

THIS WEEK:

- **Rule 404 (b); Delusional Compulsion**
- **Alternate Jurors; Failure to Object**
- **Right of Self-representation; Faretta Hearings**
- **Jury Charges; Defense of Habitation**
- **Right of Confrontation; Merger**
- **Closing Arguments; Time Limitations**
- **Habeas Corpus; Ineffective Assistance of Appellate Counsel**

Rule 404 (b); Delusional Compulsion

Castillo-Velasquez v. State, S19A0323 (4/15/19)

Appellant was convicted of malice murder and possession of a firearm during the commission of a crime stemming from the shooting death of Acosta. The evidence, briefly stated, showed that Acosta and his daughter attended a soccer match. After the game was over, they were walking away when appellant came running toward them, said “hola, amigo,” and began shooting, continuing even after Acosta fell to the ground. Another witness said appellant was hiding behind a barrel, then jumped out and stated “remember me?” and then shot Acosta. Appellant testified that years ago, in El Salvador, Acosta and Acosta’s father killed appellant’s father with machetes while appellant watched. Appellant testified that Acosta pulled a gun first and appellant shot Acosta in self-defense. Appellant also testified that he suffered from mental illness. The trial court charged on both self-defense and delusional compulsion.

Appellant contended that the trial court abused its discretion in admitting evidence of crimes he committed in New York. The record showed that pursuant to Rule 404 (b), the State introduced evidence that appellant had previously been arrested for shooting at three men in New York. Specifically, the police officer who responded to that incident testified that in November 2004, appellant approached an apartment building in New York and shot at three men until his handgun ran out of bullets. After being arrested and advised of his rights under *Miranda*, appellant signed a written statement saying that the three men had beaten him with a baseball bat four years earlier.

The Court stated that a defendant puts intent at issue when he pleads not guilty and does not affirmatively take steps to remove intent from being at issue. Here, appellant not only put his intent at issue by pleading not guilty, he affirmatively put it at issue with his defense that he acted from delusions that overpowered his will and negated his criminal intent. The State’s theory, on the other hand, was that appellant acted not from delusions, but with the intent to commit the crimes in question to “right” the perceived wrongs committed against his family by Acosta and Acosta’s father.

The Court also stated that where the intent required for the charged offenses and other acts is the same, and intent is at issue, the first prong of the Rule 404 (b) test is satisfied, regardless of whether the charged offense is one requiring general

or specific intent. And here, among other crimes, appellant was charged with aggravated assault with a deadly weapon, a general-intent crime, and felony murder based on that same crime. The other-act crime in New York involved an assault with a deadly weapon—the same type of general-intent crime as the aggravated assault charged here. Accordingly, the first prong of the Rule 404 (b) test was satisfied.

As to the second part of the Rule 404 (b) analysis, the Court stated that it must weigh the probative value of evidence determined to be relevant against its danger of unfair prejudice. Appellant argued that the State's need for the other-act evidence was minimal, that there were few similarities between the charged crimes and the New York crime, and that a substantial amount of time elapsed between the 2004 crime and Acosta's murder in 2013. But, the Court found, appellant squarely placed his intent at issue by claiming at trial that his delusions completely negated his criminal intent. To rebut that claim, the State needed evidence that appellant acted with the intent to commit the crimes. As a result, the State had a significant need for the other-act evidence. Moreover, the charged crimes and the past crime bear significant similarities: in both cases, appellant used a handgun to assault people that he perceived had committed an offense against him or a family member many years before. As for temporal proximity, although almost nine years passed between the 2004 crime and Acosta's murder in 2013, the prior acts were not so remote as to be lacking in evidentiary value. This was especially true because the time between crimes must be viewed in light of relevant circumstances: in 2006, appellant was sentenced to eight years in prison in New York, was released in 2011, and was then deported to El Salvador, where he lived before moving to Gainesville in late 2012. To have evidentiary value, the prior crime need not be very recent, especially where a substantial portion of the gap in time occurred while the defendant was incarcerated.

In sum, the Court concluded, because appellant strongly contested the issue of intent, because the State needed evidence of the New York crime to counter that defense, and because the trial court mitigated the prejudicial impact of the other-act evidence by giving the jury specific instructions about the limited purpose of the evidence, the trial court did not abuse its discretion in concluding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to appellant.

Alternate Jurors; Failure to Object

Coley v. State, S19A0457 (4/15/19)

Appellant was convicted of malice murder. He contended that the trial court erred by allowing the alternate juror into the jury room during jury deliberations and that a new trial was therefore required. The Court disagreed.

Under Georgia law, “[u]pon final submission of the case to the jury, the alternate jurors shall not retire with the jury of 12 for deliberation but may be discharged.” OCGA § 15-12-171. If the trial court deems it advisable to keep one or more of the alternate jurors available, however, “it may direct that one or more of the alternate jurors be kept in the custody of the sheriff or one or more court officers, separate and apart from the regular jurors, until the jury has agreed upon a verdict.” *Id.* And although there is a rebuttable presumption of harm to the defendant if an alternate juror sits in on the jury's deliberations over the defendant's objections, any error is waived if the defendant agreed to the alternate juror's presence during deliberations.

Here, the Court found, after the court instructed the jury and sent it into the jury room to begin deliberations, the court informed the parties that it was “thinking about sending the alternate in with them with instructions not to participate in any discussion.” Defense counsel voiced some apprehension about the prospect and said, “I don't know,” to which the court replied, “I don't have any feelings one way or the other.” Defense counsel then conferred with appellant and afterward informed the court, “I've explained this to my client as best I could and he doesn't have any problem with [the alternate juror] sitting in there.” The court stated, “I'm not going to do it over objections,” and defense counsel replied, “No. He doesn't and I don't think I'll have an objection to that either.”

Thus, the Court held, because appellant ultimately agreed, without objection, to the alternate juror's presence in the jury room during deliberations, any error concerning a violation of OCGA § 15-12-171 was waived, and this enumeration therefore failed. Nevertheless, the Court stated, “we should be clear ... that the trial court's action was inappropriate, and we do not approve of permitting alternate jurors to be present during deliberations.”

Right of Self-representation; *Faretta* Hearings

Oliver v. State, S19A0019 (4/29/19)

Appellant was convicted of malice murder and other offenses. He argued that the trial court erred by failing to hold a *Faretta* hearing after he invoked his right to self-representation. The Court disagreed.

The Court noted that the right of a criminal defendant to self-representation is guaranteed by both the federal and state constitutions. To avail himself of this right, a defendant must clearly and unequivocally assert his desire to represent himself. If an unequivocal invocation is made, it must be followed by a hearing to ensure that the defendant knowingly and intelligently waives the traditional benefits associated with the right to counsel and understands the disadvantages of self-representation so that the record will establish that he knows what he is doing and his choice is made with eyes open. The improper denial of the right to self-representation is a structural error not subject to a harmlessness analysis, and requires automatic reversal.

The Court found that the only evidence appellant offered as proof of his invocation was a pro se petition he filed while represented by counsel titled “Petition To: Dismiss and Reappoint Indigent Council.” The petition expressed dissatisfaction with counsel and stated that “... In light of my current petition please accept my request to act upon my own behalf (Pro-Se) until this matter is heard and resolved in your court. I hereby petition the court for new appointment of counsel.” But, the Court found, both the title and the content of this petition reflected a request for the appointment of new counsel; it was not an unequivocal invocation of the right of self-representation for trial. Moreover, appellant went to trial with counsel without any objection or even mention of it to the trial court and complained only after trial. Acquiescence to the substantial participation by counsel at trial obliterates any claim that such participation in question deprived appellant of control over his own defense. Accordingly, the Court concluded, because appellant never unequivocally asserted his right to self-representation, the trial court was not required to hold a *Faretta* hearing.

Jury Charges; Defense of Habitation

State v. Newman, S19A0374 (4/29/19)

Newman was convicted of two counts of felony murder and aggravated assault, three counts of possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon in connection with the shooting death of Jason Wood and for shooting at Candace Shadowens. The evidence, briefly stated, showed that Newman was Wood's supervisor at work. Newman fired Woods earlier in the day. Later that day, Newman picked up a handgun and then he and the owner of the business went to Wood's home to retrieve a company van that Wood drove for work. Newman spoke with Wood outside the house, and, at some point, Newman pulled out his gun. When Shadowens came outside, Wood told her to call 911 because Newman had pulled a gun on him. As Shadowens started to dial 911, Newman said, referring to Shadowens, "I'll kill that b**ch." Shadowens replied, "If you're going to shoot somebody, just shoot somebody, you fat b**ch." Newman then shot Wood in the chest as Wood attempted to push Shadowens out of the way.

The trial court charged the jury on the defenses of self-defense and accident, but did not charge the jury on the use of force in defense of habitation, and no such charge was requested at trial. Thereafter, the trial court granted Newman's motion for a new trial, finding that (a) a jury charge on the use of force in defense of habitation should have been given at Newman's trial, and (b) trial counsel was ineffective for having failed to request such a charge. The State appealed.

The Court noted that because Newman failed to object to the trial court's failure to charge on defense of habitation, its review was limited to whether the trial court correctly concluded that the failure to give a charge on defense of habitation constituted plain error such that Newman was entitled to a new trial. The Court found no plain error.

Here, Newman contended that, despite his insistence that he only shot Wood by accident, he was entitled to a charge on defense of habitation based on the evidence presented at trial indicating that Wood was violently entering the company van and possibly attempting to steal money from inside the van at the time that Wood was shot. But, the Court stated, even assuming (without deciding) that Newman presented the "slight evidence" necessary to support the giving of a charge on defense of habitation, and that the failure to give such a charge constituted a clear or obvious error, this still would not automatically show that the failure to give the charge affected the outcome of the trial court proceedings for purposes of showing plain error.

The Court found that the record did not support a finding of harm to Newman that would have warranted the granting of a new trial. Specifically, the record showed that Newman deliberately brought a gun with him to Wood's house to retrieve the company van; that Shadowens could be heard in a surveillance video confronting Newman about his apparent desire to shoot someone by telling him that "[i]f [he was] going to shoot somebody, just shoot somebody;" that a gunshot could be heard on the surveillance video just after Shadowens's statement to Newman; that all of the forensic evidence presented at trial ran contrary to Newman's claim that the shooting took place inside the van; and, most importantly, that Newman gave several shifting and inconsistent stories about how the shooting took place — none of which suggested that he intentionally shot Wood, including his trial testimony in which he told the jury that the shooting was accidental. Although the jury was not specifically instructed on defense of habitation, the jury was, in fact, instructed on self-defense as well as accident, and the jury rejected all of Newman's conflicting stories and those defenses. Thus, the Court concluded, in light of the compelling evidence of Newman's guilt, the alleged error here did not likely affect the outcome of the trial

court proceedings. Accordingly, there was no plain error based on the trial court's failure to instruct the jury on defense of habitation.

And, the Court found, because no harm resulted from the trial court's failure to give a charge on defense of habitation, trial counsel could not have been ineffective for failing to request such a charge. Therefore, the trial court erred in granting Newman's motion for a new trial. However, because the trial court also failed to address Newman's remaining claims in his motion for new trial, the Court remanded the case to the trial court for the resolution of those claims.

Right of Confrontation; Merger

Outler v. State, S19A0158 (4/29/19)

Appellant was convicted of murder, aggravated assault, armed robbery, and three counts of possession of a firearm during the commission of a felony. The evidence showed that the victim was shot and beaten. Appellant argued that his rights under the Confrontation Clause were violated when the prosecuting attorney continued questioning a witness about a statement that a witness had given to an investigator even after the witness invoked his privilege against self-incrimination under the Fifth Amendment. Appellant contended that this continued questioning essentially allowed the prosecuting attorney to testify for the witness about matters on which he could not be cross-examined.

However, the Court found, the prosecuting attorney did not ask leading questions of the witness that allowed the State effectively to present the content of the witness's prior statement. The witness first invoked his privilege against self-incrimination when the prosecuting attorney asked him if he had lied when he told the investigator that he had seen appellant with the victim on the morning of the last day the victim was seen alive. But by that point, the witness had already testified that he had made the statement in question to the investigator, and he also had already testified that (notwithstanding his statement) he had not, in fact, seen the two men that morning. The substance of his testimony on these points was not revealed for the first time by the question that immediately preceded his invocation of the privilege. And the only other questions about the statement that the witness subsequently refused to answer were whether he had told the investigator if he saw who killed the victim and whether he told the investigator anything else. Neither of those were leading questions with "obvious inferences" that allowed the State to present the content of the witness's statement to the investigator. As a result appellant's rights under the Confrontation Clause were not violated.

The Court also found that although the jury was authorized by the evidence to find appellant guilty of an aggravated assault upon the victim with a firearm, the trial court erred when it failed to merge this aggravated assault with the murder. Merger generally is required when there is no deliberate interval between the non-fatal injury that forms the basis for aggravated assault (here, the shooting) and the fatal injury that forms the basis for the murder (here, the beating). Here, there was no evidence at all of a deliberate interval between the shooting and the beating. Accordingly, the conviction and sentence for aggravated assault with a firearm must be vacated.

The Court further concluded that the trial court erred when it convicted and sentenced appellant on three counts of possession of a firearm during the commission of a felony. The indictment charged appellant with unlawfully possessing a firearm during the commission of the murder, armed robbery, and aggravated assault. But where multiple crimes are

committed together during the course of one continuous crime spree, a defendant may be convicted once for possession of a firearm during the commission of a crime as to every individual victim of the crime spree, as provided under OCGA § 16-11-106 (b) (1), and additionally once for firearm possession for every crime enumerated in subsections (b) (2) through (5). Here, the murder, armed robbery, and aggravated assault were all part of one continuous crime spree involving a single victim, and appellant was not convicted of any crimes enumerated in subsections (b) (2)-(5) of OCGA § 16-11-106. As a result, OCGA § 16-11-106 (b) authorizes only one conviction and sentence for possession of a firearm during the commission of a felony in this case, and therefore, the Court vacated appellant's convictions and sentences for the unlawful possession of a firearm during the commission of armed robbery and aggravated assault.

Closing Arguments; Time Limitations

Lay v. State, S19A0361 (4/29/19)

Appellant was convicted of two counts of felony murder and a firearm offense. He contended that his trial counsel was not given the proper amount of time for his closing argument. The record showed that the day before closing arguments began, the trial court told the jury that the attorneys anticipated that their arguments would be about an hour each. The next day, the following exchange occurred in front of the jury: "COURT: I told you last night that the law gives each side an hour for closing arguments in this case. That's right isn't it? PROSECUTOR: Yes, your honor. COURT: Sometimes I worry it's two hours."

Appellant's counsel did not object to the trial court's stated plan to give each side an hour for closing argument. During the defense closing, presumably as appellant's hour was coming to an end, the trial court interrupted counsel, telling him that he had ten minutes left. Counsel then spoke for a short time before ending his argument. He did not request more time.

The Court noted that OCGA § 17-8-73 provides that "[i]n cases involving capital felonies, counsel shall be limited [in their closing arguments] to two hours for each side." This two-hour limit applies to malice murder and felony murder cases like appellant's case regardless of whether the prosecution seeks the death penalty, and the trial court has no discretion to impose any further limit on the time for closing argument. Therefore, the Court found, the trial court erred by limiting appellant's closing argument to one hour. However, appellant's counsel did not object either when the trial court announced that it would give him one hour or when the court told him that his time for argument was running out. Accordingly, the Court concluded, appellant forfeited his right to raise this issue on appeal.

Habeas Corpus; Ineffective Assistance of Appellate Counsel

Luckie v. Berry, S19A0100 (4/29/19)

Appellant was convicted in 2005 of unlawfully possessing heroin with intent to distribute and abandoning a controlled substance in a public place. The trial court denied his motion to preclude the State from asking defense witness Gerald Hurst about Hurst's pending charge of unlawfully possessing heroin with intent to distribute. The evidence would have shown that Hurst and appellant were arrested together for possession of heroin less than a month before the offense for

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which appellant was on trial. Appellant's trial counsel argued that the evidence would place appellant's character in issue. The prosecutor agreed that he would not ask about appellant, but only that Hurst had an open case for possession of heroin.

Appellant had new counsel on appeal, who argued that the trial court abused its discretion in allowing the cross-examination, because the prosecutor's questioning of Hurst about his heroin charge did not show any relationship between Hurst and appellant that might provide a motive for Hurst to shade his testimony in appellant's favor. The Court of Appeals affirmed, holding that appellant failed to preserve this argument for appellate review by not objecting on this ground at trial. *Luckie v. State*, 310 Ga. App. 859 (2011).

Appellant later filed a habeas petition, alleging that his appellate counsel was constitutionally ineffective in failing to claim on appeal that his trial counsel were constitutionally ineffective in not objecting on this ground at trial. The habeas court denied the petition and the Court granted appellant an appeal.

The Court stated that to prevail on an ineffective assistance of appellate counsel claim based on the quality of the representation, a habeas petitioner must show both deficient performance by appellate counsel and resulting prejudice. Thus, a habeas petitioner must show that his appellate counsel was professionally deficient in failing to raise a particular issue on appeal and that, but for appellate counsel's error, there is a reasonable probability that the outcome of the appeal would have been more favorable. When a habeas petitioner claims that appellate counsel was professionally deficient in not raising ineffective assistance of trial counsel, to establish prejudice, the petitioner must demonstrate that the underlying ineffectiveness-of-trial-counsel claim would have had a reasonable probability of success. In other words, to establish the prejudice required to prevail on this type of ineffective assistance of appellate counsel claim, a habeas petitioner must show that his trial counsel's performance was professionally deficient and that the deficiency resulted in prejudice to his case. And here, the Court found, appellant failed to carry his burden.

The record of appellant's trial showed that Hurst's heroin charge stemmed from his arrest with appellant less than a month before trial. This fact was discussed at appellant's trial, albeit only outside the jury's presence. Thus, if appellant's trial counsel had objected that Hurst's heroin charge, standing alone, was not probative of any relationship between Hurst and appellant, the State likely would have responded by seeking leave to present evidence that Hurst and appellant were together in the incident that resulted in Hurst's heroin charge, which would have been far more damaging to appellant's defense. Moreover, the Court found, the trial court likely would have given the State leave to present such evidence. Appellant also failed to show that his trial counsel's decision not to take that risk was objectively unreasonable, and that, but for his trial counsel's decision not to object on this ground, there was a reasonable probability that the outcome of the trial would have been more favorable. Consequently, the Court concluded, appellant failed to show the prejudice necessary to prevail on this claim of ineffective assistance of appellate counsel. Accordingly, the Court affirmed the habeas court's judgment denying relief.