

Perry was accused of DUI (less safe), DUI (per se) and failure to maintain lane. The evidence showed that an off-duty police officer reported a possible drunk driver, and a deputy with the sheriff's department was dispatched to the area where the driver was last seen. Dispatch instructed the deputy to be on the lookout (“BOLO”) for a white male and white female in a white SUV with a particular license plate number. The deputy encountered Perry in a white SUV with a plate number matching the BOLO, and the deputy started following Perry. The deputy did not immediately pull Perry over in response to the BOLO because he believed that he did not yet have justification to effectuate a traffic stop. The deputy testified that he pulled Perry over when he witnessed Perry “weaving over the roadway.”

Perry filed a motion to suppress. The deputy's pursuit of Perry was captured on his dash cam, and the video was played for the trial court at the hearing. After reviewing the video, the trial court stated that it believed Perry operated his vehicle smoothly and indicated that it would grant Perry's motion. The State appealed.

The Court noted that the deputy was aware of a BOLO based upon a report of an off-duty police officer that the driver of Perry's vehicle, identified by license plate number, may be intoxicated. Particularized alerts issued by police officers for specifically described vehicles possibly involved in criminal activity have long served as a legitimate basis for investigatory stops. A dispatcher's report of a suspected intoxicated driver, containing details about the driver, the driver's vehicle, the driver's behavior, and the location where the behavior occurred, has been held to provide articulable suspicion authorizing a responding officer to detain the driver, even if the source of the report is a citizen or unidentified informant. Accordingly, the Court held, the BOLO provided the deputy with reasonable articulable suspicion to effectuate the traffic stop of Perry.

Moreover, the Court found, it is of no consequence that the deputy testified that he did not believe the BOLO, by itself, gave him justification for the stop. An officer's subjective belief that he lacks authority to stop an individual does not control where the facts objectively show the officer had such authority. “Because we decide whether reasonable suspicion justifies a detention based on all the objective facts, we are not limited by the detaining officer's subjective opinions.” Therefore, the Court concluded, given that the BOLO objectively provided reasonable articulable suspicion to stop Perry,

it did not need to address whether Perry failed to maintain his lane for purposes of reviewing the motion to suppress. Even viewing the evidence in the light most favorable to the trial court's judgment, the trial court erred in suppressing the evidence.

Motion for New Trial; Abandoned Arguments

Wilson v. State, A18A1826 (3/12/19)

Appellant was convicted of armed robbery, burglary, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon. Appellant argued that the trial court erred by denying his motions for new trial as abandoned instead of ruling on the merits of his arguments that the verdict of the jury is contrary to the evidence and the principles of justice and equity under OCGA § 5-5-20 and is contrary to the weight of evidence pursuant to OCGA § 5-5-21. The Court agreed.

The record showed that at the conclusion of appellant's hearing on the motion for new trial, defense counsel argued that the evidence was insufficient because of the error of admitting certain hearsay. The trial court then directed appellant to brief "these issues," within 15 days and directed the State to respond to appellant's arguments. However, appellant failed to brief the issues. Thus, 15 months later, the trial court found that "[t]he Motion for New Trial has been abandoned by the defendant's failure to pursue the matter within a reasonable time."

The Court stated that the trial court has the affirmative obligation to rule on the merits of the motion for new trial on the general grounds, and where it appears that a trial court has refused to exercise its discretion, the appellate courts will vacate the order denying the motion for new trial and remand for consideration under the proper legal standard. Here, the trial court's order expressly declined to consider the merits of appellant's motion on the general grounds even though the argument had been raised in the motion for new trial and an evidentiary hearing had taken place with appellant's counsel arguing the general grounds. Thus, even though appellant's counsel should have filed a brief on the hearsay issues as directed by the trial court, that omission constituted an abandonment of the opportunity to make further argument on those issues, rather than the entire motion for new trial. Accordingly, the Court vacated the portion of the trial court's order declining to rule on the merits of appellant's motion for new trial on the general grounds and remanded the case for the trial court to consider the general grounds under the appropriate standard.

Perjury; Mistake of Fact

Law v. State, A18A1792 (3/12/19)

Appellant was convicted of exploitation of a disabled adult, perjury, using a false document, and nine counts of theft by taking. The evidence showed that the victim was appellant's elderly mother who suffered from severe dementia. He contended the trial court erred by failing to charge on mistake of fact as a defense to the counts of perjury and use of a false document in connection with filing a verified Petition for Appointment of Guardian and/or Conservator (the "Petition"), for his mother and her assets, on the ground that she had "severe dementia." The Court disagreed.

The evidence showed that the Petition failed to list lineal descendants as required by law. The Petition also failed to disclose that appellant previously "[had] been nominated to serve under a ... durable power of attorney for healthcare ... or other

instrument that deals with the management of the person of the proposed ward” or that he “[had] been nominated to serve under a power of attorney, ... or other instrument that deals with the management of the property of the proposed ward in the event of incapacity.” The Petition also failed to disclose, as required, that appellant had conflicts of interest in that he co-owned joint accounts and certain real property with his mother. And page 12 of the Petition, which required appellant to list all of his mother's assets, was not included in the filing. The State presented further evidence that all of the information in the Petition came from appellant and that he was asked to confirm that the information was true, accurate, and correct. In fact, appellant verified the facts set forth in the Petition.

The Court noted that the law of misapprehension/mistake of fact provides that a person cannot be found guilty of a crime “if the act or omission to act constituting the crime was induced by a misapprehension of fact which, if true, would have justified the act or omission.” OCGA § 16-3-5. Mistake of fact is a defense to a crime to the extent that the ignorance of some fact negates the existence of the mental state required to establish a material element of the crime. Generally, however, ignorance or mistake of fact constitutes a defense to a criminal charge only if it is not superinduced by the fault or negligence of the party doing the wrongful act. And even where an accused's sole defense is mistake of fact, such charge is not required where it is not authorized by the evidence.

In Count 3, the State asserted that appellant committed perjury, OCGA § 16-10-70, when he knowingly and willfully made a false statement in the Petition “when he failed to disclose all of [his mother's] personal assets and lineal descendants, and that he held Power of Attorney over [her] and joint ownership of her property.” In Count 4, the State asserted that appellant committed the offense of using a false document, OCGA § 16-10-20, for essentially the same reasons. In his defense, appellant testified that he completely and correctly filled out the Petition, including page 12, and he implied that perhaps his attorney and his attorney's staff caused the omissions. He characterized this problem as “mistaken conduct beyond his control” and he argued that he therefore was entitled to a charge on “misapprehension of fact.”

But here, the Court found, it was undisputed that appellant reviewed and verified the accuracy of the information to be filed. Thus, if the document contained errors when he signed it, he superinduced those errors. Further, any mistake about what persons were his mother's lineal descendants is a mistake of appellant, and therefore does not require a charge on mistake of fact.

Finally, even if a charge on mistake of fact should have been given, the Court found no reversible error because the court fully and adequately charged the jury regarding perjury and filing a false document and that each required knowing and willful action. Thus, the jury was instructed on appellant's defense that he did not know there were errors in the Petition or that he did not willfully file the Petition with errors included. Accordingly, appellant's convictions were affirmed.