Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING OCTOBER 18, 2019
Issue 42-19

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Rehabilitation of Witnesses; Subjective Fear of Rape

Riggs v. State, S19A0591 (9/9/19)

Appellant was convicted of murder and armed robbery in connection with the death of the victim. The evidence, briefly stated, showed that appellant solicited sex online. The victim responded to his ads. Appellant lured the victim to appellant's home under the pretense of having sexual relations with him. But, appellant strangled and beat the victim to death, robbed him, and then disposed of his body by throwing it in a creek.

On cross-examination, appellant state that he killed the victim, a much older and smaller man than appellant, because he feared for his life because he feared the victim was going to rape him. Appellant argued that the trial court erred in barring his testimony on redirect that he was raped at age 11. Specifically, he contended that his "subjective fear of rape" was relevant to the jury's consideration of voluntary manslaughter, and also that the testimony was admissible to rehabilitate his credibility after cross-examination. The Court disagreed.

Here, the jury heard appellant's testimony on cross-examination that he feared both for his life and that he was about to be raped. The Court stated that the question was not whether appellant was entitled to a jury instruction on voluntary manslaughter; the trial court instructed the jury on the definition of voluntary manslaughter. The evidence at trial, including appellant's own testimony, established overwhelmingly and without dispute that appellant lured the victim to his house by telling him that the two of them were going to have sex in order to rob the victim. Appellant made no formal proffer at trial regarding why being raped "would be a fear of [his]," but it was clear from a sidebar discussion that he would have testified to "an incident that happened to him when he was a child" if allowed to answer his counsel's question on redirect. But, the Court found, that answer concerned an alleged incident occurring many years earlier and was simply not relevant to the jury's determination regarding voluntary manslaughter. Nor was the testimony relevant to support a claim of justification or self-defense, both because appellant did not contend that the victim sexually abused him as a child, and because during the charge conference, appellant withdrew his requested charges on justification and self-defense. Similarly, in the absence of an insanity defense, which appellant also withdrew from consideration by the jury, appellant could not demonstrate that this evidence was relevant to show his alleged subjective mental state.

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Nevertheless, citing *Allison v. State*, 296 Ga. App. 379 (2009), appellant contended the evidence was relevant to show why he had a "subjective fear" of rape and thus was admissible as rehabilitation evidence. But, the Court stated, *Allison*, was decided under the old Evidence Code and did not involve rehabilitation of a witness' credibility. But even if this evidence could have been considered for the limited purpose of rehabilitating his credibility in testifying to his fear of rape, any error in refusing to admit it was harmless because the testimony was not relevant to support any claim of voluntary manslaughter, justification and self-defense.

Voir Dire; Excusals for Undue Hardship

Davis v. State, S19A0681 (9/9/19)

Appellant was convicted of felony murder and other crimes. The record showed that during questioning of the venire by the trial court, Juror 36 raised her card in an affirmative response when the trial court asked whether anyone had "something going on in your personal life that would prevent you from giving your full attention to this case if selected[.]" When defense counsel asked the venire if anyone had an economic or familial hardship, Juror 36 again gave an affirmative response. The trial court asked Juror 36 to describe the nature of her hardship. Juror 36 explained that, the day before, her brother had died in Mississippi from throat cancer. She said that she believed that the funeral would occur that weekend, although she had not "talked to anyone today because [she had] been here." Following voir dire, the State moved to excuse Juror 36 on the basis of her hardship and because she had indicated a hostility to law enforcement that showed she was not capable of being fair and impartial. Over the objection of appellant, the court excused Juror 36 because of her hardship.

Appellant contended that the trial court erred when it granted the State's motion to strike Juror 36 over his objection. Specifically, he argued that the trial court improperly questioned the juror regarding a topic not covered in OCGA § 15-12-164 (a). But, the Court stated, that statute enumerates questions that must be asked of prospective jurors; it does not limit the trial court's inquiry to those issues.

Nevertheless, appellant argued, it was evident that the State's motion was based not on hardship but on her bias against law enforcement. Appellant contended that, in fact, Juror 36 was not biased in that she had testified during her individual questioning that she could be fair and impartial to both appellant and the State. However, the Court stated, the State's motion to remove the juror was based in part on the juror's hardship and in part on the juror's alleged inability to be fair and impartial. The trial court then excused Juror 36 on the basis of hardship. It is well-settled under OCGA § 15-12-1 (a) that a trial court may excuse a potential juror for "good cause" if jury service would impose an undue hardship. Accordingly, the Court concluded, there was no error.

Jackson-Denno Hearings; *Miranda*

Reid v. State, S19A0762 (9/9/19)

Appellant was convicted of malice murder, felony murder, and cruelty to children in the first degree in connection with the death of her three-year-old son. The evidence showed that after the victim was admitted to the hospital, a physician notified Division of Family and Children Services (DFCS) that child abuse was suspected. Herndon, a DFCS investigator, who was not a sworn law enforcement officer, interviewed appellant at the hospital. He introduced himself to appellant

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and indicated that DFCS and law enforcement would be working the case "jointly." There were no law enforcement officers with Herndon at the time. Appellant gave a statement.

Later that afternoon, Herndon saw appellant at the police department detective bureau where he conducted a second interview of her. No detectives or law enforcement officers were present when Herndon interviewed appellant at the detective bureau. Over appellant's objections based on *Miranda*, recordings of Herndon's conversations with appellant at the hospital and detective bureau were played for the jury.

Appellant first contended that the trial court erred by not conducting a *Jackson-Denno* hearing to determine whether, under the Fourteenth Amendment, the statements she made to the DFCS investigator at the detective bureau were made voluntarily. However, the Court stated, *Jackson-Denno* and *Miranda* provide distinct means for challenging the State's use of a confession. Thus, appellant's objection under *Miranda* was insufficient to challenge the voluntariness of the statements appellant made in her interview with the DFCS investigator at the detective bureau. To do so, appellant was required to make a specific objection to the admission of the statements on the basis of voluntariness or request a *Jackson-Denno* hearing. Because she did neither, and pretermitting whether Herndon's actions constituted "police" action under *Jackson-Denno*, the trial court did not err by failing to conduct such a hearing.

Appellant next argued that she was in custody when she was interviewed by Herndon at the detective bureau, thereby necessitating *Miranda* warnings and that she invoked her right to counsel during the interview. The Court disagreed.

The evidence showed that after Herndon interviewed appellant at the police bureau, she returned to the hospital but later came back to the detective bureau of her own volition. Upon her return, she met with Detective Patterson, who read her the *Miranda* warnings. According to Detective Patterson, this was the first time anyone had provided the *Miranda* warnings to appellant that day. Appellant then invoked her rights to remain silent and to counsel, and Detective Patterson stopped questioning her. She was then placed under arrest.

Thus, the Court found, the record thus belied appellant's contention that she was interrogated after receiving the *Miranda* warnings and invoking her rights to remain silent and to counsel. Instead, the record supported the trial court's determination that appellant was not in custody at either time she spoke with the DFCS investigator. Moreover, the record established that appellant remained free to leave the interviews with Herndon at any time and that she did so at the conclusion of each.

Therefore, the Court held that appellant was not in custody or under arrest when she was interviewed by the DFCS investigator at the detective bureau. Moreover, no reasonable person in appellant's position would have considered herself to be restrained to such a degree that she would have perceived herself to be in custody when she was interviewed at the detective bureau. Consequently, because it was not incumbent upon the DFCS investigator to provide appellant with the *Miranda* warnings before interviewing her, her statements in the interview conducted at the detective bureau were admissible.

Finally, appellant argued that admission of the recording of her interview with the DFCS investigator at the detective bureau violated her Sixth Amendment right to counsel, as articulated in *Massiah v. United States*, 377 U.S. 201 (84 SCt 1199, 12 LE2d 246) (1964), and *Brewer v. Williams*, 430 U.S. 387, 398 (97 SCt 1232, 51 LE2d 424) (1977). But, under

Massiah and its progeny, the Sixth Amendment right to counsel is violated by the admission of incriminating statements that a government agent deliberately elicits in the absence of counsel after judicial proceedings have been initiated against the defendant. Before judicial proceedings are initiated, a suspect in a criminal investigation has no Sixth Amendment right to the assistance of counsel. And here, the Court found, appellant's DFCS interview at the detective bureau was conducted on the day the victim was transported to the hospital from appellant's house. Thus, because no judicial proceedings had been initiated against appellant when that interview took place, there was no basis for excluding the contents of the interview under *Massiah* and *Brewer*.

Supplementing the Record; Showing of Harm

West v. State, S19A0594 (9/23/19)

Appellant was convicted of felony murder and other crimes in connection with a shooting death. Appellant filed a timely notice of appeal on July 27, 2015, but on December 2, 2016, the Clerk of the Supreme Court returned the record to the trial court as incomplete because State's Exhibit 2, a recording of several 911 calls in which callers reported the shooting, was omitted. On September 13, 2017, appellant filed in the trial court a motion to complete the record for his appeal in which he specifically requested that he be granted a new trial if the 911 recording could not be located.

At a subsequent hearing, it was determined that the 911 recordings could not be located. The trial court thereafter ordered that the record be supplemented with the certified transcript of the 911 recording. The trial court explained that, in light of the significant evidence adduced at trial showing appellant's guilt, the recording would have little, if any, bearing on appellant's appeal and that the loss of the recording did not entitle him to a new trial.

Appellant contended that the trial court failed to follow the procedure, as provided in OCGA § 5-6-41 (g), for supplementing the trial record; that the trial court erred in supplementing the record with a transcript of the lost recording; and that, as a result, he has been denied his right to full and fair appellate review of his convictions. The Court disagreed.

Where, as here, an otherwise complete record is missing only one or a few parts of the trial, the appellant is not entitled to a new trial unless he alleges that he has been harmed by some specified error involving the omitted part and shows that the omission prevents proper appellate review of that error. But here, the Court noted, appellant contended only that his appellate counsel could not determine whether any errors occurred when the 911 recording was played for the jury and, as a consequence, was prevented from adequately representing appellant on appeal. Thus, the Court found, appellant made a generalized assertion of harm but failed to raise any specific objection to matters that occurred during this portion of the trial; his only objection was to the recording's omission from the record. Thus, because appellant did not show that he was prevented from raising any viable issue on appeal or otherwise harmed as a result of the minimally incomplete record, the Court affirmed his convictions.

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Motions for New Trial; General Grounds

State v. Denson, S19A0699 (9/23/19)

Denson and his brother were convicted of felony murder (predicated on aggravated assault), two counts of aggravated assault, and three counts of possession of a firearm during commission of a felony. The trial court granted Denson a new trial on the general grounds and the State appealed.

The State contended that the trial court's grant of a new trial for Denson on the general grounds must be reversed because the trial court "gave no indication of what factors" it considered in reaching that decision. But, the Court stated, it recently considered and rejected a similar argument in *State v. Hamilton*, S19A0722 (9/3/19). Also, it was clear from the order granting Denson's motion for new trial that even though the trial court acknowledged that "there [was] some evidence in favor of the jury's findings of guilt in this case," it nonetheless concluded that "under the principles of justice and equity, the guilty verdicts on all charges are decidedly and strongly against the weight of the evidence." And it cited both OCGA § 5-5-20 and § 5-5-21 in doing so. This showed that the trial court understood the legal standard required to grant a motion for new trial on the general grounds and exercised its discretion in applying that standard. The law does not require a trial court to provide findings regarding the factors it considered in exercising its discretion as the thirteenth juror, so long as it is clear that the trial court applied the correct legal standard and exercised its discretion under OCGA §§ 5-5-20 and 5-5-21. Thus, the Court held, because the State failed to demonstrate that the trial court did not exercise properly its discretion, the State's contention failed.

The State also contended that the trial court abused its discretion in granting Denson a new trial on the general grounds because the evidence against Denson was "strong" and there were "no significant conflicts in the evidence," meaning that the law and facts of this case "demand the verdict that was rendered by the jury." The Court disagreed.

The State's primary argument was that the "only conflict" in the evidence presented at trial was that "[f]ive eyewitnesses" to the shooting "testified and gave the same or similar accounts of the crime," which differed from Denson's testimony that "he acted in self-defense and defense of the co-defendant." But, the Court stated, it is well established that a trial judge's "broad" and "substantial" discretion to sit as a "thirteenth juror" includes making determinations about conflicts in the evidence, credibility of witnesses, and weight of the evidence. And, the Court found, having reviewed the entire record, and considering that the trial court was authorized, as the thirteenth juror, to credit Denson's version of events and discount versions offered by other witnesses, and bearing in mind the standard of review set forth in OCGA § 5-5-50, it could not say that the trial court abused its substantial discretion in granting Denson a new trial on the general grounds.

Impeachment; OCGA § 24-6-621

Hills v. State, S19A0866 (9/23/19)

Appellant was convicted of the strangulation, beating, and stabbing death of his live-in girlfriend. A few days before trial, the State filed a "Motion in Limine Regarding 'Some Other Dude Did It' Defense." The motion sought to prevent appellant from introducing evidence to suggest that the victim's older son may have murdered her. At trial, outside the presence of the jury, appellant called Carolyn Walker, a neighbor of the victim, to testify. Walker was sworn and said that the victim's son went to the victim's house "the next day right after [the victim] died . . . getting [bicycles] and whatever

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else that he wanted out [of] the house"; that Walker was "pretty sure he had a key"; and that at some unspecified date "[b]efore any of this happened," Walker had seen him enter the house through a second-story window that could be reached from the porch roof. The trial court excluded the proffered testimony, concluding that the evidence did not connect the son with the corpus delicti, did not clearly point to someone other than the accused as the perpetrator, and "would have no effect other than to cast a bare suspicion or to raise a conjectural inference as to the commission of a crime by another."

Appellant contended, pursuant to OCGA § 24-6-62, that the trial court erred by barring testimony from Walker that the victim's older son had gained entry into the house on other occasions, which he argued would have impeached through contradiction the police officers' testimony that the house was secure. But, the Court found, Walker's proffered testimony did not disprove the facts testified to by the police officers. Walker's statement that she saw the victim's son enter the house, possibly by means of a key, after the victim's death, and that she saw the victim's son enter a window of the house at some unspecified time "[b]efore any of this happened," did not contradict the officers' testimony that the house was secure on the day the victim was killed. As a result, the Court concluded, the trial court did not abuse discretion in excluding the proffered testimony.