

THIS WEEK:

- **Ineffective Assistance of Counsel; Prejudice**
- **Statements; Miranda**
- **Rule 404(b); Conspiracy**
- **Impeachment; First Offender**
- **Sentencing; *Coates***
- **Burglary; Mistake of Fact**

Ineffective Assistance of Counsel; Prejudice

Dozier v. Watson, S19A0027 (4/15/19)

The warden appealed after the habeas court granted Watson's petition. The evidence showed that Watson pled guilty to two counts of aggravated battery and to one count of aggravated assault and the State agreed to enter an order of nolle prosequi on the attempted murder count. Watson was sentenced as a recidivist and given twenty years' imprisonment on the first count of aggravated battery and a consecutive ten-year term of probation on the second count. The court merged the aggravated assault count.

Thereafter, Watson filed a petition for writ of habeas corpus alleging ineffective assistance of counsel. Specifically, he alleged that his plea counsel was ineffective for failing timely to advise him that he would be sentenced as a recidivist pursuant to OCGA § 17-10-7 (c) and that he would be ineligible for parole. The habeas court, after an evidentiary hearing, entered a brief, written order finding that counsel's performance was deficient because he "failed to adequately advise [Watson] that he would be sentenced as a recidivist until after his plea was already entered." The habeas court did not evaluate whether counsel's deficient performance prejudiced Watson. Rather, the court concluded that prejudice was "apparent because [Watson] was deprived of constitutionally sufficient performance."

The Warden did not challenge the habeas court's findings concerning plea counsel's deficient performance. Rather, the Warden contended only that the habeas court, by "conflating" deficient performance and prejudice, failed to properly analyze whether Watson was prejudiced by counsel's deficient performance. The Court agreed.

The deficient performance and prejudice prongs of the *Strickland* test are two separate inquiries, and the habeas court was required to determine whether Watson had shown that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Thus, because the habeas court failed to properly analyze the prejudice prong, its order lacked a factually supported legal conclusion essential to its ruling on Watson's ineffective assistance of counsel claim and essential to the Court's appellate review of that ruling. Therefore, the Court vacated the habeas court's judgment and remanded the case to the habeas court with instruction to enter a new order

containing the requisite findings of fact and conclusions of law. In so holding, the Court rejected Watson's argument that the Court simply uphold the grant of habeas corpus relief because it was "the right decision."

Statements; Miranda

Davis v. State, S19A0250 (4/15/19)

Appellant was convicted of murdering his wife and son. He contended that the trial court erred by allowing the lead investigator to testify about a brief delay in his interview of appellant. The evidence showed that at the outset, the investigator read the *Miranda* warnings to appellant, and appellant agreed to submit to an interview and executed a written waiver of his rights. But after signing the waiver, appellant asked the investigator if he needed a lawyer and suggested that he needed someone to advise him. The investigator explained that, if appellant wanted a lawyer, the interview would have to stop. Appellant then said that he wanted to continue with the interview. The investigator nevertheless discontinued the interview for approximately 22 minutes. During that time, the investigator left the interview room and consulted with the office of the district attorney about how to proceed. He then returned to the interview room, read the *Miranda* warnings again, and after appellant confirmed that he wanted to go forward with the interview, proceeded to question appellant.

The investigator made a video recording of the interview, and the prosecution offered the recording as evidence at trial. In connection with its presentation of the recording, the prosecution asked the investigator to explain the 22-minute gap in the recording that coincided with the investigator leaving the interview room to consult with the office of the district attorney. The investigator testified that, in light of appellant's statements about a lawyer, he had stopped to consult with the office of the district attorney "to make sure it was good to go back in and interview [appellant] due to him saying he wanted to talk." Appellant made no contemporaneous objection to this testimony.

Appellant contended that the testimony to explain the 22-minute gap was inadmissible hearsay and unduly prejudicial, inasmuch as it implied that the district attorney thought that his submission to an interview was voluntary. The Court found no plain error.

First, the Court found that the testimony was not hearsay because it was admitted not for the truth of the matter allegedly asserted—that the statement he gave in his interview was voluntary (at least in the eyes of the district attorney)—but rather for the purpose of explaining the gap in the recording. Second, appellant failed to show that the testimony was unduly prejudicial. The testimony was relevant to explain the gap, and the investigator did not reveal exactly what the office of the district attorney said to him. At best, the testimony merely implied that the district attorney had determined that the investigator could proceed with the interview (although perhaps only after the *Miranda* warning was repeated and appellant again agreed to an interview). Moreover, the Court was unconvinced that the testimony tainted the jury's consideration of the voluntariness of the statement. Finally, the Court found, even if appellant could have shown the testimony was inadmissible, he failed to demonstrate that its admission affected the outcome of the proceedings.

Rule 404 (b); Conspiracy

Carpenter v. State, S19A0439 (4/15/19)

Appellant was convicted of murder and possession of a firearm during the commission of a felony in connection with the fatal shooting of Vasquez. The evidence showed that appellant and his co-defendants, Hernandez and Wofford, decided to rob Vasquez during a drug deal to buy marijuana that Hernandez set up. When Vasquez arrived at the meeting place, appellant and Hernandez got into the backseat of the car, where Carpenter sat behind Vasquez's girlfriend, and Hernandez sat behind Vasquez. Wofford did not enter the car, but he stood nearby. The girlfriend saw Carpenter pull out a Raven .25-caliber handgun, and fire two shots, killing Vasquez. The three then fled.

Appellant argued that the trial court erred when it limited his cross-examination of Hernandez. In particular, appellant wanted to elicit testimony that, a few months before Vasquez was killed, Hernandez had threatened a man who caught Hernandez breaking into his property. The man tackled Hernandez, and after Hernandez was arrested, Hernandez told a detective that he was going to kill the man who tackled him and caused him to be arrested. According to appellant, this "other acts" evidence was admissible under OCGA § 24-4-404 (b) to show that Hernandez had a motive to kill Vasquez. The trial court, however, refused to allow appellant to elicit this evidence on cross-examination.

The Court found that evidence that Hernandez threatened to kill a man certainly would tend to show that Hernandez has a general propensity to threaten others with violence, but that is not a permissible purpose for evidence offered under OCGA § 24-4-404 (b). Extrinsic evidence is admissible to show motive only when it is logically relevant and necessary to prove something other than a propensity to commit the crime charged. Appellant argued that the evidence showed that Hernandez had not only a general propensity to threaten violence, but also a more particularized desire to seek violent retribution against someone who has caused him trouble. But, the Court stated, a major problem with this argument was the absence of any evidence that Vasquez was killed as retribution for anything. Indeed, appellant argued at trial not that Vasquez was killed by Hernandez as retribution for causing Hernandez trouble, but rather, that Vasquez was killed by someone who was motivated to kill "for no reason." Evidence that Hernandez had a desire to seek violent retribution against another person on another occasion was not logically relevant and necessary to establish motive under OCGA § 24-4-404 (b), and the trial court did not abuse its discretion when it refused to allow appellant to elicit such evidence on cross-examination.

Appellant also argued that the trial court erred when it charged the jury that "a conspiracy is an agreement between two or more persons to do an unlawful act, and ... [w]hen persons associate themselves in an unlawful enterprise, any act done by any party to the conspiracy to further the unlawful enterprise is considered to be the act of all of the conspirators." Appellant argued that this charge was misleading because the trial court failed to specify that the "unlawful enterprise" at issue was an "unlawful armed robbery." Absent that specification, the jury might have been misled to believe that it could find him guilty of murder simply because he had agreed to participate in an "unlawful enterprise" to purchase marijuana from Vasquez, even if the jury found that it was Hernandez who killed Vasquez, that appellant never agreed to participate in any enterprise other than to purchase marijuana, and that Hernandez shooting Vasquez was beyond the scope of the enterprise to purchase marijuana.

However, the Court found, the instruction was not misleading. First, it is not error to charge on the subject of conspiracy when the evidence tends to show a conspiracy, even if a conspiracy is not alleged in the indictment. Second, when a trial court is authorized to charge the jury on conspiracy as a theory by which the jury could connect the defendant as a party to the crimes in question, the trial court properly may charge the jury in terms of an “unlawful enterprise” without specifying the object of the enterprise.

Finally, the Court found no likelihood that the jury would have been misled by these instructions to believe that it could find appellant guilty of felony murder simply because it believed he was involved in an uncharged enterprise to purchase marijuana. To the contrary, the jury charge as a whole adequately informed the jury that it could find appellant guilty of felony murder only if it found beyond a reasonable doubt that he was a party (as a conspirator or otherwise) to one of the felonies charged in the indictment as a predicate of felony murder. Accordingly, the Court found the charge on conspiracy was not error.

Impeachment; First Offender

Jones v. State, S19A0392 (4/15/19)

Appellant was convicted of malice murder. The evidence showed that appellant and his girlfriend, Moore, were living together at the time of the offense. Moore was at her mother’s house after a funeral for her grandfather. Appellant was not welcome in Moore’s mother’s home, but came over anyway. At some point, Moore and appellant argued. The victim intervened and was shot by appellant.

Appellant argued that the trial court erred by denying him the opportunity to cross-examine Moore regarding her guilty plea to forgery under the First Offender Act. The Court disagreed.

The Court stated that the Confrontation Clause of the Sixth Amendment of the United States Constitution and Article I, Section I, Paragraph XIV of the Georgia Constitution sometimes may require that a defendant be permitted to use a first offender plea for certain purposes, including to show the witness’s bias or motive or to contradict the witness’s testimony. Here, the Court noted, Moore had completed her probation and been discharged without an adjudication of guilt. To the extent that a first offender plea could ever be probative of bias in favor of the State — even post-discharge, the Court found that appellant did not make the requisite showing before the trial court. In arguing before the trial court that he should be able to cross-examine Moore with her first offender plea for the purpose of showing bias, appellant made no proffer explaining a relationship between Moore’s prior discharge and her testimony in his case. Rather, he averred only that the prior case would “show a bias in favor of the State because the first offender has been discharged.” But, the Court held, this was insufficient, and therefore, the trial court did not abuse its discretion in refusing to allow him to use the first offender plea in cross-examination.

Sentencing; Coates

Harrell v. State, A17A1463, A17A1464 (3/26/19)

Appellant was charged with three counts of possession of a firearm by a convicted felon. The evidence showed that when the police responded to a 9-1-1 call reporting a shooting, they found appellant and three different firearms (a pistol, a

shotgun, and a rifle) at the scene. Appellant entered a negotiated plea and the judge sentenced him to five years on each of the three counts of possession of a firearm, with five years to serve in incarceration and the remaining 10 years to be served on probation. Appellant thereafter filed a motion to reduce his sentence arguing that his three separate convictions for possession of a firearm should have been merged for sentencing purposes. The trial court denied that motion, and appellant then filed a motion to correct a void sentence, again asserting that the trial court erred in sentencing him separately on each of the three counts. After the trial court denied that motion, appellant appealed the denial of both his motion to modify his sentence and his motion to vacate his sentence as void.

The Court reversed. In *Coates v. State*, 304 Ga. 329 (2018), the Supreme Court held that OCGA § 16-11-131 (b) permits only one prosecution, conviction, and sentence for the simultaneous possession of multiple firearms. Therefore, the trial court erred in convicting and sentencing appellant for three separate violations of OCGA § 16-11-131 (b) based on his simultaneous possession of a pistol, a shotgun, and a rifle. Accordingly, the Court remanded the case for the trial court to convict and sentence appellant on only one of the three counts.

Burglary; Mistake of Fact

Ogle v. State, A19A0624 (4/9/19)

Appellant was convicted of burglary in the second degree and theft by taking. The evidence (by way of the victim's video surveillance) showed that appellant pulled into the victim's driveway in a red pick-up truck and proceeded to enter the victim's carport. Two minutes later, appellant came out of the carport and entered the passenger side of the truck. The truck proceeded to back up into the carport, and appellant exited the vehicle. Appellant then entered the carport and tossed an air compressor and garden tiller into the bed of the pick-up truck and drove off.

At trial, appellant admitted to the theft by taking charge, but denied committing any other crime. He explained that he works for different nurseries around the country, buying and thinning liriope (edging grass). Appellant testified that he bought some liriope from the victim in 2015. He explained that after he bought the liriope and thinned it out, he knocked on the carport door and asked the victim if he could come back after it grows back and buy again, and the victim said "sure." When appellant went by the victim's home on February 25, 2016, he noticed that the liriope had died and he wanted to fix it by planting new plants. He entered the carport and knocked on the door, but no one came to the door. While he "waited and waited and waited" for someone to respond, he noticed the air compressor and garden tiller next to the garbage can in the carport. He assumed both were trash because they did not work, so he loaded them into his truck. Appellant testified that he "had permission to stop back [at the victim's home] when [he] was in the area." According to the victim, appellant did not ask the victim if he could return after the liriope grew back to buy more and the victim never gave appellant permission to come on his property or go in his carport on February 25, 2016.

Appellant argued that the trial court erred by failing to charge the jury sua sponte on the defense of mistake of fact. He further contended that it was his "primary" defense and that the evidence supported the charge. The Court disagreed.

The Court noted that mistake of fact represents an affirmative defense, under which a person shall not be found guilty of a crime if the act constituting the crime was induced by a misapprehension of fact which, if true, would have justified the act or omission. If the defense was raised by the evidence, including the defendant's own statements, the trial court would

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have been required to present the affirmative defense to the jury as part of the case in its charge, even absent a request. The affirmative defense, however, would not have to be specifically charged if the case as a whole had been fairly presented to the jury. Additionally, a defendant is not entitled to a jury charge on this defense where the evidence shows that his ignorance or mistake of fact was superinduced by the defendant's own fault or negligence.

The Court stated that even assuming, without deciding, that mistake of fact was appellant's sole defense, and that his action in entering the victim's carport on February 25, 2016, was induced by the misapprehension of fact that the victim had given him permission in 2015, that misapprehension would not have justified appellant's action in backing his truck into the carport and entering the carport a *second* time - after confirming on his first entry into the carport that no one was home - and tossing the air compressor and garden tiller into the back of his truck.

Nevertheless, appellant argued, the unauthorized entry element of burglary is independent and not conditioned on the intent to commit a theft element of OCGA § 16-7-1 (c). He further contended that because of the nature of the previous transaction, he was not negligent in believing he had permission to enter the carport. However, the Court found, the video footage presented at trial showed that appellant chose to enter the carport twice, the second time after ascertaining during his first entry that no one was home. Having been made aware that no one was home to discuss the liriopie during that first entry, appellant nevertheless climbed back into his truck, backed it into the carport, exited the truck, and then re-entered the carport a second time. These circumstances did not support a finding that appellant acted under a reasonable and honest mistake of fact. Accordingly, the trial court did not err in failing to sua sponte charge the jury on mistake of fact.