

## THIS WEEK:

- **Statements; Impeachment**
- **Body Cams; Video and Audio Recordings**
- **Habeas Corpus; Ineffective Assistance of Appellate Counsel**
- **Terroristic Threats; Sufficiency of the Evidence**
- **Motions for New Trial; General Grounds**
- **Hearsay; Motions for Mistrial**

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### Statements; Impeachment

*Lee v. State, S19A0661 (9/3/19)*

Appellant was convicted of murder and possession of a firearm during commission of a crime. He argued that the trial court erred when it admitted his custodial statement based on its finding that his request for counsel was ambiguous. The Court disagreed.

The Court stated that a suspect who asks for a lawyer at any time during a custodial interrogation may not be subjected to further questioning by law enforcement until an attorney has been made available or until the suspect reinitiates the conversation. An ambiguous or equivocal statement about an attorney does not require officers to cease interrogation, however; a suspect must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.

Here, the Court found, appellant's numerous references to counsel—including "It ain't gonna be too much different from when my lawyer get here," "I wanted to wait for my lawyer but I'll go ahead," "Well I hadn't really picked my lawyer out, but I know within a few days, I should have one," and "Can I just wait until I get a lawyer?"—were not unequivocal and unambiguous requests to have counsel present during interrogation. Moreover, appellant twice indicated an intention to obtain counsel in the future, but future-oriented references to obtaining counsel are not clear requests for an attorney that require law enforcement officers to immediately end an interview. Thus, when a defendant makes an equivocal reference to counsel, as appellant did here, interviewing officers are not always required to clarify the request, but they can. And here, the Court found, appellant made equivocal and ambiguous statements about his intent to obtain an attorney, and each time the officer reasonably sought clarification of appellant's statements. Ultimately, appellant stated, "I'll talk to you. You know what I'm saying. I'll go ahead and tell you." Thus, the Court held, because appellant did not unambiguously invoke his right to counsel during the custodial interview, the trial court did not err in admitting its recording into evidence.

Appellant also argued that the trial court erred when the State was permitted to impeach Lewis, a defense witness, with a pending indictment. Appellant called Lewis to testify at trial, and on cross examination, the State asked Lewis if he currently was under indictment for possession of cocaine with intent to distribute and possession of marijuana with intent to distribute. Lewis admitted that he was, and appellant then moved for a mistrial, arguing that a witness can only be

impeached on the basis of a conviction, not an indictment. The court denied the motion for a mistrial, finding that the State introduced the evidence not to generally impeach the witness on the ground that he was a criminal and ought not be believed, but instead to impeach the witness on the ground that he was biased against the State because he was then being prosecuted by the same district attorney's office. The court did, however, give a limiting instruction to the jury, advising the jurors that they could only consider the testimony to show Lewis's bias against the State.

The Court found that the trial court did not abuse its discretion by allowing the prosecution to cross-examine Lewis regarding his pending indictment for the limited purpose of showing his bias. A defendant may cross-examine a prosecution witness about pending criminal charges to show that the witness has reason to shade his testimony in favor of the State. Thus, the Court stated, it could see no reason why charges pending against a witness and brought by the same office of prosecuting attorneys could not also be used to suggest that a defense witness has reason to be hostile to the State. Which inference to draw—whether the pending charges give the witness reason to curry favor with the State or instead give him reason to try to wound the State by shading his testimony—is for the jury to decide. Therefore, the trial court did not err when it allowed the prosecution to use pending charges to impeach Lewis on grounds of bias, especially where (as here) the trial court was careful to issue a limiting instruction so that the jury considered the evidence only for that purpose.

## **Body Cams; Video and Audio Recordings**

*Varner v. State, S19A0951 (9/3/19)*

Appellant was convicted of malice murder and possession of a firearm by a convicted felon in connection with the shooting death of Joshua Deberry. The evidence, briefly stated, showed that Deberry and appellant had an argument regarding payment for work appellant did as a contractor for Deberry. As the men argued, appellant pulled a gun and shot Deberry three times before fleeing. One of the first police officers to respond wore a body camera, which began recording audio and video on the way to the scene. Officers found Smith, appellant's fiancé, crouched on the pavement next to Deberry, who was bleeding profusely from his face and abdomen but was still alive. Smith told the officers that she knew where appellant lived and described his house, the clothes he was wearing, and the argument with Deberry about being paid. At some points, Smith bent over Deberry, who was mumbling, and repeated what Deberry said to the officer. Both Smith and Deberry told the officers that appellant had used a .38-caliber revolver.

Appellant filed a motion in limine to exclude the video and audio recording made by the body camera worn by the first police officers who responded to the 911 call after the shooting. Appellant's only argument was that the video portion of the recording was substantially more prejudicial than probative. The court denied the motion.

First, appellant argued that the recording should have been excluded under Rule 403 because it showed Deberry's blood pooling on the ground and flowing from his head and face as he waited for an ambulance. The Court disagreed. The Court stated that although the segments of video that show Deberry were certainly disturbing to see - as are many images of fatal shootings - they and the recording as a whole were relevant and probative to show the crime scene, Deberry's injuries, and his and Smith's condition and demeanor as they spoke to each other and to the responding officers, as well as to corroborate Smith's and the officer's testimony. Accordingly, the trial court did not abuse its discretion by admitting the video portion of the recording.

Next, appellant argued that the trial court should have excluded the evidence as a violation of his right of confrontation and as hearsay. The Court noted that since these arguments were not raised before the trial court, its review was limited to whether there was plain error.

The Court stated that a Confrontation Clause violation occurs when an out-of-court statement admitted into evidence is "testimonial" in nature and the declarant is unavailable at trial and was not previously subject to cross-examination. Thus, as appellant conceded, the admission of Smith's recorded statements did not violate the Confrontation Clause because she testified at trial and was subject to cross-examination.

However, appellant contended that the admission of Deberry's statements violated the Constitution. The Court disagreed because even though Deberry was obviously unavailable, his statements were not testimonial. As the trial court properly concluded, Deberry's statements were nontestimonial in that they were not intended to establish or prove a past fact; rather, they were intended to describe current circumstances that required immediate police action, that is, securing a crime scene and determining whether an armed killer might still be in the vicinity.

The Court also found that the statements were not inadmissible hearsay. First, Smith's statements repeating what Deberry mumbled qualified as present sense impressions. A present sense impression is "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter." OCGA § 24-8-803 (1). To be admitted under this exception, the statement must describe or explain an event or condition that is personally witnessed by the declarant and is "essentially contemporaneous" to the statement. Smith's statements repeating Deberry's responses to the officer's questions satisfied these criteria. First, the statements described what she personally perceived: "He just said '.38,'" and "Yeah, he just said 'yeah.'" Second, the statements were made immediately, as Smith merely repeated Deberry's mumbled responses to make sure that the officers could hear them.

And, the Court found, the rest of Smith's statements and all of Deberry's statements were admissible under the excited-utterance exception to the rule against hearsay. An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." OCGA § 24-8-803 (2). Although the recording depicted Smith and Deberry after the shooting occurred, had an objection been raised, the trial court would have been fully authorized to rule that the stress and excitement caused by the shooting had not yet dissipated. The police officers responded just minutes after the shooting, and Deberry was still bleeding profusely as he waited for an ambulance. As soon as the officers arrived, Smith frantically shouted, "I know who did it," and she appeared visibly shaken and panicky throughout the entire recording, even after Deberry was taken to the hospital. Accordingly, the Court concluded, because appellant failed to show that any of the now-disputed statements on the body-camera recording were inadmissible hearsay, he failed to show any error at all in this respect, much less plain error.

## **Habeas Corpus; Ineffective Assistance of Appellate Counsel**

*Benton v. Hines, S19A0927 (9/3/19)*

Hines was convicted of armed robbery and other crimes in connection with the robbery of a convenience store, and she was sentenced to imprisonment for 20 years. The evidence presented at her trial showed that she, Geoffrey Jupiter, and Ricky Timmons were involved in the robbery. Hines and Jupiter were tried together, and Timmons testified against them.

Timmons had agreed to testify for the prosecution as a part of a plea deal that allowed Timmons to plead guilty to simple robbery and avoid prosecution for the greater offense of armed robbery.

After she was convicted and sentenced, Hines obtained new counsel to represent her in post-conviction proceedings. Hines's motion for new trial was denied, and her attorney sought review in the Court of Appeals, raising 16 claims of error, including several claims of ineffective assistance of trial counsel. The Court of Appeals affirmed, rejecting all these claims of error. See *Hines v. State*, 320 Ga. App. 854 (2013).

In 2017, Hines filed a habeas petition. She argued that her appellate counsel rendered ineffective assistance by not raising the issue of trial counsel's ineffectiveness as to the impeachment of Timmons. Specifically, she claimed that her trial counsel failed to cross-examine Timmons about the fact that he faced a potential life sentence for armed robbery with no parole eligibility for 30 years, but for his deal in which the State agreed that he could plead guilty only to simple robbery and testify against Hines (and Jupiter). Following a hearing, the habeas court concluded that Hines was entitled to relief on this claim and issued the writ. The Warden appealed.

The Court found that Hines failed to show ineffective assistance of appellate counsel. The underlying claim in this case (the claim that Hines believed her appellate lawyer should have raised) was that trial counsel rendered ineffective assistance in failing to cross-examine Timmons about the maximum time he would be facing if he had not made a plea deal and instead was convicted of armed robbery. But, the Court stated, the merit of this claim, was doubtful at best. Even if Hines could have shown that her trial counsel acted deficiently in failing to impeach Timmons on this particular issue, she likely would not have been able to show prejudice because the record showed that Timmons was cross-examined extensively about his plea deal by Hines's and Jupiter's attorneys. Thus, Hines's appellate lawyer reasonably could believe that raising a claim of trial counsel's ineffectiveness on the issue of Timmons's impeachment would not have succeeded on appeal, and so Hines did not show that her appellate lawyer was deficient in failing to raise this claim. Accordingly, the Court concluded, the habeas court erred when it granted the writ of habeas corpus to Hines.

## **Terroristic Threats; Sufficiency of the Evidence**

*Bryant v. State*, S19A0747 (9/3/19)

Appellant was convicted of the malice murder of his wife, Angelina Bryant ("Bryant"), the aggravated assault of Trina Nwoke, and making a terroristic threat. The evidence, briefly stated, showed that Bryant separated from her husband and went to live with a friend. Approximately a couple of months later, Bryant received telephone calls and text messages from appellant that made her feel unsafe. These messages continued late into the night. Appellant decided to seek a TPO the next day. That morning, as she and Nwoke were getting ready to leave, appellant called again. The call was put on speaker-phone so others could hear. Bryant asked, "what do you want?" Appellant said, "you will regret this," and ended the call. Approximately ten minutes later, as Bryant and Nwoke were walking down a flight of stairs at the apartment where Bryant was living, appellant ambushed them. He shot and killed Bryant and seriously wounded Nwoke.

Appellant contended that the evidence was insufficient to convict him of terroristic threats. The Court agreed. The Court noted that at the relevant time, former OCGA § 16-11-37 (a) (2010) provided in pertinent part: "A person commits the offense of a terroristic threat when he or she threatens to commit any crime of violence ... with the purpose of terrorizing

another[.]” Thus, the State was required to establish two elements to sustain a conviction for making terroristic threats: (a) that the defendant threatened to commit a crime of violence against the victim, and (b) that the defendant did so with the purpose of terrorizing the victim.”

Here, the indictment specified that the crime of violence that appellant allegedly threatened to commit was murder. And the record shows that the communication, declaration, or expression of an intention to commit the crime of murder identified by the State at trial was appellant’s statement in his final phone call to Bryant “you will regret this.” But, the Court stated, patently, “you will regret this,” without more, is not an explicit declaration of an intention to commit murder. But, the specific form of a terroristic threat is not important. It need not take any particular form or be expressed in any particular words, and may be made by innuendo or suggestion. A communication is sufficient to constitute a threat if a reasonable person could conclude that it was a threat under the circumstances.

Nevertheless, the Court stated, the crime of making a terroristic threat was completed, if at all, when the appellant communicated the threat to Bryant with the intent to terrorize her. Appellant’s shooting of Bryant, albeit only ten minutes later, was not part of his communication to her in that phone call. Because the appellant’s conduct *after* the phone call was not part of his communication to her in that phone call, the shooting was not relevant to the determination whether a reasonable person could conclude, under the circumstances at the time of the communication, declaration, or expression at issue, that appellant threatened to murder Bryant.

Furthermore, the Court noted, the evidence of the circumstances surrounding the alleged threat to commit murder showed one incident of non-lethal violence against Bryant two to three months before the shooting (a battery that bruised her face) and appellant’s harassing conduct the day and night before the shooting (when he texted and called Bryant to the point that she was frightened enough to want a protective order). Therefore, the Court concluded, the evidence, when viewed in context, was not sufficient to authorize the jury to find that a reasonable person could conclude that, when the communication, expression, or declaration “you will regret this” was made to the victim, appellant was threatening to kill Bryant, as opposed to inflicting some other harm. Accordingly, the evidence was not sufficient to support the jury’s verdict of a terroristic threat, and the appellant’s conviction was reversed.

## Motions for New Trial; General Grounds

*State v. Holmes, S19A0613 (9/3/19)*

Holmes was convicted of malice murder and other offenses. The trial court granted his motion for new trial on two grounds: first, on the ground that the court had erred by denying Holmes permission to enter into evidence portions of the recorded and transcribed statement of Hamilton, who was not available to appear as a witness at trial, and second, on the general grounds as the “thirteenth juror.” The Supreme Court reversed and remanded. *State v. Holmes*, 304 Ga. 524 (2018). The Court found that the trial court erred in its evidentiary analysis of the admissibility of Hamilton’s statement. Also, while the trial court granted a new trial on the general grounds, it based this second ground in part on its conclusion that it had made an evidentiary error with respect to Hamilton’s statements. Thus, the Court remanded for the trial court to apply the correct standard of review on each of the two grounds upon which it originally granted the new trial.

After a brief hearing on remand, the trial court granted Holmes a new trial on the general grounds. The State appealed.

The State first argued that the trial court ignored the Court's direction to reconsider the admissibility of Hamilton's statement. The Court disagreed because the State's argument failed to acknowledge that the Court's direction regarding the admissibility of Hamilton's statement pertained to one of *two* alternative grounds for the initial grant of a new trial. The trial court was therefore authorized on remand to grant a new trial on either alternative ground, so long as it did not repeat either of the errors that it made in its initial grant of a new trial (or make any new ones). And, the Court found, the trial court did not.

Next, the State argued that the trial court acted hastily and out of pique, and not with the cautious discretion it was authorized to exercise as the thirteenth juror. In support of this argument, the State pointed to the trial court's quick requests for a proposed order—directed only to defense counsel near the beginning and the end of the hearing on remand—even though one of defense counsel's arguments was supposedly the same as an argument the Court had already rejected in the first appeal. The Court again disagreed.

It is well established that a trial court may request and then adopt a proposed order from one party and doing so does not itself demonstrate an absence of cautious discretion. Here, the Court found, the trial judge had presided over the entire trial and the original proceedings on motion for new trial, and thus had sufficient time and familiarity with the case to formulate his thoughts as the thirteenth juror. Also, the State showed nothing in the record on remand that supported its claim that the trial court prejudged the case because of carelessness or for any other reason. And, the Court stated, even assuming, without deciding, that defense counsel did repeat an argument on remand that it rejected in Holmes's first appeal, the Court presumes—absent record evidence to the contrary—that the trial court understood the nature of its discretion and exercised it. Moreover, the trial court's written order on remand did not reveal any improper basis for the grant of a new trial on the general grounds, and instead showed that the court properly exercised its discretion. Thus, the Court held, it presumes, in the absence of affirmative evidence to the contrary, that the trial court properly exercised its discretion.

Finally, having reviewed the record for itself, and bearing in mind the standard of review set forth in OCGA § 5-5-50, the Court stated that it could not say that the trial court abused its substantial discretion in granting Holmes a new trial on the general grounds.

## **Hearsay; Motions for Mistrial**

*Walker v. State, S19A0540 (9/3/19)*

Appellant was convicted of felony murder and a firearm offense in connection with the shooting death of his girlfriend, 53-year-old Constance Cox. He contended that the trial court erred in denying his motions for a mistrial after the State introduced evidence of hearsay statements by Cox through the testimony of Cox's daughters, Nunnally and Quinn, in violation of a trial court order, and that he was denied the effective assistance of counsel due to his trial attorneys' failure to object and move for a mistrial when the State introduced evidence of another hearsay statement by Cox through the testimony of her son-in-law. The Court disagreed.

The record showed that the hearsay statements were made by Cox after she was wounded in her back at appellant's house about a year before the fatal shooting. Before trial, the State filed a notice of intent to introduce evidence of several of those statements under the residual exception to the rule against hearsay, OCGA § 24-8-807. The relevant parts of the notice said that the State intended to present testimony from Nunnally that Cox refused treatment when the EMTs arrived at the Nunnallys' apartment; testimony from Quinn that Cox said that appellant shot at her but missed; and testimony from Nunnally's husband that Cox told him when he arrived at appellant's house that appellant had fired a shot at her. The trial court ruled prior to trial that "the State's request to introduce the statements [by Cox] referred to in the Notice is denied."

First, appellant argued, the trial court abused its discretion in denying his mistrial motions, because Nunnally testified, in contravention of the court's order, that Cox "refused" to go with the EMTs. But, the Court found, at trial, Nunnally did not testify that Cox said that she did not want medical treatment or that Cox told the EMTs to go away. Instead, she testified that Cox "refused to go with them [i.e., the EMTs]," and as the trial court correctly explained, "you can refuse by your actions without having to say a word" — which the evidence showed that Cox did. Thus, contrary to appellant's argument, and as the trial court found, Nunnally's testimony that Cox "refused" to go with the EMTs did not violate the court's order on the State's notice.

Next, appellant contended, the trial court should have granted his motion for a mistrial after Quinn testified that Cox "had been through it before" with appellant. But, the Court found, Quinn did not testify about anything that Cox said to her. Instead, Quinn testified that when her aunt called her on the day that Cox died, Quinn's only response to her aunt was, "Let me know how she is." When the State asked why, Quinn testified that Cox "had been through it before" with appellant and that Quinn therefore did not think that the situation was serious. Quinn knew from her own observations at the Nunnallys' apartment, which she had just recounted to the jury, that Cox sustained a serious but non-fatal back wound at appellant's house about a year before the fatal shooting. Quinn also had personal knowledge that Cox went back to appellant after that incident, which she told the jury. The trial court was authorized to conclude that Quinn's testimony about why she reacted to her aunt's call the way she did suggested that her lackadaisical response — just "[l]et me know how she is" — reflected not a lack of concern for her mother, but rather resignation about the choice that Cox had made to stay with appellant. Thus, the Court concluded, contrary to appellant's argument, Quinn's testimony that Cox "had been through it before" with appellant did not violate the court's order on the State's notice, and the trial court therefore did not abuse its discretion in denying his mistrial motion.

Finally, appellant argued that he was denied the effective assistance of counsel due to his trial attorneys' failure to object and move for a mistrial when the State introduced evidence of another hearsay statement by Cox through the testimony of Nunnally's husband. The Court again disagreed.

The Court noted that the State's notice of intent to introduce hearsay statements by Cox said that Nunnally's husband would testify that Cox told him when he arrived at appellant's house to pick her up about a year before the fatal shooting that appellant had fired a shot at her. And the trial court's order concluded, "the State's request to introduce the statements [by Cox] referred to in the Notice is denied." Appellant contended that the testimony of Nunnally's husband that he twice asked appellant if appellant had shot Cox violated the court's order, because the only way that Nunnally's husband knew to ask appellant that question was because Cox had told him that appellant fired a shot at her. But Nunnally's husband testified that what prompted him to ask appellant if appellant had shot Cox was Cox's crying and emotional state and the tense atmosphere at appellant's house.

*Prosecuting Attorneys' Council of Georgia*

# CaseLaw UPDATE

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Moreover, the Court stated, aside from certain unusual circumstances — for example, questions of the infamous “When did you stop beating your wife?” variety— questions are not hearsay, because they do not assert anything, nor are they intended as assertions. Thus, Nunnally's husband's testimony that he twice asked appellant if appellant had shot Cox was not hearsay, so there was no basis for a hearsay objection, and the failure to make a meritless objection is not deficient performance. Likewise, appellant's trial counsel were not professionally deficient in failing to make a mistrial motion based on a violation of the court's order, because the testimony by Nunnally's husband did not violate the order, so a mistrial would not have been warranted. Accordingly, the Court concluded, appellant's ineffective assistance of counsel claim failed.