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## Autopsy Photographs; Prosecutorial Misconduct

*Venturino v. State, S19A0166 (6/24/19)*

Appellant was convicted of felony murder and other crimes. He contended that the trial court erred by allowing the State to introduce into evidence, over objection, an “overly gruesome” autopsy photograph. Specifically, a color autopsy photograph of the victim's opened chest cavity, with organs removed and rods inserted to approximate the trajectory of the bullets that struck him. Appellant argued that this photograph, which was introduced during the State's direct examination of the medical examiner who conducted the autopsy, was unduly prejudicial under Rule 403. The Court disagreed.

In arguing that the photograph should not have been admitted, the Court noted that appellant relied in part on the exclusionary rule announced by the Court in *Brown v. State*, 250 Ga. 862, 866 (1983), that “[a] photograph which depicts the victim after autopsy incisions are made or after the state of the body is changed by authorities or the pathologist will not be admissible unless necessary to show some material fact which becomes apparent only because of the autopsy.” But, the Court stated, “today we make clear that the categorical rule announced in *Brown* has been abrogated by our new Evidence Code.” In so holding, the Court stated that the rule it announced in *Brown* was the type of judge-made, categorical evidentiary rule it recently disapproved in *Orr*. Accordingly, the Court disavowed the application of the rule announced in *Brown*, and applied in its progeny, in cases governed by the new Evidence Code. Instead, to evaluate the admissibility of autopsy photos, our courts should look to Rules 401, 402, and 403, our appellate cases decided under the new Evidence Code, and to federal case law for guidance.

And here, the Court found, the medical examiner referenced the complained-of autopsy photograph at trial as he explained that the only way he could get the trajectory probes through the victim's body (and thus demonstrate the flight path of the bullets that passed through him) was in the manner depicted in the photograph. He further explained that the fact that he first needed to remove certain organs to position the probes through the bullet holes was “very consistent ... with somebody

who had been sitting when they got these wounds”; that this was the only way to accurately demonstrate the precise flight path of the bullets; and that “while it’s not pleasant to look at, it’s necessary in order to understand how the bullets went through his body.” Although the photograph was relatively gruesome, the record showed that it depicted the “only way” the medical examiner could insert the trajectory probes to “accurately” show the precise path that the bullets travelled through the victim’s body—a point that was made to support the State’s theory that the victim was sitting when he was shot. Moreover, the medical examiner’s explanation of the autopsy photo was also consistent with testimony that the victim was seated and asleep when appellant stood over him and shot him. Therefore, the Court concluded, the trial court did not abuse its discretion when it ruled that the photograph was relevant and that its probative value was not substantially outweighed by the danger of unfair prejudice.

Appellant also argued that the trial court erred by failing to rebuke the prosecutor when she misstated the law regarding voluntary manslaughter during closing argument. Specifically, he argued that the prosecutor misstated the law by stating that voluntary manslaughter is an affirmative defense, and that this misstatement ran afoul of OCGA § 17-8-75’s prohibition on “statements of prejudicial matters which are not in evidence.” Appellant contended that under OCGA § 17-8-75, the trial court was required to rebuke the prosecutor, instruct the jury to remove the improper impression from their minds, and that the trial court therefore erred by overruling his counsel’s objection.

However, the Court found, the comments were, at most, a misstatement of the law and therefore outside the purview of OCGA § 17-8-75. And, even though the prosecutor may have been unclear about the distinction between voluntary manslaughter and the affirmative defense of self-defense in the inarticulate closing-argument excerpt appellant highlighted, the prosecutor then corrected herself and clarified the difference between the two legal concepts in later portions of closing argument. Moreover, the court charged the jury separately and correctly on self-defense and voluntary manslaughter, and the Court presumed that jurors follow the law. As a result, the Court found, any error was harmless.

## **Judicial Comments; OCGA § 17-8-57**

*Boyd v. State, S19A0018 (6/24/19)*

Appellant was convicted of felony murder and other crimes in connection with the shooting death of Ray Murphy. The evidence, briefly stated, showed that appellant and his co-conspirator gang members, killed Murphy when they attempted to rob him during a drug deal. One of appellant’s co-conspirators shot the victim.

Appellant argued that the trial court erred by making an improper comment on the evidence and on his guilt in the presence of the jury during appellant’s closing argument. The Court disagreed.

The Court noted that former OCGA § 17-8-57, was in effect during appellant’s trial in 2015. It provided: “It is error for any judge in any criminal case, during its progress or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused.”

The transcript showed that the trial court — with no prompting from the State — interrupted when counsel began explaining each indicted count to the jury. Specifically, counsel said, “If [the prosecutor] is correct, that parties to a crime means that anybody involved, like prosecutorial buck shot, it catches everybody in your path, anybody involved at all even

if you didn't have knowledge and even if you didn't aid and abet. If that's true, then count malice murder would make sense, but it's not. And also even if it was true, I'm sorry, it would not make sense because if you think about this, malice has to be formed by the person doing it or somebody setting up a murder. That's not what happened even by the wildest stretch of imagination.”

The trial court then interrupted, telling counsel he was “getting on kind of dangerous grounds” because there were “two theories in this case: conspiracy and parties to a crime” and the way counsel was arguing was “diminishing those theories legally where they can't be diminished that way.” After a brief colloquy, the trial court warned counsel against trying to “explain the law to [the jury] that's contrary to what they are going to be given in the law.” Counsel proceeded with his closing argument and began talking about the felony murder counts in the indictment, saying “felony murder, while in the commission of an armed robbery ... did cause the death of Ray Murphy ... by shooting him with a pistol. Okay. You can count that off. [Appellant] didn't shoot a pistol.” At that point, the trial court excused the jury and told counsel he was “simply misstating the law” and misleading the jury by implying that if appellant did not pull the trigger then he could not be found guilty of the charged crimes. Counsel acknowledged that a defendant “[t]heoretically” could be found guilty without pulling the trigger and told the trial court that he was working through the counts and would get to conspiracy and parties to a crime. The trial court repeated that counsel could not instruct the jury on the law or mislead them about it, and told counsel not to “refer to the indictment in its literal sense” like counsel had done. The trial court also said that when the jury returned the court would explain that there were “two theories in this case, parties to the crime and conspiracy, that do not need to be included in the indictment.”

When the jury returned and counsel continued his closing argument, he said, “[p]arties to a crime is a theory of prosecution that anyone who had knowledge and aided and abetted ... .” The trial court interjected again, saying, “It's not a theory of prosecution. It's the law. He didn't make that up.” Addressing the jury, the trial court continued, “Parties to a crime is a legal concept. It's the law, and you'll be given the law by me at the conclusion of these arguments. What these attorneys say are not evidence and not to be considered by evidence to you. What they say about the law — what I say about the law trumps them. Is that clear to everybody?” Trial counsel completed his closing argument without further interruption or objection.

The Court found that viewing the trial court's comments in context and as a whole, the trial court's interjections were merely clarifying statements about the law that no reasonable jury would understand to be expressions or intimations of the court's opinion as to what facts had or had not been proved during trial or as to the guilt or innocence of the defendant. Thus, because the trial court's statements were not error, appellant's claim under former OCGA § 17-8-57 failed.

## **Juveniles; Waiver of Right to Appeal**

*Brant v. State, S19A0047 (6/24/19)*

In 1994, appellant was indicted for malice murder, felony murder, armed robbery, and four other crimes. Appellant was 17 years old at the time of the crimes. In 1996, the State filed a notice of intent to seek the death penalty for malice murder, specifying four aggravating circumstances. In 1999, appellant, who was represented by counsel, entered into a negotiated plea agreement with the State. The plea agreement provided, among other things, that the State waived the death penalty as a potential sentence and agreed to recommend that the trial court sentence appellant to life without parole on malice

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murder and to a consecutive life sentence with the possibility of parole for armed robbery. The agreement also expressly provided that appellant “waives any and all rights to appeal and will not file, or caused to be filed, any appeal” and “waives and agrees not to seek any post-conviction relief from the sentence imposed pursuant to this contract.” The trial court accepted appellant's guilty pleas and followed the State's sentencing recommendations — except that for armed robbery, the court sentenced appellant to life in prison without the possibility of parole instead of “imprisonment for life,” as the State had recommended and as the court had pronounced earlier.

In subsequent orders entered in 2014 and 2016, the trial court (1) resentenced appellant for malice murder, imposing a sentence of life with the possibility of parole, (2) corrected the scrivener's error on the 1999 armed robbery sentence, noting that the original sentence was for life with the possibility of parole; and (3) denied a motion filed by appellant to withdraw his guilty plea. Appellant appealed these orders.

The Court stated that Georgia allows a defendant to enter into a negotiated agreement to forgo the right to seek post-conviction relief as a means to serve the interests of the State and the defendant in achieving finality. Here, the Court found, appellant was represented by two attorneys when he entered the plea agreement and at his plea hearing, and in his written plea contract, appellant acknowledged that “after consultation and advice from” those attorneys, he “[d] knowingly, intelligently and voluntarily stipulate and agree” to the appeal waiver. Appellant also acknowledged in the written agreement that he was entering “into this contract with full awareness of what [he] [was] doing.” Moreover, the plea hearing transcript showed that both the district attorney and the trial court asked appellant if he understood that he was waiving his rights of appeal under the agreement, and appellant said that he understood. Appellant acknowledged that he had consulted with his attorneys about the case, stated that he was satisfied with their services, and affirmed that he was entering the plea voluntarily. Therefore, the Court held, the record showed that appellant agreed to the appeal waiver knowingly, voluntarily, and intelligently.

Appellant nonetheless argued that his plea contract was involuntary because he agreed to the plea contract to avoid the possibility of receiving the death penalty, a sentence for which he was eligible in 1999, but for which he was determined to be ineligible after the Supreme Court's 2005 opinion in *Roper v. Simmons*, 543 U. S. 551 (125 SCt 1183, 161 LE2d 1) (2005), The Court disagreed. Citing *Brady v. United States*, 397 U. S. 742, 756-757 (90 SCt 1463, 25 LE2d 747) (1970) and *Dingle v. Stevenson*, 840 F3d 171, 175 (4th Cir. 2016), the Court stated that where a defendant is eligible for the death penalty under existing law and enters into a plea agreement to avoid the possibility of receiving a sentence of death, his guilty plea is not rendered involuntary by subsequent legal developments that make him ineligible for the death penalty. Therefore, the Court held, appellant's appeal waiver is valid. In so holding, however, the Court noted that appellant was not now seeking to appeal from a sentence that imposes punishment not authorized by law, nor seeking to appeal from a sentence that imposes punishment greater than that for which he bargained. If either of those circumstances were otherwise, the Court stated its analysis might be different. But, since neither of those circumstances was present in this case, the Court dismissed appellant's appeal.

## Pre-Arrest Silence; *Mallory*

*Jackson v. State*, S19A0231 (6/24/19)

Appellant was convicted of malice murder and other offenses. At trial, appellant claimed that he killed the victim in self-defense. Appellant contended that the trial court erred in failing to grant a mistrial after the prosecutor repeatedly violated *Mallory* by questioning the lead detective as to whether appellant ever told him that appellant acted in self-defense and that if the detective had told him, the detective would have investigated appellant's defense. However, the Court stated, a motion for mistrial must be promptly made as soon as the party is aware of the matter giving rise to the motion. And here, the motion for mistrial was not based on a single question, but, instead, was premised on allegedly improper testimony elicited throughout trial. The record reflected that the State had elicited similar testimony without objection from an earlier witness and, also, during its direct examination of the detective the prior day. It was only after appellant had cross-examined both witnesses and the State had returned to this line of questioning on re-direct examination that the motion for mistrial was lodged. Thus, the Court held, this was too late to claim error based on the pattern of questions.

Appellant next argued that his trial counsel was ineffective for failing to properly object and/or move for a mistrial with respect to approximately 18 questions that allegedly led to testimony regarding his failure to come forward to law enforcement concerning the victim's murder. Appellant contended that trial counsel should have objected in each and every instance on the grounds that the question and resulting testimony was inadmissible under *Mallory*, the Fifth Amendment to the United States Constitution, Georgia's constitutional protections against self-incrimination, and OCGA § 24-4-403.

First, the Court stated, the rule announced in *Mallory* - categorically excluding evidence of a criminal defendant's pre-arrest "silence or failure to come forward" to law enforcement — was an evidentiary holding decided under our old Evidence Code. Appellant's trial, however, occurred *after* the effective date of Georgia's new Evidence Code, at which time *Mallory*'s continuing validity was questionable. And, the Court held, now that it has squarely held that *Mallory* was abrogated by Georgia's new Evidence Code, it is clear that a defendant cannot prevail on a claim of ineffectiveness on the basis that his trial counsel failed to rely on a case that was not applicable to his trial.

Appellant next argued that trial counsel should have objected to and/or moved for a mistrial under the Fifth Amendment to the United States Constitution, arguing that, under *Griffin v. California*, 380 U.S. 609 (85 SCt 1229, 14 LE2d 106) (1965), the State violated his right to remain silent. The Court disagreed. *Griffin* addresses whether a comment on a defendant's failure to testify violates the Self-Incrimination Clause of the Fourteenth Amendment. Here, though appellant did not testify, there was no suggestion that the prosecutors commented on his exercise of this right. Further, the Fifth Amendment does not per se exclude testimony concerning a defendant's pre-arrest failure to come forward. As such, appellant's contention that trial counsel should have lodged a general objection under the Fifth Amendment was without merit.

Appellant also argued that trial counsel should have objected on the basis of Georgia's constitutional provision against self-incrimination, citing *Creamer v. State*, 229 Ga. 511 (192 SE2d 350) (1972) and *Olevik v. State*, 302 Ga. 228 (806 SE2d 505) (2017). But, the Court found, these cases are inapposite; neither case speaks to the admissibility of testimony concerning a defendant's failure to come forward to law enforcement, and the cases certainly do not stand for the

proposition that trial counsel's failure to object here amounted to deficient performance. Neither *Mallory* nor *Orr* was decided as a matter of Georgia constitutional law, and the Court noted, appellant points to no law — and the Court found none — suggesting that Georgia's constitutional provision concerning the right against self-incrimination, would compel an objection from trial counsel. As such, there was no merit to this argument either.

Finally, appellant argued that trial counsel should have objected to the various questions and answers under OCGA § 24-4-403 (Rule 403). However, the Court noted, appellant failed to engage in any Rule 403 analysis with respect to the individual questions and answers about which he complained, instead, simply making a blanket assertion that trial counsel should have lodged a Rule 403 objection in each instance. In fact, the Court agreed with the testimony of trial counsel who indicated during the hearing on appellant's motion for new trial that some of the testimony was, in fact, "innocuous."

Nevertheless, the Court held, to the extent that the questions and answers at issue implicated appellant's failure to come forward, the failure of trial counsel to object under Rule 403 did not prejudice the defense. Though appellant suggested that the questions and answers unfairly prejudiced his self-defense strategy, the evidence strongly suggested that the crime was not self-defense; indeed, appellant tied up the victim, left him in a locked and alarmed residence, fled in the victim's vehicle and with his property, and then sped away when a police officer attempted to initiate a traffic stop. As such, trial counsel's failure to object in these instances under Rule 403 did not amount to ineffective assistance.

## **Prosecutorial Misconduct; Evidence of Gang Affiliation**

*Fleming v. State, S19A0116 (6/24/19)*

Appellant was convicted of the murder of Corbin, the shooting of Skrine and other related offenses. The evidence, very briefly stated, showed that appellant was a high ranking member of the Bloods. He believed that the two victims were withholding information about who killed appellant's brother. Appellant brought three unknown men to the home where the victims could be found, and at appellant's direction, the three shot the two victims.

Appellant contended that the trial court erred by failing to sua sponte rebuke the prosecutor under OCGA § 17-8-75, and for failing to sua sponte declare a mistrial after the State raised matters in closing argument that had not been placed into evidence during trial. The record showed that Corbin had a tattoo on his chest that said "M-O-B." The State's gang expert was asked on cross-examination if "M-O-B" was short for "Member of Blood[s]," to which the expert replied, "yes." Relying this evidence, defense counsel argued during closing that the jury could infer that appellant could not have been responsible for Corbin's death because appellant and Corbin were both members of the Bloods. In response, the prosecutor reminded the jury that the State had elicited testimony that Corbin was not a Bloods member and further argued that defense counsel had "mischaracterized . . . that M-O-B means member of blood[s]." Defense counsel objected, arguing that the prosecutor had misstated the evidence. The trial court instructed the jury to "recall what the evidence was and base your verdict on your recollection and not on what counsel says it was." The prosecutor then took out a cell phone, played a portion of Tupac Shakur's song, "M.O.B.," and argued that "M-O-B" actually stands for "money over b\*\*ches," not "member of blood[s]." Once again, defense counsel objected, and argued that the prosecutor was trying to present new evidence. The trial court sustained the objection and the prosecutor moved on. Later, during its charge of the jury, the trial court instructed the jury that closing arguments were not to be considered as evidence.

The Court stated that while the prosecutor improperly extended closing argument into matters not in evidence when she played a portion of Tupac Shakur's song for the jury, defense counsel's objection to the argument was sustained, and where the objection to the prejudicial matter is sustained the court has no duty to rebuke counsel or give curative instructions unless specifically requested by the defendant. And here, defense counsel made no such request. Furthermore, the Court stated, even assuming that the trial court erred in not rebuking the prosecutor under OCGA § 17-8-75, any such error was harmless given the substantial evidence against appellant, defense counsel's prompt objections, and the trial court's instructions. Accordingly, the Court concluded, the trial court did not deprive appellant of a fair trial by not declaring a mistrial sua sponte.

Appellant also argued that the trial court erred in admitting evidence of his alleged gang affiliation because there was no evidence that the crime was gang-related, and because the evidence of gang membership was highly prejudicial to him. The Court disagreed.

Here, the State sought to introduce evidence of appellant's gang affiliation in order to establish a connection between appellant and the shooters, and to provide context for his participation in the crimes at issue. The record showed that appellant initially arrived at Skrine's house seeking answers regarding who had shot his brother; that appellant and the unknown men arrived at and departed from the scene together; that appellant was a high-ranking member of the Bloods with the authority to order a retaliatory attack on a person who had wronged the gang or its members; that the unknown men were making gang signs prior to the shooting; that the unknown men were wearing gang colors; that appellant had previously self-identified as a member of the Bloods; and that, immediately prior the shooting, appellant gave the unknown men a "look."

The Court found that the evidence was intrinsic to the crimes and therefore admissible. Indeed, the testimony concerning appellant's gang affiliation completed the story of the crimes as it enabled the State to explain appellant's authority within the gang, his association with the shooters, and his role in the crimes. This evidence was also inextricably intertwined with the charged offenses as the record showed that the shooting was a retaliatory attack orchestrated by appellant, a high-ranking gang member. Lastly, although the evidence may have incidentally placed appellant's character at issue, its probative value was not substantially outweighed by the danger of unfair prejudice under these circumstances. Therefore, the Court held, the trial court did not abuse its discretion in admitting the gang affiliation evidence at trial.

Finally, appellant argued that the trial court erred in admitting under Rule 404 (b) a surveillance video from the jail that showed appellant orchestrating a retaliatory and violent attack on another inmate, along with related expert testimony. Specifically, the evidence at trial showed that, while awaiting trial at the jail, appellant entered a pod where another inmate, who was accused of murdering a member of the Bloods, was in protective custody. Other lower-ranking Bloods members were also in the pod. There, appellant communicated with the three lower-ranking gang members via hand gestures and signals. As soon as appellant left the area, the three lower-ranking gang members carried out a violent assault on the inmate in protective custody. Appellant contended that the State failed to establish that this evidence was admissible to show his intent and knowledge in the charged crimes. The Court again disagreed.

Appellant was charged with felony murder predicated on aggravated assault, and two separate counts of aggravated assault for each victim. For the felony murder charge, the State was required to prove that appellant caused Corbin's death while

in the commission of an aggravated assault. Both of the aggravated assault charges, as well as the underlying aggravated assault for the felony murder charge, required proof that appellant had the general intent to assault Corbin and Skrine. Importantly, because appellant was not the shooter, the State needed to prove that he acted as a party to a crime. Appellant's conduct during the jail incident involved the same intent to assault that the State had to prove in the present case for both the aggravated assault charges and the felony murder charge predicated on aggravated assault. Accordingly, the Court held, the jail incident was relevant to show appellant's intent.

Next, the Court weighed the probative value of the other-acts evidence against the danger of unfair prejudice. Here, the State had a high prosecutorial need for the other-acts evidence, as the State needed to overcome appellant's defense that he was merely present at the scene of the crime, to prove that he shared the same criminal intent as the unknown men, and, indeed, to show that he may have been the mastermind behind the assaults and resulting murder. The significant similarities between the incidents — the number of assailants involved, the communication through Bloods hand gestures and signals, the fact that appellant immediately departed from the scene of the assaults just before they began, and the retaliatory nature of the attacks — outweighed the dissimilarities — gun versus fists, and the setting of the attacks. Moreover, the Court found, less than one year had passed between the crimes charged and the jail incident, making the other-acts evidence not so remote as to be lacking in evidentiary value. Therefore, the Court held, the jail incident had high probative value and while the jail attack evidence was prejudicial, the incident was not a matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. Instead, this evidence allowed the State to rebut appellant's defense of mere presence and establish appellant's intent as a co-conspirator and ringleader in the present case. Accordingly, the Court concluded, the probative value of the evidence outweighed any prejudicial effect, and the trial court did not abuse its discretion by admitting the jail incident into evidence at trial via Rule 404 (b).

## **Tolling of Statute of Limitations; Accomplice Corroboration**

*Vasquez v. State, S19A0042 (6/24/19)*

Appellant was convicted of malice murder, two counts of felony murder, aggravated assault, two counts of cruelty to children in the first degree, and concealing the death of another in connection with the death of his two-year old daughter, Prisi Vasquez. The evidence, very briefly stated, showed that in February of 2007, appellant, his wife, Ruiz, their two-year-old daughter, Prisi, and Ruiz's three-year-old son, J.E., lived in a rental house in Gwinnett. Appellant called Ruiz to come home because Prisi was "sick." Ruiz found Prisi lying on the couch and unresponsive. Appellant stuffed Prisi in a trash bag and hid her in the attic through an entrance in the bedroom closet. Appellant, Ruiz and J.E. then fled to Mexico. Prisi's body was found in June of 2008. Ruiz came back from Mexico in 2009. Appellant was extradited from Mexico in January of 2013.

Appellant argued that the State failed to present sufficient evidence that the statute of limitation for concealing the death of another was tolled. The Court disagreed. In criminal cases, the statute of limitation normally runs from the time the criminal act is committed to the time of indictment. However, OCGA § 17-3-2 (1) provides, in relevant part, that "[t]he period within which a prosecution must be commenced under Code Section 17-3-1 ... does not include any period in which [t]he accused is not usually and publicly a resident within this state[.]"



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Here, the Court found, the evidence authorized the jury to determine that appellant had absconded and that the statute of limitation was tolled from February 4, 2007, until January 17, 2013. The evidence established both the date on which appellant left Georgia (February 4, 2007) and the date he was returned by compulsory legal process (January 17, 2013). The evidence allowed the jury to infer that he remained outside of Georgia for the entire period between those dates and that he did so for the purpose of “concealing himself so that he could not be arrested. Consequently, the jury was authorized to find that the statute of limitation on the offense of concealment of the death of another did not begin to run until January 17, 2013. As appellant was indicted on June 3, 2015, less than two and a half years later, the jury was authorized to find that prosecution of this offense was not barred by the statute of limitation.

Appellant also argued that the trial court plainly erred by failing to instruct the jury regarding the need to corroborate the testimony of an accomplice. The Court noted that there was evidence to support a finding that Ruiz was an accomplice of appellant, particularly in the failure of both individuals to seek medical care for Prisi or report her injuries and subsequent death to authorities and in their joint efforts to leave their home and flee to Mexico. The Court found such evidence to be clearly the type of evidence our courts view as supporting the finding that one is an accomplice. Thus, it was clear and obvious error for the trial court not to instruct the jury as to the corroboration requirements of OCGA § 24-14-8 so that it could properly evaluate Ruiz's testimony and the need to have it corroborated by other witnesses or evidence presented at trial.

However, the Court found, the record also made clear that appellant intentionally relinquished his right to have the jury instructed as to the accomplice-corroboration requirement under OCGA § 24-14-8. Under the plain-error analysis, an objection is intentionally relinquished or abandoned if it is affirmatively waived. An affirmative waiver may occur, for example, when a defendant requests a specific jury instruction but later withdraws such request, explicitly requests a jury instruction that he later argues on appeal should not have been given, or objects to a charge that he later argues on appeal should have been given. In such circumstances, the defendant has invited the alleged error, and it therefore provides no basis for reversal.

Generally, counsel's silence at a juncture when a request for — or objection to — a jury instruction might have been made will be considered merely a forfeiture for which plain-error review remains available. However, an appellate court can conclude that the defendant's right — or objection — to a particular instruction was intentionally relinquished if the appellate court can discern a tactical reason on the part of the defense for failing to request (or object to, as the case may be) a specific jury instruction.

And here, the Court found, through review of the record — including trial counsel's testimony at the hearing on appellant's motion for new trial, counsel's opening statement and closing argument, and his cross-examination of the State's witnesses — it could discern that counsel had a tactical reason for not requesting an accomplice-corroboration charge. At the hearing on appellant's motion for new trial, trial counsel was asked by the State whether he considered Ruiz's testimony to be accomplice testimony. Counsel replied, “No ... our defense was she did it. She was responsible. *And I didn't really want a jury hearing instructions that they were working together or that they were somehow in cahoots on this thing.* Our defense was we were pointing fingers at [Ruiz], and that was it.” (Emphasis supplied.) Through this testimony, trial counsel clearly articulated on the record that his trial strategy was to place blame for Prisi's death solely on Ruiz and that this strategy was

advanced by not having the trial court suggest to the jury through its charge that Ruiz and appellant were, or could be considered, accomplices.

Furthermore, the Court found, in addition to counsel's testimony, the trial record reflected that appellant's trial counsel explicitly presented this theory of the case to the jury in his opening statement and closing argument and through cross-examination of the State's witnesses. Accordingly, the record reflected that trial counsel elected not to request a jury instruction regarding accomplice corroboration as part of a conscious defense strategy to place blame for Prisi's death on Ruiz and to avoid any suggestion by the trial court that Ruiz and appellant were accomplices. Consequently, the Court concluded, appellant intentionally relinquished any request to an accomplice-corroboration instruction. Accordingly, appellant's claim failed at the first step of plain-error analysis.

## **Accomplice Corroboration; Statute of Limitations**

*Taylor v. State, S19A0373 (6/24/19)*

Appellant was convicted of murder and possession of a weapon during the commission of a crime. The evidence, very briefly stated, showed that Sheats drove Dorsey to an apartment complex so that Dorsey could conduct a drug transaction. Sheats stayed in his vehicle, while Dorsey exited. Dorsey walked behind one of the apartment buildings and came back with two other African-American men whom Sheats said he had never seen before. The two unknown men then attempted to arm rob Dorsey and in the process, shot and killed him. The two assailants then fled. Appellant was identified as one of the two assailants.

Appellant contended that Sheats was an accomplice inasmuch as he admittedly drove the victim to the crime scene in order to engage in a drug transaction and, therefore argued he was entitled to a charge on accomplice testimony. The Court stated that whether a person is a party to the crime may be determined from his actions before, during, and after the commission of a criminal act. Here, Sheats drove Dorsey to the scene and stayed in the car while the drug transaction commenced. Sheats did not know appellant or his accomplice. Rather than fleeing the scene with appellant and the other assailant after appellant shot Dorsey, Sheats stayed with Dorsey and reported the shooting to police. Sheats immediately disclosed the fact that he and Dorsey were at the apartment complex for a drug transaction. Thus, the Court found, Sheats' conduct before, during, and after the incident did not indicate an intent to aid or abet appellant in any of the crimes charged. Accordingly, the Court held, a charge on accomplice testimony was unwarranted in this case.

Appellant also challenged the validity of his conviction for possession of a weapon during the commission of a crime by asserting that the trial court committed plain error when it failed to give a charge on the statute of limitation sua sponte. The Court stated that in criminal cases, the statute of limitation runs from the time of the criminal act to the time of indictment. Where an exception is relied upon to prevent the bar of the statute of limitation, it must be alleged and proved. The State bears the burden at trial to prove that a crime occurred within the statute of limitation, or, if an exception to the statute is alleged, to prove that the case properly falls within the exception.

As to possession of a weapon during the commission of a crime, the Court noted that the indictment, was read to the jury and sent out with the jury during its deliberations. It alleged in pertinent part that appellant's "identity was unknown to law enforcement until April 14, 2013." An exception to the statute of limitation is a "material allegation" which must be

alleged in the indictment. While the trial court did not give a specific charge on the statute of limitation sua sponte, it did, at the close of all evidence in the case, instruct the jury that the State had the burden to “prove every material allegation of the indictment ... beyond a reasonable doubt.” The Court stated that it must presume that the jury follows the trial court's instructions. Furthermore, the Court noted, appellant cited no precedent requiring a more detailed instruction on the statute of limitation or the applicable tolling exceptions. Accordingly, the Court could not say that the trial court's failure to specifically instruct the jury on the relevant statute of limitation or tolling amounted to clear and obvious error.

### **Deadlocked Juries; Batson**

*Bannister v. State, S19A0418 (6/24/19)*

Appellant was convicted of felony murder and a firearm offense. Appellant contended that the trial court erred in two ways when the jury indicated that it was deadlocked — first by failing to grant a mistrial, and second by giving a coercive *Allen* charge. The Court disagreed.

The determination of whether a jury is hopelessly deadlocked is a sensitive one best made by the trial court that has observed the trial and the jury. The Court found that the jury heard about five days of evidence and then deliberated for only about six hours before indicating that it had two hold-out jurors. The jury's next note, sent after five more hours of deliberation, indicated that the jurors were deadlocked and that the juror who authored the note did not know how to resolve their differences. However, after they were given an *Allen* charge, they deliberated an additional seven and a half hours without any indication of an impasse before finding appellant guilty of some crimes and not guilty of others, indicating that they had not been as stuck as they believed. Under these circumstances, the Court held, the trial court did not abuse its discretion in denying appellant's motion for a mistrial.

Appellant also argued that the *Allen* charge was coercive because it did not specifically remind the jurors not to abandon their own conscientious beliefs. The Court noted that since appellant did not request this language at trial or object to the charge as given, its review was limited to whether there was plain error. And here, the Court found, the *Allen* charge given by the trial court in this case was essentially the same as the pattern instruction. See Suggested Pattern Jury Instructions, Vol. II: Criminal Cases § 1.70.70 Jury (Hung) (updated January 2019). Furthermore, the charge was essentially the same as that which the Court found was not coercive in *Drayton v. State, 297 Ga. 743, (2015)*. Also, although appellant contended that the trial court failed to remind the jurors not to abandon their conscientious beliefs, the court told them to decide the issues “*if you can conscientiously do so.*” Finally, the overall circumstances of the jury's deliberations did not indicate that it was coerced. Accordingly, the Court concluded, appellant failed to demonstrate error, let alone plain error.

Appellant also contended that the trial court erred by holding that he had not made a prima facie showing supporting his *Batson* challenge. The record showed that at the beginning of voir dire, the trial court announced that there were 55 prospective jurors on the venire panel and that 33 of them would be qualified for potential selection. At the end of voir dire, appellant raised his *Batson* challenge, asserting that the State had improperly used five of its nine peremptory strikes (or about 56%) against African-American women. The trial court then asked about the racial and gender composition of the venire panel and the jury that had been selected. There were eight qualified African-American women on the panel and that the State struck five of them. The Court noted that there were four African Americans on the jury, but it was not

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clear from the record how many of them were women. Based on this information, the trial court ruled that appellant had not made a prima facie case under *Batson*.

Appellant argued that the State's use of the majority of its peremptory strikes against African-American women showed discriminatory intent, particularly because African-American women made up a small percentage of the venire. The Court stated that in some cases, it has held that a prima facie case was established solely by the percentage of strikes used against a certain cognizable group of prospective jurors — but in all of those cases the percentage of strikes used against the group was much greater than 56%. Similarly, in cases where it held that a prima facie case was established based on the percentage of strikes used compared to the overall venire, the State used all or almost all of its strikes to remove all or almost all of a particular cognizable group.

And here, the Court stated, appellant did not identify any case, nor did the Court find one, that would persuade it to rule that a trial court must find a prima facie case of discrimination in the circumstances presented here. Accordingly, the Court concluded, the trial court did not abuse its discretion in holding that appellant failed to make out a prima facie case of purposeful discrimination.