

THIS WEEK:

- **Jury Deliberations; Juror Misconduct**
- **Mental Competency; Due Process**
- **Jury Instructions; Prior Consistent Statements**
- **Rule 404 (b); VGCSA**
- **Prior Inconsistent Statements; Rule 404 (b)**

Jury Deliberations; Juror Misconduct

State v. Baker, A19A1545 (9/5/19)

Baker was convicted of armed robbery, aggravated assault, possession of a firearm during the commission of a crime, and possession of a firearm by a first offender probationer. The record, very briefly stated, showed that during deliberations, the jury sent out a note saying that after “intense” deliberations, they could not reach a verdict. Later, the bailiff heard an argument inside the jury room and when it got “personal,” he went in and told them to calm down. Shortly thereafter, the jury sent another note saying that they are unable to “to openly discuss the charges because one juror will not communicate and has stonewalled.” The judge brought the foreperson into the courtroom. The discussion centered on one particular juror whom the judge noted had slept during some of the testimony. The foreperson agreed that was the person who was not deliberating. The judge decided to remove that juror and replace her with an alternate because she refused to deliberate and she had been sleeping.

At the motion for new trial, the dismissed juror testified that she was from Ghana and that the other jurors would not let her speak and were rude to her. She was the only black person on the jury and she felt like the other jurors were ganging up on her. She stated that she never stopped participating and that after considering all the evidence, she did not think Baker was guilty. She also said that she worked at night and slept during the day. However, she denied that she was sleeping during trial. Instead she insisted that she was only resting her eyes and heard all the testimony. The trial court granted Baker’s motion for a new trial, finding that it erred by not inquiring of the juror before the court dismissed her. The State appealed.

The Court noted that pursuant to OCGA § 5-5-25, which is applicable here, “[i]n all motions for a new trial on other grounds not provided for in this Code, the presiding judge must exercise a sound legal discretion in granting or refusing the same according to the provisions of the common law and practice of the courts.” The State contended that the trial court failed to follow the directive of OCGA § 5-5-25 when it relied on *Green v. Zant*, 715 F2d 551 (11th Cir. 1983) to conclude that additional inquiry was required before dismissing the juror. But, the Court stated, although the juror discharge issue in *Green v. Zant* arose in a different context, the principles relied upon by the trial court — that the trial court’s decision to remove a juror must be informed and supported by a sound basis — are found in Georgia law. A trial court’s discretion to remove a juror is set forth in OCGA § 15-12-172, which provides that “[i]f at any time, whether before or after final submission of the case to the jury, a juror dies, becomes ill, upon other good cause shown to the court

is found to be unable to perform his duty, or is discharged for other legal cause, the first alternate juror shall take the place of the first juror becoming incapacitated.” And, while a trial court may properly exercise its discretion in deciding whether to remove a juror for “good cause shown” under OCGA § 15-12-172, it must be an informed exercise. Furthermore, there must be some sound basis upon which the trial judge exercises his discretion to remove the juror. And, both the need for investigation and the possibility of harmful error are heightened when a jury has begun deliberations or when a jury is deadlocked.

The State contended that no further inquiry was warranted by the trial court because the court and counsel had witnessed the juror sleeping. But, the Court stated, the trial court's decision to grant Baker's motion for new trial was also based on the juror's alleged refusal to deliberate. Where, as here, a jury has begun deliberations and is deadlocked, a particular danger of harmful error is posed by the removal of a lone holdout juror. Such a juror may well have concluded that a reasonable doubt exists as to the defendant's guilt and therefore has not refused to deliberate but has simply refused to engage in additional deliberation after reaching his conclusion. A holdout juror is not subject to dismissal for failing to acquiesce to the other jurors' conclusions regarding the persuasiveness of the evidence and further investigation is necessary to establish additional evidence of failure to deliberate or juror misconduct before resorting to the extraordinary step of replacing a juror with an alternate.

And here, the Court found, the trial court granted Baker's motion for new trial based on its determination that it erred in failing to question the juror about her alleged sleeping and alleged failure to deliberate before dismissing her. Thus, the Court concluded that under the circumstances of this case, the trial court acted within its discretion in granting the motion.

Mental Competency; Due Process

Stodghill v. State, A19A1620 (9/6/19)

Appellant was convicted of five counts of aggravated child molestation, five counts of aggravated sodomy, and three counts of enticing a child for indecent purposes. He contended that the trial court erred in denying his counsel's pretrial request for a competency evaluation of him. The Court disagreed.

The record showed that the week before the trial, defense counsel made an oral request for a continuance and for a mental health evaluation of appellant's competency. Counsel explained that appellant was low functioning and that he had been completely uncommunicative at a meeting the week before. The trial judge began questioning appellant, asking if he knew the charges against him; if he understood the purpose of a jury trial, the role of the district attorney, and the trial procedure; if he knew his attorney; if he knew the role of the judge; and whether he would be able to participate in the trial by communicating with his attorney. Appellant answered the trial court's questions. The judge then gave defense counsel an opportunity to discuss the case with appellant and his family members. Afterwards, defense counsel informed the court that appellant seemed to comprehend their discussion and that “based on his demeanor and communication [that she observed that day, she] would not have requested the mental health evaluation. ...” The trial judge stated that “based on everything [he had] seen” he was denying the motion for a competency evaluation.

The Court stated that its review must focus on three factors: (1) evidence of the defendant's irrational behavior; (2) the defendant's demeanor at trial; and (3) prior medical opinion regarding the defendant's competence to stand trial. Such an

analysis focuses on what the trial court did in light of what it knew at the time of the trial or plea hearing. And here, the Court found, none of these three factors raised a bona fide doubt about appellant's ability to understand the proceedings, and thus the trial court was not required to conduct a competency hearing. The record did not show that appellant engaged in any irrational behavior prior to the start of the trial or that his demeanor exhibited incompetence. Also, a review of the transcript revealed that he responded appropriately to questions. And, the Court noted, despite her initial concerns, appellant's attorney indicated that his behavior and demeanor did not warrant a competency evaluation. Thus, the Court concluded, in light of what the trial court knew at the time of trial, the trial court did not err in proceeding without ordering a mental evaluation.

Jury Instructions; Prior Consistent Statements

Wilson v. State, A19A1477 (9/9/19)

Appellant was convicted of aggravated assault with the intent to rape (as a lesser included offense of the charged crime of rape), aggravated sodomy and false imprisonment. The evidence, briefly stated, showed that the victim was dating White, who was a friend of appellant. The three of them spent the evening in White's apartment smoking marijuana. White and the victim then went to bed and appellant slept in another bedroom. The victim and White had consensual sex. The next morning the three then smoked marijuana together. White thereafter left the apartment. The victim went back to White's bedroom to take a nap. She awoke to find appellant who wanted to have sexual relations. The victim refused and was assaulted.

The State called White to testify. He testified that he dated the victim, but that appellant was his "best friend" and on the morning of the incident he told appellant "if he can work his mojo, if he wanted to he could try [the victim] up[.]" He stated that he told appellant that he could "try" the victim because White "share[s] everything with [appellant]" and that they had "shared" female partners before.

Appellant contended that the trial court erred by not charging the jury on accomplice testimony. Specifically, appellant contended that White was an accomplice because he told him "if he can work his mojo, if he wanted to he could try [the victim]." Therefore, appellant claimed that the trial court committed plain error by failing to instruct the jury that accomplice testimony must be corroborated, given that the court instructed the jury that "[t]he testimony of a single witness, if believed, is sufficient to establish a fact[.]" But, the Court found, White did not testify that he encouraged appellant to assault the victim; rather he testified that if appellant could "work his mojo" he could "try" the victim and that he and appellant had "shared" sexual partners in the past. Additionally, White was not present during the commission of the crime, and he testified at trial that he did not believe that appellant had assaulted the victim. Moreover, the Court noted, appellant pointed to no evidence that White knew that appellant was planning on assaulting the victim, and he failed to cite precedent requiring an accomplice-corroboration instruction under circumstances similar to those presented here. As such, the Court stated that it could not conclude that the trial court committed obvious error in failing to instruct the jury on the need for corroboration of accomplice testimony.

Appellant contended that the trial court erred in admitting hearsay and bolstering testimony through three witnesses: the physician, the detective, and the victim's friend. The three witnesses all testified and repeated what the victim told them regarding the assault in the immediate aftermath.

The Court stated that an out-of-court statement made by a witness is not hearsay if the witness testifies at the time of trial or hearing, is subject to cross-examination concerning the statement, and the statement is admissible as a prior consistent statement under OCGA § 24-6-613. A witness's prior consistent statement is admissible only when the veracity of a witness's trial testimony has been placed in issue at trial. While a prior consistent statement can be admitted to rehabilitate a witness if it logically rebuts any attack on a witness's credibility, it cannot be admitted for attacks upon her character for truthfulness or evidence of her prior convictions.

The Court found that a review of the record revealed that part of appellant's trial strategy was to discredit the victim by attacking her memory of the assault. In his opening argument, appellant claimed that the victim could not remember what had happened because she had smoked marijuana. During his cross-examination of the victim, appellant's trial counsel repeatedly asked about her use of marijuana prior to the assault, and the effect of marijuana on her memory.

Thus, the Court found, while appellant did not call the victim a "liar," he nevertheless attacked her credibility by suggesting that her account of the events was not believable due to her use of marijuana. Because the victim's credibility was attacked, her prior consistent statements to the physician, the detective and her friend were admissible if they logically rebutted the attack. The victim's three prior statements, given within hours of the assault, that appellant performed non-consensual oral sex on her and then raped her logically rebutted appellant's claims that the victim's marijuana use had so clouded her memory that she could not remember what happened. Thus, the Court concluded, the trial court did not abuse its discretion in admitting the testimony of the physician, the detective and the victim's friend regarding the victim's prior consistent statements.

Rule 404 (b); VGCSA

Moton v. State, A19A1422 (9/9/19)

Appellant was convicted of three counts of sale of methamphetamine, one count of possession of marijuana (misdemeanor) and one count of possession of drug-related objects. The evidence showed that appellant made three sales of meth to a confidential informant. Following the third buy, the police executed a search warrant at appellant's home which revealed the marijuana and drug-related objects.

At trial, the State presented, pursuant to Rule 404 (b), that two years earlier, during a traffic stop, appellant dropped a bag of cocaine and a bag of marijuana out of his car window. Appellant argued that the trial court erred by admitting the other act evidence because the evidence was irrelevant to any issue other than his character, and the probative value of the evidence was substantially outweighed by its unfair prejudice in that there was "no credible evidence linking [him] to the drug sales."

As to the first prong of the Rule 404 (b) test, the Court found that appellant placed his intent at issue by pleading not guilty and taking no affirmative steps to relieve the State of its burden to prove intent. In order to prove that appellant had the requisite intent to sell, the State had to prove that appellant also had methamphetamine under his control, as the State alleged with his prior drug possession arrest. Both the charged crimes and the other act required that appellant had the

intent to control an illegal substance. Evidence of prior drug activity is highly probative of intent to sell a controlled substance and it is immaterial that the type of drug in the other act evidence is different from the drug at issue.

Furthermore, the Court stated, the prior act of drug possession occurred while appellant was driving a car in the same area where the sale of the methamphetamine during the first buy, from a car appellant was driving, took place. A similarity between the other act and a charged offense will make the other offense highly probative with regard to a defendant's intent in the charged offense. Thus, the Court found, there was sufficient similarity between the two incidents to show that the intent for the prior act was relevant to his intent to sell methamphetamine. As such, appellant's intent regarding the prior act was relevant to the charged offenses.

As to the second prong, appellant's possession of drugs in the prior act and the sale in the first buy occurred at the same location within two years of one another. Moreover, the risk of unfair prejudice to appellant was reduced by the court's limiting instruction, which was given both prior to the officer's testimony and during the general jury charge. Therefore, the Court concluded, the trial court did not abuse its discretion in concluding that the probative value of the evidence outweighed the risk of undue prejudice to appellant.

Prior Inconsistent Statements; Rule 404 (b)

Chambers v. State, A19A1119 (9/9/19)

Appellant was convicted of one count of aggravated assault, one count of false imprisonment, and one count of battery. The evidence, very briefly stated, showed that appellant assaulted the victim, his fiancé, after she confronted him about his drug use. The victim gave statements detailing the assault. Nevertheless, two weeks later, she submitted a handwritten affidavit, claiming that she falsely accused him of attacking her. And, at trial, she admitted calling 911, but denied that appellant physically abused her and that she did not remember anything from that night because she had been drinking and not taking her blood-pressure medication.

Appellant argued that the trial court erred in admitting into evidence the victim's prior inconsistent statements to law-enforcement officers. Specifically, he argued that her statements claiming he attacked her, which were recorded by the police officer's body camera, failed to meet the requirements of OCGA § 24-6-613 (b), because S. P. claimed that she could not recall the details of the night in question and she was not actually subject to cross examination as the rule requires. But, the Court stated, the failure of a witness to remember making a statement may provide the foundation for offering extrinsic evidence to prove that the statement was made. And here, the Court found, the foundation was laid for admission of the victim's prior statements to the responding officer when she gave testimony inconsistent with those statements, was confronted with that fact, and claimed not to recall them. Accordingly, the trial court did not err in admitting the statements.

Appellant also contended that the trial court erred in admitting evidence of his prior conviction for family violence battery to show motive under OCGA § 24-4-404 (b). Specifically, appellant contended that the trial court erred in admitting evidence of his 2003 family violence battery conviction, because the State failed to show a common motive between that prior conduct and the charges relating to his attack upon victim. The Court disagreed.

Prosecuting Attorneys' Council of Georgia **CaseLaw** UPDATE

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Issue 43-19

Motive has been defined as the reason that nudges the will and prods the mind to indulge the criminal intent. And while motive is not an element of any of the charged offenses, the testimony of the police officer who responded to the 2003 family violence battery incident was relevant to help the jury understand why appellant used violence against the victim. Indeed, the officer explained that appellant admitted to the battery of his former girlfriend but claimed he did so after she confronted him about a child-care issue and allegedly struck him with the handle of a pair of scissors. Thus, the officer's testimony revealed that the impetus behind the violence was control, or more specifically, reasserting control after being challenged by his girlfriend. Relatedly, the State's expert testified that many domestic-violence situations involve the male partner trying to maintain power or control over his female partner. And as the State summarized in closing argument, appellant used violence to assert his control over the victim when she confronted him about his drug use. Given these circumstances, the Court held that the police officer's testimony was relevant to the State demonstrating motive, i.e., that appellant used violence to assert control when his authority was questioned.

Appellant further argued that the evidence of his 2003 family violence battery was inadmissible because the trial court failed to weigh its prejudicial impact against its probative value. But, the Court found, at the conclusion of the argument regarding the admissibility of the 2003 conviction, the trial court explicitly stated that the probative value of the evidence was not substantially outweighed by its prejudicial effect.

And here, the Court found, photographs of the victim following the attack left no doubt that she suffered injuries; and in her initial statements to the 911 dispatcher and the first responding police officer, she claimed appellant perpetrated the attack. But these statements were at least somewhat called into question by the victim's recantation in her affidavit, in which she claimed that she falsely accused appellant, and her lack of recall on the witness stand. Thus, the prior-acts evidence showing that appellant resorted to violence to assert control over his female partners was needed by the State to counter the victim's reluctance to testify against appellant. Indeed, the Court stated, such evidence added significantly to the other evidence submitted to show that appellant, in fact, struck and choked the victim. And while the evidence was certainly prejudicial, as almost all evidence presented by the State against a criminal defendant will be, the Court agreed with the trial court that "on balance any such prejudice did not substantially outweigh the probative value of the evidence in this case." Accordingly, the trial court did not abuse its discretion in admitting appellant's 2003 family violence battery conviction into evidence.