Prosecuting Attorneys' Council of Georgia
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Prosecutorial Misconduct; Comments on Post-arrest Silence

State v. Spratlin, S18A1158 (3/11/19)

Spratlin was convicted of malice murder and a firearms offense. The evidence, very briefly stated, showed that Spratlin arranged for a drug purchase at the home of Gilliam. When the two could not agree on a purchase price, Spratlin called his co-defendant, Blackmon, to the house and Gilliam brought over his neighbor, Cobb. After the purchase was made, the four men headed for the door. However, Blackmon pulled out a gun and attempted to rob Gilliam and Cobb. He wounded Gilliam and killed Cobb. However, there were bullet casing from two weapons found later in the house. Spratlin ran out of the house, screaming that he was being robbed. Sixteen days later, he and Blackmon were found together in Alabama and arrested. At trial, Spratlin admitted setting up the drug deal, but argued he was surprised by Blackmon's spontaneous attempt of robbery.

The trial court granted Spratlin a new trial on the ground that his trial counsel provided ineffective assistance by failing to seek the exclusion of testimony and comments about his post-arrest silence. The State appealed.

The transcript showed that a detective from the Birmingham Police Department ("the Alabama detective") testified that he located and arrested Spratlin in Alabama. The prosecutor then asked the Alabama detective, "Did you ask [Spratlin] if he wanted to make a statement?" to which he answered no. The prosecutor then followed up with "Did he make a statement? Did he tell you anything?" The Alabama detective again answered no.

The State contended that Spratlin's trial counsel was not deficient in failing to object to comments on Spratlin's silence based on the evidentiary rule announced in *Mallory*. However, the Court stated, the *Mallory* Court announced an evidentiary rule that prohibits Georgia prosecutors from eliciting testimony or otherwise commenting about a defendant's *pre-arrest* silence for impeachment or otherwise. In other words, *Mallory*'s state evidentiary rule was crafted for prosecutorial comments on silence that are not already prohibited by the federal Constitution — that is, silence before the defendant receives *Miranda* warnings or is interrogated while in custody, after which point the United State Supreme Court's decisions in *Miranda* and *Doyle* prohibit comment on his silence. Thus, the Court stated, it must properly consider the testimony and comments about Spratlin's post-arrest silence through the lens of the federal Constitution rather than *Mallory*. And, in this regard, the Court found that there appears to be no controlling precedent from the United States

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Supreme Court or a Georgia appellate court on whether this precise type of testimony is constitutionally prohibited — post-arrest, pre-*Miranda*-warnings, without interrogation or an affirmative invocation of the right to silence, and offered in the State's case rather than only for impeachment. Moreover, the federal circuit courts appear to be split on the issue. Therefore, the Court concluded, because the law on this point is not settled, Spratlin's trial counsel cannot be deemed deficient for not objecting to the Alabama detective's testimony and consequently, the trial court erred.

The trial court also found deficient performance in failing to object to testimony from the detective from Georgia that went to pick up the two fugitives in Alabama. The prosecutor elicited from the Georgia detective that when he got there, he interviewed Spratlin and Blackmon. When the prosecutor asked, "[W]hat, if anything, did either of them tell you?" the Georgia detective replied, "[Spratlin] refused to make a statement. When I interviewed [Blackmon], I noticed that he seemed to be under the influence of something. So I did not continue with the interview, knowing that he was going to be coming back to DeKalb County."

The Court agreed that the Georgia detective's testimony was clearly objectionable because he was attempting to interrogate Spratlin in a custodial setting and Spratlin invoked his Fifth Amendment right to remain silent by "refus[ing] to make a statement." But, the Georgia detective made only a brief reference to Spratlin's post-arrest silence before explaining at greater length how he had to stop Blackmon's interview because Blackmon appeared intoxicated. Thus, the Court found, an objection may have called the jury's attention to the passing mention of Spratlin's silence, while also leading to the exclusion of testimony showing Blackmon — on whom Spratlin was trying to cast full blame for the crimes — in a poor light. Whether the potential upside of arguably objectionable testimony exceeds its downside is a question of trial strategy, and thus, Spratlin failed to show that his lawyer's strategy was patently unreasonable. Accordingly, the trial court also erred to the extent it found Spratlin's trial counsel deficient in this respect.

Next, the trial court found that defense counsel was deficient regarding the prosecutor's closing argument. Although the arguments were not taken down, the trial court found that the prosecutor should not have referred to Spratlin's "not making a statement to the police" and should not have said "anything about the defendant remaining silent." Defense counsel made a motion for mistrial, but only after the closing arguments.

The Court found that defense counsel performed deficiently with respect to the prosecutor's comments during closing arguments. By that stage of the trial, it was clear that the prosecutor wanted to refer to Spratlin's pretrial silence as being indicative of his guilt, and the record showed that trial counsel was concerned by that point about such improper comments. Spratlin's counsel could have sought to prevent reference to the Georgia detective's testimony by raising the issue with the court outside of the presence of the jury before closing arguments began; at a minimum, counsel performed deficiently by not objecting immediately when the prosecutor referred in her rebuttal argument to Spratlin's not making a statement to the police — a comment that trial counsel acknowledged at the motion for new trial hearing related directly to the Georgia detective's testimony. Trial counsel's mistrial motion made after the arguments concluded (and after a lunch break) was untimely, even if the trial court considered it on the merits.

Thus, the Court turned to whether this deficient performance prejudiced Spratlin. The Court found that while the prosecutor improperly suggested to the jury that Spratlin had an obligation to tell his story to the police when the Georgia detective interviewed him, the impact of that argument was mitigated in two significant ways. First, the prosecutor's comments were somewhat cumulative of other testimony; and second, the trial court gave the jury a strong curative

instruction, explaining that "a defendant is not required to make any statement to the police" and cautioning the jury that "if a defendant elects not to make any statement to the police, no inference hurtful, harmful, or adverse to the defendant shall be drawn by the jury, nor shall such fact be held against a defendant in any way. Moreover, the Court noted, although the evidence against Spratlin was not as strong as in other cases in which it has held similar comments on post-arrest silence were harmless or not prejudicial, the evidence of Spratlin's guilt was not weak either. Therefore, the Court concluded that there was not a reasonable probability that, but for the limited deficient performance by Spratlin's trial counsel, the jury at his trial would have reached a different result. Accordingly, the Court reversed the trial court's order granting Spratlin a new trial.

Ineffective Assistance of Counsel; Trial Strategies

State v. Tedder, S18A1137 (3/11/19)

Tedder was convicted of murder and other crimes in connection with the shooting death of Glass. The evidence, very briefly stated, showed that Glass had a girlfriend named Tabb. Tabb, Glass and Tedder picked up Eggleston. Tabb was driving, Glass was in the front passenger seat, Tedder was in the rear passenger seat behind Glass and Eggleston was in the rear seat behind Tabb. There was a large laundry basket sitting between Eggleston and Tedder.

Eggleston and Glass were friends and members of the "Yung Fame," a quasi-gang/rap group. Eggleston testified that Tedder was not a member, but was armed that particular day. The four of them were following other cars of Yung Fame members. They were looking for a rival gang in order to seek revenge for an earlier shooting. At some point, Glass started shooting out the window. Eggleston stood and was shooting out of the sunroof. Neither Tabb nor Eggleston could see what Tabb was doing because of the laundry basket. Glass was shot in the back of the head.

Based on the totality of the evidence presented at trial, the State argued that Tedder, sitting behind Glass, was the only person who could have fired the shot that killed Glass. Defense counsel argued that Tedder was merely present in the vehicle, that he did not participate in planning or executing the shootout, and that he was not armed. Tedder's counsel also attacked Eggleston's credibility, calling him a "liar" and pointing out the inconsistencies in Eggleston's testimony about Tedder having a gun. Tedder's counsel further argued, consistent with testimony from the State's forensic pathologist on cross-examination, that Eggleston could have fired the fatal shot.

The trial court granted Tedder's motion for new trial based on ineffective assistance of counsel. At the hearing, defense counsel, despite knowing the State's liability theories and that the State intended to call at least two expert witnesses in its case-in-chief, testified that he "did not think about" hiring a crime scene expert or presenting the same as a witness at trial. The trial court determined that trial counsel's performance was deficient because of counsel's failure "to obtain and present critical expert testimony that would have rebutted the State's entire theory of the case and evidence that [Tedder] was the only person that could have shot [Glass]." The State appealed.

The Court stated that when considering whether trial counsel performed deficiently, although the thinking of the lawyer may be relevant to its inquiry, the Court's inquiry properly is focused on what the lawyer did or did not do, not what he thought or did not think. In other words, it is the *conduct* of the lawyer, not his *thinking* that is assessed for reasonableness, even though the thinking of the lawyer may inform the reasonableness of his conduct. Thus, the Court stated, even if the

failure of Tedder's trial counsel to call a crime scene expert was the result of inattention, counsel's decision to pursue the theory that Eggleston was the shooter was not so unreasonable that no competent attorney would have pursued that strategy. Trial counsel could reasonably have made that decision even if he had known at the time of trial that expert testimony was available pointing to the fatal shot coming from outside Tabb's vehicle.

And here, the Court found, the record reflected that Tedder's trial counsel pursued a theory of defense that Tedder did not have a weapon and, concomitantly, that Eggleston fired the fatal shot. But, Tedder contended, his trial counsel should have presented the testimony of a crime scene expert who would testify that the fatal shot could not have originated inside the vehicle. The Court found that at its core, this argument challenged the reasonableness of his trial counsel's theory of defense. Given the paucity of physical evidence and testimony concerning an extra-vehicular shooter, Eggleston's admission that he fired his weapon, the weakness of the ballistics expert's testimony, and the medical examiner's testimony that Glass's wound was consistent with the bullet originating from Eggleston's weapon, the Court could not say that this trial strategy was objectively unreasonable.

Moreover, the fact that Tedder's trial counsel failed to articulate any strategic reasons for his failure to present expert testimony makes no difference because the inquiry is focused on the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Here, it was sufficient that trial counsel pursued a viable and reasonable defense theory that was supported by the evidence. Indeed, the theory that trial counsel pursued could have led the jury to believe Eggleston's testimony about Tedder not being associated with Yung Fame and its plans to retaliate for the shooting of one of its members — testimony important to Tedder not being convicted as a party to the crimes, whatever the source of the gunfire — while also believing that Eggleston would lie about Tedder being armed so Tedder would be blamed for shooting Glass, rather than Eggleston admitting that he inadvertently shot his fellow gang member while clambering up through and down from the sunroof of Tabb's vehicle. The fact that the chosen strategy failed while another reasonable strategy remained unemployed does not render trial counsel deficient. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight. As such, the Court concluded Tedder failed to demonstrate, in accordance with *Strickland*, that his trial counsel performed deficiently in failing to present the testimony of a crime scene expert. Accordingly, the Court reversed and remanded for the trial court to consider Tedder's other claims in his motion for new trial.

Sufficiency of the Evidence; Arguments Defining Reasonable Doubt

Debelbot v. State, S18A1073 (3/13/19)

Appellants were convicted of the malice murder of their infant daughter, McKenzy. The evidence showed that McKenzy was born on May 29 and appellants took the baby home from the hospital on May 31. There were no signs that the baby was unhealthy or in distress. Thirteen hours later, appellants returned with McKenzy to the hospital after noticing a bump on her head. McKenzy died a few hours later.

Appellants contended that the evidence was insufficient to support their convictions because the State failed to present direct evidence that either one of them inflicted or helped the other inflict the alleged injuries to McKenzy. The Court disagreed. Even if a person is not directly responsible for the crime, he or she may be convicted as a party to the crime if he or she intentionally aids or abets the commission of the crime, or intentionally advises, encourages, hires, counsels, or

procures another to commit the crime. Whether a person is a party to a crime may be inferred from that person's presence, companionship, and conduct before, during, and after the crime, and where the crimes involve relatives with close relationships, slight circumstances can support the inference that the parties colluded.

And here, the Court found, the evidence, although entirely circumstantial as to who committed the crimes, was legally sufficient to support the malice murder convictions. The evidence showed that McKenzy was healthy when she left the hospital following her birth. The State's expert testified that the injuries to McKenzy were non-accidental, were caused by blunt force trauma, and could not have occurred during birth or the infant's initial stay at the hospital following her birth. This unequivocal expert testimony that McKenzy had been murdered went essentially unrebutted; the only meaningful point brought out on cross-examination was that the expert did not know who committed the homicide. And between the initial hospital stay and her return to the hospital in distress, McKenzy was in the sole care of appellants — a married couple who insisted that neither of them did anything to harm McKenzy. Thus, the Court concluded, "[a]lthough a close question,… this evidence was sufficient to allow the jury to find both [appellants] guilty of malice murder under the standard of *Jackson v. Virginia* [cite]."

Appellants contended that their respective defense counsel rendered ineffective assistance when neither objected when the prosecutor made the following statements in closing argument: "The Judge will charge you on reasonable doubt. Just keep in mind, and he will charge you, reasonable doubt does not mean beyond all doubt. It does not mean to a mathematical certainty. Which means we don't have to prove that ninety percent. You don't have to be ninety percent sure. You don't have to be eighty percent sure. You **don't have to be fifty-one percent sure**. It does not mean to a mathematical certainty. And it does not mean beyond a shadow of a doubt. That's just something the TV made up. It's actually beyond a reasonable doubt. And that would be a doubt to which you can attach a reason. And I submit to you there is no reasonable doubt in this case." (Emphasis added.).

The Court stated that the State's closing argument during trial that flatly stated that proof beyond a reasonable doubt in this murder case does not require the jury to be even 51% sure— in other words, requires less than even the preponderance of the evidence required to meet the burden of proof in a civil case, was "obviously wrong." Moreover, the Court added, in a case like this one, where there was no direct evidence to prove that either appellant, both of them, or neither of them killed McKenzy, could turn on reasonable doubt, and the verdict could be affected by an argument that 50-50 proof is good enough. Also, the trial court's jury instruction on reasonable doubt — which in many cases may cure previous misstatements on the subject — did not cure the State's obviously wrong argument here. The State's point was to define reasonable doubt as not requiring the State to prove its case to "a mathematical certainty" — a phrase the State repeated twice. Of course, that is a phrase that occurs in the pattern instruction as well, and so when the trial court gave that instruction, it may well have been understood by the jury not as correcting the State's error, but as reinforcing it. Thus, the Court stated, "We cannot conceive of any good reason that a competent criminal defense attorney could have to fail to object to such an egregious misstatement of the law."

But, the Court stated, whether that deficiency supports reversal, depends on weighing prejudice from all deficiencies. However, the Court did not address the prejudice prong of *Strickland*. Here, the Court also spend considerable "ink" addressing another "deeply troubl[ing]" ineffective assistance of counsel claim regarding the failure of trial counsel to present any expert evidence establishing an alternative explanation for McKenzy's injury and the trial court's analysis of

that claim. The Court found that the trial court's order prevented meaningful review of the issue. Thus, it remanded for further proceedings to address the deficiencies in the order regarding the "alternative explanation" claim.

Jury Charges; Alternate Offenses

Walker v. State, A18A2084 (3/6/19)

Appellant was convicted of three counts of aggravated sodomy, two counts of aggravated sexual battery, two counts of aggravated assault, three counts of false imprisonment, two counts of impersonating an officer, one count of possession of a firearm during the commission of a crime, and one count of kidnapping. The evidence showed that appellant, posing as a police officer, forcibly sodomized three young men. Appellant's sole defense at trial was that the sexual acts were consensual and that the victims were male prostitutes.

Appellant argued that his testimony would have supported charges such as pandering, pandering by force, theft of services, and theft by deception, and even though he was not charged by the State with any of these crimes, the trial court erred by failing to instruct the jury accordingly. The Court disagreed. Trial courts should tailor their charges to match the allegations of indictments. Criminal indictments are not deemed amendable to conform to the evidence. Consequently, a trial court does not have the power to interpret the evidence so as to support a jury charge on a separate, unindicted, alternative offense. Therefore, the Court held, the trial court committed no error in failing to give unrequested charges on unindicted alternate offenses.

Ineffective Assistance of Counsel; Third Party Perpetrators

Tripp v. State, A18A1782 (3/6/19)

Appellant was convicted of aggravated child molestation, sexual battery, aggravated sexual battery, and two counts of child molestation of his 12-year-old daughter, B. T. He argued that he received ineffective assistance of counsel when trial counsel "fumbled" his attempt to present third-party perpetrator evidence. The Court disagreed.

At the time of trial, appellant's counsel notified the trial court that he could present two or three witnesses that, within the last year, "B. T. was seen in bed with her stepmother's brother, who had entered a first-offender guilty plea to statutory rape of someone other than B. T." Upon the State's motion to exclude this evidence, the trial court heard argument from both parties and granted the State's motion, stating that it may revisit the issue if a testifying witness "opened the door to the admission of such evidence." The trial court did not alter its ruling because there was no direct evidence presented that linked the actions of the stepmother's brother to B. T.'s injuries.

At the motion for new trial hearing, appellant's mother testified that she witnessed the stepmother's brother in bed with B. T. in the weeks prior to appellant's arrest. Although defense counsel could not remember why he did not call the appellant's mother to testify at trial, "[h]e thought she might have been nervous, did not want to testify, or that her testimony may not have been helpful."

Appellant argued that his mother's testimony was admissible under the "source of the injury" analysis, as set forth in *Tidwell v. State*, 306 Ga. App. 307 (2010). However, the Court noted, the Supreme Court recently held that "cases

purporting to allow a relevance exception to the Rape Shield Statute for the admission into evidence of a complaining witness's past sexual behavior beyond that contained in [the Statute] are hereby overruled to the extent that they do so." *White v. State*, ___ Ga. ___ (2) (___ SE2d ___), 2019 Ga. LEXIS 66 (2019) (citing OCGA § 24-4-412 (b)) (specifically overruling *Tidwell*).

Moreover, the Court found, B. T. never identified anyone, other than appellant, who had touched her in a sexual nature. And, even if appellant's mother testified that she saw B. T. in bed with the stepmother's brother, because she did not witness any sexual activity between the two, her testimony would have been insufficient to show actual sexual abuse by a third party. Instead, appellant's mother's testimony was speculative as to the stepmother's brother's interactions with B. T.

Finally, the Court found, the evidence at the motion for new trial showed that defense counsel made a strategic choice not to call appellant's parents to testify, reasoning that they were nervous and afraid and he thought that some of the taped jail conversations between appellant and his parents were unfavorable to appellant's defense. Accordingly, based on the speculative testimony of appellant's mother as to the interactions between B. T. and the stepmother's brother, as well as the trial counsel's strategic decision not to call various family members to testify during trial, the Court concluded that appellant failed to show there was a reasonable likelihood that the outcome of the trial would have been different if trial counsel had offered the testimony of appellant's mother.

Attempt; Abandonment as an Affirmative Defense

Reid v. State, A18A2138 (3/6/19)

Appellant was convicted after a bench trial on one count of criminal attempt to commit child molestation and two counts of computer pornography. He contended that the evidence was insufficient to support his conviction for criminal attempt to commit child molestation. Specifically, he argued that he abandoned any attempt to commit child molestation. In a 2-1 decision, the Court disagreed.

The evidence showed that appellant and a police investigator, posing online as a 15-year-old girl, arranged to meet at a gas station. Once appellant indicated that he was close to the arranged meeting location, the investigator began surveillance. The investigator observed a male in a Jeep pull into a parking space toward the end of the parking lot. The male sat in his vehicle for several minutes without exiting before backing up and attempting to leave the location. Thereafter, the investigator conducted a traffic stop and identified the male as appellant. The investigator testified that appellant initially stated that "he was just simply riding around" but then admitted "that he was coming to meet a female that he knew was underage."

The Court stated that "[w]hen a person's conduct would otherwise constitute an attempt to commit a crime under Code Section 16-4-1, it is an affirmative defense that he abandoned his effort to commit the crime or in any other manner prevented its commission under circumstances manifesting a voluntary and complete renunciation of his criminal purpose." OCGA § 16-4-5 (a). If a defendant raises and testifies in support of an affirmative defense, the State has the burden of disproving that defense beyond a reasonable doubt.

Here, appellant did not testify and he argued that he never had any "intent to do the things that were specifically listed in the State's indictment, and that was criminal attempt to commit child molestation." However, he still argued that the evidence presented at trial showed he abandoned any criminal purpose. The Court found that the evidence established that, prior to the arranged meeting, appellant expressed concern that he would be discovered by law enforcement or the child's parents, and that he was under law enforcement surveillance the entire time he was at the gas station. After appellant was apprehended, he never explained to the investigator why he left the gas station or expressed a change of heart. It was for the factfinder to determine whether the State met any burden to disprove an affirmative defense of abandonment—a determination which the factfinder made in the State's favor. Accordingly, the Court found, the trial court's determination that the State met its burden to disprove the affirmative defense of abandonment was supported by the evidence.