

THIS WEEK:

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- **Ineffective Assistance of Counsel; Conflicts of Interest**
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- **Motions for Mistrial; *Brady***
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- **Traffic Offenses; Void for Vagueness**
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Ineffective Assistance of Counsel; Suicidal Ideation

Gude v. State, S19A0611 (8/5/19)

Appellant was convicted of malice murder and other crimes related to the stabbing death of Jacquelyn Nash on January 20, 2004. At trial, the State presented the testimony of Tayrn, appellant's daughter. Tayrn testified that, on January 20, she returned home from work to find a voicemail message from appellant on her answering machine. In the voicemail, appellant confessed to killing Nash because he had given Nash \$500 for safekeeping but when he went to her home to retrieve the money he found that she no longer had it. After listening to the voicemail, Tayrn made numerous attempts to contact appellant. She finally reached him the next day, January 21, at the home of his sister. When Tayrn asked appellant what happened to Nash, he gave several conflicting stories. Appellant informed Tayrn that he drank radiator fluid some time that day because he did not want to go back to prison, and appellant's sister told Tayrn that appellant was in the bathroom vomiting as a result of drinking the radiator fluid. Tayrn reported her communications with appellant to the police that evening.

Appellant argued that his trial counsel should have moved to suppress as involuntary statements that he made to Tayrn in their phone conversation. Specifically, citing *Nelms v. State*, 255 Ga. 473, 474 (1) (1986), he contended that the statements were involuntary because he ingested radiator fluid and was allegedly suicidal at the time he made the statements. The Court noted that in *Nelms* it stated that a confession made when a defendant is insane and incompetent is not free and voluntary and is not admissible. But, the Court stated, *Nelms* was distinguishable because Nelms's confession was given to police while he was in custody and coercive police activity is a necessary predicate to a finding that a confession is involuntary within the meaning of the due process clause of the Fourteenth Amendment.

And here, the Court found, the statement at issue was made during the phone conversation with appellant's daughter. Because the police were not involved in obtaining this statement from appellant nor was the statement made to law enforcement or anyone acting on the State's behalf, appellant's statement could not be described as involuntary within the

meaning of the due process clause of the Fourteenth Amendment. Therefore, any motion to suppress that counsel could have raised would have been meritless, and failure to raise a meritless objection cannot support a finding of ineffective assistance.

Appellant also contended that his trial counsel was ineffective in failing to secure an expert witness to testify regarding a purported link between his suicidal ideations and the statements he made to Tayrn when they spoke on January 21. In support, appellant offered at the hearing on his motion for new trial the testimony of McGee, a social services coordinator at the public defender's office. McGee was qualified as an expert in forensic psychology by the trial court. McGee testified that she had neither interviewed appellant nor reviewed his records because she "want[ed] to remain objective." McGee further testified in generalities regarding what she termed inappropriate guilt, as well as some of the symptoms of depression and suicidal ideation. McGee opined that a person's statement made concurrently with a suicide attempt "can provide knowledge to the fact that [the person's] thought process could be distorted."

The Court found this testimony, in addition to its general nature, amounted to nothing more than speculation as to appellant's mental condition at the time he spoke to his daughter. Appellant did not present any evidence that he had ever been evaluated by an expert or that a psychologist reviewed the record and formed an opinion as to his state of mind at the time he made the statements at issue, and speculation about results if he had been evaluated were not enough. Therefore, the Court held, appellant failed to show that this evidence would have been favorable to his defense and that a reasonable probability existed that the result at trial would have been different.

Ineffective Assistance of Counsel; Conflicts of Interest

Collins v. State, S19A0809 (8/5/19)

Appellant was convicted of murder and other crimes. He argued that his trial counsel provided ineffective assistance by failing to withdraw from representing him before trial. The record showed that in the month before his trial, appellant sent a letter to the State Bar to complain about his trial counsel, alleging ethical violations including improper discussions with appellant's mother about whether appellant should have taken a plea deal and other information and failing to give appellant all of the discovery. The letter ended by saying, "My goal in this matter is to request [trial counsel] be asked or made to withdraw himself as my counsel, and to be appointed counsel who will represent me to the fullest." Appellant contended that upon receipt of the bar complaint, his trial counsel should have immediately withdrawn from representation, relying on a comment to Rule 1.16 of the Georgia Rules of Professional Conduct relating to a lawyer's obligation to decline or withdraw from representation where the client insists that the lawyer engage in illegal or unethical conduct.

But, the Court noted, appellant did not identify any illegal or unethical conduct in which he supposedly demanded his trial counsel engage. Moreover, although appellant cited the *Strickland* deficiency-and-prejudice test applicable to most claims of ineffective assistance of counsel, in order for a criminal defendant to prevail on a claim that his attorney was ineffective due to a conflict of interest, he must show that an actual conflict of interest adversely affected his lawyer's performance. And, the Court stated, a bar complaint, standing alone, does not require immediate withdrawal or disqualify trial counsel in a criminal case.

Furthermore, the Court found, the evidence showed that trial counsel responded to appellant's bar complaint by letter and met with him in person to resolve the dispute before the trial began. Appellant then told the trial court that he was "very much" satisfied with his counsel's services, and counsel testified at the motion for new trial hearing that the incident "was merely a blip" in their otherwise amicable relationship. Consequently, the Court held, appellant did not show that his trial counsel had an actual conflict of interest, much less one that adversely affected his lawyer's performance at trial.

Jury Instructions; Self-Defense

Jackson v. State, S19A0861 (8/5/19)

Appellant was convicted of murder and other crimes. He contended that the trial court committed plain error by giving a pattern jury instruction on self-defense that included language stating that the defendant must not have acted "in the spirit of revenge" at the time that he was defending himself in order to properly claim self-defense. Compare Code 1933, § 26-1012 (stating that party asserting justification defense must have "acted under the influence of [the] fears [of a reasonable man], and not in a spirit of revenge") with OCGA § 16-3-21 (containing no "spirit of revenge" language and stating that "a person is justified in using force which is intended or likely to cause death or great bodily harm only if he or she reasonably believes that such force is necessary to prevent death or great bodily injury to himself or herself or a third person or to prevent the commission of a forcible felony").

The Court stated that a jury instruction must be adjusted to the evidence and embody a correct, applicable, and complete statement of law. And here, there was no error in giving the jury charge in question because, despite the fact OCGA § 16-3-21 does not contain language indicating that a defendant must show that he or she did not act in the spirit of revenge in order to assert self-defense, when comparing the current language of OCGA § 16-3-21 with the previous statute that included the "spirit of revenge" language, in essence the old law and the new law have the same standard as to justification of homicide. Therefore, the instruction, even though it included the "spirit of revenge" language, is still a correct statement of the law. Accordingly, there was no error, much less plain error.

Motions for Mistrial; Brady

Cain v. State, S19A0669 (8/5/19)

Appellant was convicted of malice murder of Mobley, aggravated assault on Gregory, and other offenses. At trial, appellant contended that he acted in defense of his sister (the estranged wife of Gregory), his mother, and Jennifer's two children.

Citing *Brady v. Maryland*, appellant contended that the State failed to timely produce exculpatory information that would have supported his defense of self-defense and asserted that the trial court erred in denying his motion for mistrial predicated on that alleged failure. The record showed that during trial, appellant moved for a mistrial based on the State's failure to timely produce two cellphones, the voicemail-boxes of which, appellant contended, contained voicemails from Gregory in which he threatened appellant and his sister. Appellant argued that as a result of the State's failure to produce the cellphones, the voicemails were lost. Appellant's sister gave the cellphones to law enforcement on the day of the crimes, and the State did not return the cellphones to appellant until the day before trial. According to appellant, law enforcement made no efforts to retrieve the voicemails from the phone or to secure the phones so that the voicemails could be retrieved later.

The Court stated that to prevail on a *Brady* claim, a defendant must establish the following four factors: (1) the State, including any part of the prosecution team, possessed evidence favorable to the defendant; (2) the defendant did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) a reasonable probability exists that the outcome of the trial would have been different had the evidence been disclosed to the defense. Information of which a defendant is “already aware” generally does not constitute *Brady* material.

Here, the Court found, appellant could have obtained the voicemails through the exercise of reasonable diligence. Appellant was aware of the existence and contents of the voicemails, and, even though he no longer had access to the cellphones, the record established that the voicemails were available to him from other sources and had appellant acted in a timely manner, he would have been able to obtain the voicemails directly from the service providers or by simply dialing into the cellphones' voicemail-boxes remotely. Physical possession of the cellphones was not necessary to retrieve the voicemails by either of those methods.

Moreover, appellant demonstrated neither that the prosecution suppressed the recordings nor that, had the cellphones been turned over to the defense and the voicemails played for the jury, there was a reasonable probability that the outcome of the trial would have been different. Appellant agreed to a stipulation that the State was not at fault in regard to appellant's inability to retrieve the voicemail messages. Also, appellant and his sister testified to the contents of the voicemails, and the jury was free to credit or to reject their assertions that they had been threatened. Thus, the Court held, given these circumstances, appellant's *Brady* claim failed. As a result, the trial court did not abuse its discretion in denying appellant's motion for mistrial.

Grand Juries; Fair Cross-Section

Shubert v. State, S19A0886 (8/5/19)

Appellant was convicted of malice murder and concealing the death of another. He argued that the grand jury was not a fair cross-section of the community in violation of the Sixth Amendment because there were too many duplicate juror names on the grand jury list and those duplicates were disproportionately white.

The Court stated that to successfully make a Sixth Amendment fair cross-section claim, a defendant must prove three things: (1) the allegedly excluded group is distinctive; (2) representation of that group in jury pools was not fair or reasonable in relation to the number of persons in the community; and (3) that underrepresentation is due to systematic exclusion of the group from the jury selection process.

The Court found that appellant failed to carry his burden because he presented insufficient evidence to determine the racial composition of the grand jury master list. Racial identification was supplied for only 29 percent of those people on the list. Although appellant presented analysis of the data he had, it was simply not possible to prove a disparity between the racial composition of the master jury list and that of the population of the county when the race of 71 percent of those on the list had not been identified. Accordingly, the Court held, appellant was unable to meet his burden to make even a prima facie case for a fair cross-section claim.

Prior Consistent Statements; Improper Motive to Testify

Abney v. State, S19A0741 (8/5/19)

Appellant was convicted of multiple counts of malice murder and other crimes related to the shooting deaths of Marshall and two other victims. The evidence, very briefly stated, showed that Marshall allowed Butler and another woman to move into her house. But, things did not go well and after a couple of weeks, Marshall asked them to move out. Appellant and Hampton came to get them and their belongings. After they left with most of the two women's belongings, Hampton asked Butler if he wanted him to shoot up the house. Butler said yes. Hampton and appellant then returned to Marshall's house, went inside, and shot and killed all three victims.

Prior to trial, Butler entered into a plea deal with the State and agreed to testify. Appellant argued that the trial court erred in allowing the lead detective to testify about Butler's prior consistent statements. The Court disagreed.

Under the new Evidence Code, a witness's prior consistent statement is “admissible to rehabilitate a witness if the prior consistent statement logically rebuts an attack made on the witness's credibility[,]” OCGA § 24-6-613 (c), and the witness testifies at the trial and is subject to cross-examination, OCGA § 24-8-801 (d) (1) (A). A prior consistent statement is not permitted to rehabilitate a general attack on a witness's credibility, but may be “offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive” if the statement was “made before the alleged recent fabrication or improper influence or motive arose.” OCGA § 24-6-613 (c).

Appellant contended that, in cross-examining Butler, he did not make any affirmative charges of recent fabrication, improper influence, or improper motive. But he acknowledged that he asked Butler questions designed to show that Butler changed her story, particularly with respect to him, and that her most recent version developed only after she decided to become a witness for the State. The Court found that the record confirmed that appellant and Hampton both asked questions about Butler's cooperation with the State, getting her to admit that she entered into a favorable plea agreement with the State to drop the murder charges against her in exchange for her testimony against Hampton and appellant and that her sentence would depend on her testimony. Appellant specifically asked Butler, “Obviously, if you didn't get a deal, you wouldn't be here testifying; would you?”

The Court found that through this questioning, appellant was clearly implying that Butler had an improper motive to testify — to receive the benefit of a plea deal by receiving a lesser sentence. The disputed testimony concerned Butler's prior statements to police that predated this alleged improper motive, as Butler made the challenged statements during the investigation of the crime and prior to the return of the indictment charging her, appellant, and Hampton with murder and other crimes. Thus, the Court concluded, because the prior consistent statements rebutted a charge of improper motive, the trial court did not err in admitting them.

Traffic Offenses; Void for Vagueness

Derrico v. State, S19A0665 (8/5/19)

Appellant was convicted of aggressive driving, reckless conduct, and failure to signal lane change or turn, all in connection with a road rage incident. The evidence showed that Ambrosetti merged onto Georgia 400 and then proceed to cross all

the way to the left lane in front of appellant. Appellant attempted to overtake Ambrosetti by passing him in the right lane. However, while heading back into the left lane, appellant struck Ambrosetti's vehicle on the passenger side. Next, appellant slowed down, went behind Ambrosetti's vehicle, then entered the emergency lane and struck Ambrosetti's vehicle on the driver side. After that, both vehicles pulled off the road. Ambrosetti maintained his lane throughout the incident.

Appellant contended that OCGA §§ 40-6-397 and 16-5-60 were unconstitutionally vague as applied to him. The Court disagreed. The void for vagueness doctrine of the due process clause requires that a challenged statute or ordinance give a person of ordinary intelligence fair warning that specific conduct is forbidden or mandated and provide sufficient specificity so as not to encourage arbitrary and discriminatory enforcement. And, the Court noted, where, as here, the challenged statutes do not involve First Amendment freedoms, they are examined in light of the facts of the case at hand.

Appellant contended that OCGA § 40-6-397 is unconstitutionally vague because the statute contains an open-ended list of violations and the aggressive driving count in his indictment does not include a reference to any of the statutes listed therein. He also argued that he was arbitrarily selected for prosecution instead of Ambrosetti.

However, the Court found, it could not say OCGA § 40-6-397 does not give a person of ordinary intelligence fair warning that appellant's conduct — particularly, moving into the emergency lane to then strike Ambrosetti's car a second time — is prohibited as an attempt to intimidate someone, which violates the plain language of the statute. Appellant's claim of selective prosecution also failed because he did not even attempt to show that his prosecution represented an intentional and purposeful discrimination which was deliberately based upon an unjustifiable standard, such as race, religion, or other arbitrary classification.

Appellant also argued that OCGA § 16-5-60 (b) is unconstitutionally vague as applied to him because he was a victim of Ambrosetti's road rage and dealt with the situation as best he could and that it was arbitrary whether he or Ambrosetti would be prosecuted. However, the Court found, there was testimony that appellant was the aggressor and struck Ambrosetti's vehicle twice while in traffic. A person of ordinary intelligence would appreciate the risk from intentionally using one's vehicle to strike another vehicle at highway speeds around other motorists, and therefore would have fair notice such conduct would violate the statute. Accordingly, the Court affirmed the trial court's decision that OCGA § 16-5-60 (b) is not unconstitutionally vague when applied to the facts of this case.

Chain of Custody; Motions in Limine

Lewis v. State, S19A0765 (8/5/19)

Appellant was convicted of malice murder, rape, and burglary. The evidence showed that the crimes occurred in 1991 but went unsolved. In 2004, the police department created a Cold Case Squad. The Cold Case Squad made repeated requests to the police department's property section to obtain the victim's rape kit, but the kit was not located until January 2008. A detective then sent the swabs to a private lab for DNA analysis, leading to the creation of a DNA profile. The GBI reviewed the private lab's work, uploaded the profile into a national database of DNA profiles known as CODIS, and issued a report in April 2008 concluding that the DNA profile was a match for appellant.

Appellant argued that the trial court erred in denying his motion in limine to exclude the DNA evidence. At trial, he argued that the State's DNA evidence should be excluded because the State would be unable to establish an adequate chain of custody because it could not show the location of the evidence from September 1991 (when the GBI received the swabs from the FBI) until January 2008 (when the police department's property section located Evelyn's rape kit and sent it to the Cold Case Squad).

The Court stated that a party's motion in limine to exclude evidence as inadmissible should be granted only if there is no circumstance under which the evidence is likely to be admissible at trial. Here, the DNA evidence was certainly relevant to the issues in the case. Indeed, it was *the* critical piece of evidence in this case. Appellant's primary challenge regarding chain of custody was that police could not locate the rape kit for several years when the Cold Case Squad wanted to retest it. Appellant raised the chain of custody issue on the eve of trial and presented no evidence that anyone had tampered with the rape kit. The State argued that it would present testimony at trial establishing that the swabs in the rape kit were the same ones that were collected from the victim. Given this assurance (which was later fulfilled), the Court found that appellant could not establish a circumstance in which the evidence would be ruled inadmissible. His argument raised only a bare speculation of tampering, which was an insufficient basis to exclude the evidence. Therefore, the trial court did not abuse its discretion in denying his motion in limine.

Prosecutorial Misconduct; Double Jeopardy

State v. Jackson, S19A0646 (8/5/19)

The trial court granted a mistrial in the murder case against Jackson, finding that the prosecutor's closing argument included an improper comment on matters not in evidence. Specifically, a comment regarding what an absent witness, Porter, would have said if she had testified. After findings that the prosecutor made that improper comment intentionally in hopes that the comment would lead to a mistrial, and thus an opportunity to retry the case, the trial court determined that double jeopardy prohibited the State from retrying Jackson. The State appealed.

The record showed that in her closing argument, defense counsel noted that the State had not called Porter to testify, adding, "I wonder what she would have had to say." In the State's closing, the prosecutor stated the following: "Everything is not needed to be proven. Every witness doesn't need to be called. You have got direct evidence. There is other evidence through testimony that has told you what happened. Even Tomeka Porter, all she could tell you is[,] 'yeah, we went back to the car to clean it up.' You have got the evidence to support that already that that happened. That is corroborated. Tomeka Porter wasn't needed. All she can do is say, 'Yeah, I went back and I saw her clean up the car.'" The trial court then granted Jackson's motion for mistrial.

First, the State argued that the trial court abused its discretion in ordering a mistrial because the comment was both a reasonable inference from the evidence and an invited response to the defense's reference to Porter in closing. The Court disagreed.

Here, the State's argument went beyond a response that righted the scale. In its closing argument, the defense noted that the State did not call Porter to testify, and the defense appeared to invite the jury to consider what Porter might have said had she testified. The State did not respond to the defense argument by telling the jury that it ought not speculate about

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what Porter would have said if she testified. Instead, the State purported to tell the jury “all” that Porter would have said had she testified — while omitting that Porter had said that Sade, a co-defendant, had confessed to killing the victim. Although the State contended that its comments about what Porter would have said if called to testify were not prejudicial because they did not implicate Jackson in particular and addressed events that occurred after the murder, the trial court concluded that the State's argument effectively introduced a statement by Porter that the jury might view as providing corroboration of the testimony of Sade, Jackson's accomplice, while omitting Porter's significant exculpatory pretrial statement. Finding that the evidence presented against Jackson at trial was not overwhelming, the trial court concluded that the State's comments were so prejudicial as to create an unfair trial for Jackson. And, the Court stated, because the trial court was in the best position to judge the possible prejudicial impact of the State's argument, the State failed to show that the trial court abused its discretion in ordering a mistrial.

Next, the State argued that the trial court erred in granting the plea in bar. The State contended that the trial court erred by applying the wrong legal standard in that it equated “egregious” prosecutorial conduct with the sort of intentional goading that bars a retrial. But, the Court found, the trial court clearly found that the prosecutor made the offending comments in hopes that they would result in a mistrial. It found that the prosecutor made the comments “intentionally and strategically after realizing the evidence was not overwhelming” and “well aware that there was a high probability that this action would result in an immediate motion for mistrial[.]” And the trial court in particular found that the prosecutor “acted with specific and deliberate intent to subvert the protections afforded by the Double Jeopardy Clause by goading the defendant into moving for a mistrial.” Thus, the Court found, the trial court made the requisite findings and applied the correct standard. Accordingly, the Court held, based on the record, and especially in the light of weaknesses in the case presented against Jackson at trial, it could not say that the trial court's finding that the prosecutor acted with the requisite intent was clearly erroneous. Accordingly, the Court concluded, the State therefore failed to show that the trial court erred in granting the plea in bar.