

THIS WEEK:

- **Rule of Sequestration; Curative Instructions**
- **Extraordinary Motions for New Trial; Habeas Corpus**
- **Jury Deliberations; Spoliation Charge**
- **Refreshing Recollection; Prior Inconsistent Statements**
- **Right of Confrontation; Prosecutorial Misconduct**
- **Stipulations; Prior Convictions**

Rule of Sequestration; Curative Instructions

Franklin v. State, S19A0533 (10/7/19)

Appellant was convicted of murder and other crimes. He contended that the trial court erred when it allowed Wiley to testify after he violated the rule of sequestration. The Court disagreed.

The Court stated that when the rule of sequestration is invoked, witnesses are barred from the courtroom "so that each witness cannot hear the testimony of other witnesses." OCGA § 24-6-615. Here, the rule of sequestration was invoked at the beginning of the trial, and it is undisputed that Wiley was present for the testimony of several other witnesses before he testified. But, the record also showed that Wiley attended the trial as an observer, not a witness. He was not under subpoena and, in fact, did not appear on any witness list. When he heard the testimony of other witnesses, he had no expectation that he would be called to testify. The prosecution decided to call Wiley as a witness only after the prosecuting attorney was surprised by the testimony of another witness, who said that a gun found in Wiley's brother's car belonged to Wiley. Over appellant's objection, the trial court allowed Wiley to testify that the gun was, in fact, his and that he was not present at the scene on the day of the shooting.

First, the Court stated, it was not clear that Wiley was a witness subject to the rule of sequestration at any point before the prosecution called him to the stand. And in any event, a trial court enjoys considerable discretion to decide whether the testimony of a witness who has violated the rule nonetheless should be allowed. The rationale for disallowing the testimony of a witness who violates the rule of sequestration is the concern that the witness, having an opportunity to hear the testimony of others before he testifies, may inappropriately tailor his own testimony to the prior evidence. But, this concern is far less compelling when it comes to an unplanned witness like Wiley. Because Wiley did not expect to be called himself as a witness when he was present for the testimony of other witnesses, the Court found it unlikely that he would have been observing their testimony with an eye toward his own. Considering as well the absence of bad faith on the part of the prosecution and the limited scope of Wiley's testimony, the Court found that the trial court did not abuse its discretion when it allowed Wiley to testify.

Nevertheless, Appellant contended, the trial court should have given a curative instruction to the jury about his violation of the rule of sequestration. But, the Court noted, appellant did not ask for a curative instruction, and thus, it was limited

in its review to whether there was plain error. And here, the Court found, even if the failure to give a curative instruction was error, it was not obvious error, inasmuch as appellant failed to identify any controlling precedent that requires a curative instruction on the rule of sequestration when an unexpected witness is allowed to testify as the result of surprise developments at the trial and the witness had been in attendance at the trial prior to the occurrence of those developments. Moreover, appellant could not show harm from the failure to give a curative instruction. The jury presumably saw Wiley in the courtroom during the testimony of other witnesses, defense counsel brought out that circumstance in her cross-examination of Wiley, and counsel talked about it in closing argument. The jury was able to adequately assess Wiley's credibility, and thus, the Court found no reason to think that a curative instruction would have made any difference at all.

Extraordinary Motions for New Trial; Habeas Corpus

Mitchum v. State, S19A0554 (10/7/19)

Appellant was convicted of felony murder in 1999 and his conviction was affirmed on appeal. *Mitchum v. State*, 274 Ga. 75 (2001). Fifteen years later, he filed an extraordinary motion for new trial based upon alleged improper communications with the jury. Specifically, after voir dire concluded, the trial judge, the prosecutor on the case, appellant's defense attorney, and a senior superior court judge of the county were seen eating dinner with the twelve jurors selected for appellant's case, as well as two alternate jurors, at a local restaurant. Also, the trial judge and the senior superior court judge ate lunch with the trial jurors at the same local restaurant after the jurors had begun their deliberations. Without holding a hearing, the trial court denied the extraordinary motion. The Court granted discretionary review.

First, the Court noted, the discovery of new evidence that would be admissible at the defendant's criminal trial and that materially affects the question of the defendant's guilt or innocence is a proper subject of an extraordinary motion for new trial. See *Timberlake v. State*, 246 Ga. 488 (1) (1980). But here, appellant contended that the "newly discovered evidence" in his case involves improper communications between judges, lawyers, and jurors that occurred on two occasions at a restaurant outside of the courthouse. However, despite the fact that such allegations might be quite disturbing, if true, these allegations alone do not speak to appellant's guilt or innocence. Accordingly, appellant's claim in this case was not properly framed as one that involves "newly discovered evidence" of guilt or innocence.

And, the Court noted, while it has, "in the distant past" considered such motions involving improper communications during a defendant's trial because such communications may implicate a defendant's constitutional right to a fair and impartial trial, the legal landscape in Georgia changed significantly with the passage of this state's Habeas Corpus Act of 1967. When the General Assembly in 1967 expanded the scope of matters that could be addressed through habeas corpus to include constitutional deprivation claims, an adequate statutory remedy was created to address those constitutional claims. This creation of a comprehensive statutory means through which constitutional (and only constitutional) claims could be pursued necessarily meant that, after the passage of the Habeas Corpus Act of 1967, it was no longer necessary for one to resort to an extraordinary motion for new trial in order to assert constitutional deprivation claims. The extraordinary-motion-for-new-trial remedy, which had been judicially construed to allow for constitutional claims to be raised, became narrower, by enactment of the Habeas Corpus Act of 1967, to exclude such claims. Thus, at least since 1967, if a prisoner convicted in a Georgia court seeks, post-appeal, to assert the denial of a constitutional right through an extraordinary motion for new trial rather than a petition for a writ of habeas corpus, such claim is not properly raised.

Consequently, the Court stated, even if extraordinary motions for new trial could have properly reached constitutional deprivation claims as a matter of our decisional law prior to 1967, they could no longer do so after the passage of the Habeas Corpus Act. Thus, to the extent that appellant's claims did not involve matters of alleged constitutional deprivation that would be governed by habeas corpus proceedings, an extraordinary motion for new trial could be available as a remedy. However, constitutional matters that are exclusively governed by the adequate remedy of habeas corpus cannot be pursued through such a motion.

And here, the Court found, despite wording some of his claims in terms of "judicial misconduct" and "fraud," all of appellant's specific claims in his extraordinary motion for new trial speak to the alleged deprivation of his constitutional rights due to improper communications that impacted his rights to a fair and impartial jury and to due process. Therefore, appellant's claims could only be properly addressed in habeas proceedings involving allegations of constitutional deprivations. Furthermore, the Court stated, to the extent that appellant's claim of being denied "conflict-free defense counsel" implicates the alleged ineffectiveness of his trial counsel for failing to tell him about the alleged improper communications with the jury in which the defense attorney himself participated during a lunch break following voir dire, that claim also presented a constitutional matter that is appropriately reviewed only in habeas corpus. Accordingly, the Court concluded, because habeas corpus provided an adequate remedy, an extraordinary motion for new trial was not the appropriate vehicle for appellant to pursue his claims, and the trial court should have dismissed the motion. Accordingly, the Court vacated the trial court's decision to deny appellant's extraordinary motion for a new trial and remanded the case with direction that the extraordinary motion for new trial be dismissed.

Jury Deliberations; Spoliation Charge

Howard v. State, S19A0785 (10/7/19)

Appellant was convicted of murder and related crimes. He argued that the trial court erred in instructing the jury, after a juror was excused and replaced with an alternate. Specifically, he argued that the trial court should have instructed the jury that it was to begin deliberations anew and that the trial court's instruction, by using the terms "start fresh," "get him caught up to speed," "catch them up to speed," and "resume your deliberations," failed sufficiently to so instruct the jury, thus placing the alternate in the position of being coerced to comply with the prior deliberations of the other jurors. The Court disagreed.

The Court stated that the replacement of an incapacitated juror is governed in Georgia by OCGA § 15-12-172, which prescribes the method for substituting an alternate juror "at any time, whether before or after final submission of the case to the jury." And, the Court found, appellant's argument was foreclosed by *Sharpe v. State*, 288 Ga. 565, 569 (7) (2011), in which a very similar instruction was given to the jury. Moreover, the Court stated, the federal and out-of-state decisions cited by appellant were inconsistent with Georgia's statutory scheme for alternate jurors as laid out in OCGA § 15-12-168 et seq., particularly the provision that the trial court may for good cause substitute an alternate "whether before or after final submission of the case to the jury." OCGA § 15-12-172.

Appellant also contended that the trial court erred in improperly instructing the jury on spoliation. The record showed that the police lost some of the evidence (a gun and some Wolf brand ammunition) in the case. After the close of evidence, the trial court declined to dismiss the charges but gave the following instruction to the jury: "Ladies and gentlemen, if you

should find that either party to this case destroyed or lost evidence in this case, and if you find that in so doing there was bad faith on the part of that party, then you would be authorized to infer that if the evidence were here, that the evidence, if available, would have been against that party's interest.”

The Court held that a typical spoliation charge, based upon former OCGA § 24-4-22, is inapplicable in criminal cases and violative of a defendant's right to be convicted by evidence establishing guilt beyond a reasonable doubt. The charge, if given, would be more applicable to a defendant than to the State and would apply to all the evidence on all counts, including the defendant's failure to testify. This, undeniably, would fly in the face of justice and the right of the defendant to remain silent as well as having an eroding effect on the State's burden of proving the defendant guilty beyond a reasonable doubt.

Nevertheless, the Court stated, reversal is not automatically required. First, erroneous jury instructions are not judged in isolation, but rather are considered in the context of the entire jury charge and the trial record as a whole to determine whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution. Second, an erroneous jury charge is not reversible unless it causes harm.

And here, the Court found, the trial court charged the jury on the burden of proof and presumption of innocence; the State's burden to prove every element of the offense beyond a reasonable doubt; that the defendant has no burden of proof; that the burden never shifts to the defendant to introduce evidence or to prove innocence; and that any defense raised by the evidence must be disproved by the State beyond a reasonable doubt. In addition, the trial court instructed the jury that “[t]he defendant in a criminal case is under no duty to present any evidence tending to prove innocence and is not required to take the stand and testify in the case.”

Moreover, the trial record demonstrated that the parties and the trial court considered the instruction at issue primarily in regard to the State's lost evidence, which was the focus of repeated questioning throughout the trial. The two firearms examiners for the State and for the defense testified briefly that an exact comparison of a bullet could not be made without the gun at issue, and the prosecutor argued in closing that appellant, not the State, was responsible for the absence of the gun, and suggested that appellant lost it because it would have incriminated him. The trial court, however, instructed the jury that closing arguments are not evidence. Thus, the Court found, in the context of the entire charge and the trial record as a whole, appellant failed to show a reasonable likelihood that the jury misapplied the challenged instruction, particularly since the instruction as given omitted any mention of a charge or claim against a party or the creation of a presumption “that the charge or claim against such party is well founded.”

Finally, the Court found, appellant admitted firing his pistol at the scene, although he contended that he acted in self-defense. Moreover, because a total of ten eyewitnesses saw appellant fire a pistol at the scene, the evidence of guilt was overwhelming, and the erroneous charge in no way pointed directly at the substance of appellant's defense. Thus, under these circumstances, the giving of the erroneous charge was harmless.

Refreshing Recollection; Prior Inconsistent Statements

Smith v. State, S19A0936, S19A0937 (10/7/19)

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Appellants, Smith and his brother, Jackson, were convicted of the murder of one woman and the shooting of another woman. The evidence, briefly stated, showed that the victims were in a vehicle with two other woman. As they neared an intersection, multiple gunshots were fired at the car. Twenty-nine shell casing were recovered from the intersection. Campbell and Hearn grew up with Jackson and Smith. At the time of the shootings, Smith lived around the corner from Campbell and Hearn. In the weeks following the shooting, Campbell and Hearn were both questioned by police. They told police that Smith and Jackson ran into their home after the shooting, each carrying a gun, and both Campbell and Hearn identified Smith and Jackson in photographic lineups as those individuals.

Campbell and Hearn were both subpoenaed as witnesses by the State, but they initially refused to appear at trial. The trial court issued warrants for their arrest, and they were brought to court by their mother and grandmother. At trial, both were hostile witnesses. The State played their respective prior recorded statements to refresh their recollection.

Appellants argued that the State violated OCGA § 24-6-612 (a) (“Rule 612 (a)”) by improperly placing these recordings before the jury while purportedly attempting to refresh the witnesses’ recollection of their prior statements to police. The Court first noted that since appellants did not object on these grounds at trial, its review was limited to plain error. And, the Court stated, pretermitted whether the trial court clearly erred by permitting the State to play these recordings for the jury while purportedly offering them to refresh the witnesses’ recollection, and pretermitted whether any such error was affirmatively waived, appellant failed to show that their substantial rights were affected by the admission of the recordings. Given that both Campbell and Hearn testified at trial that they could not recall anything about the events surrounding the shooting that took place outside their house and made other statements that were inconsistent with what they had previously told the police, their recorded interviews were admissible as prior inconsistent statements. Thus, even if appellants had objected to the playing of the recordings on the basis that Rule 612 (a) did not permit them to be played before the jury while purportedly being used to refresh the witnesses’ recollection, the State could have readily moved to admit the recordings as prior inconsistent statements. Accordingly, appellants failed to show that the alleged error in allowing the recordings to be played by the State affected their substantial rights—i.e., that it affected the outcome of the trial.

Appellants also argued that the trial court erred by permitting the recordings to be played for the jury and admitted into evidence without requiring the State to provide a foundation for such recordings. But, again, because no objection on this ground was made at trial, review was only for plain error.

Here, the Court stated, pretermitted whether the trial court clearly erred by permitting the State to play these recordings for the jury without first requiring the State to authenticate them, and pretermitted whether any such error was affirmatively waived, appellants failed to show their substantial rights were affected by the admission of the recordings without such prior authentication, as there was no indication in the record that the State would have been unable to authenticate the recordings pursuant to Rule 901 (a). First, both Campbell and Hearn identified themselves by name in their respective interviews. Second, the police detective who conducted the interview with Hearn (and otherwise participated in the investigation) was called to testify at trial on behalf of the State. Thus, there was no indication that the State would have been unable to identify the recordings as being of the interviews given by Campbell and Hearn. Accordingly, any objection based on lack of authentication could have been overcome by readily available evidence.

Finally, appellants argued that the trial court erred by allowing the State to play the recording of Campbell's interview because it contained evidence that should have been excluded under OCGA § 24-4-404 (b) ("Rule 404 (b)"). The record showed that appellants objected to the State's use of this recording on the basis that it contained improper character evidence (namely, evidence that one or both of them had been seen on the street corner using and possibly selling drugs on several prior occasions). The Court disagreed because the statements regarding the alleged sale and use of drugs by appellants in Campbell's recorded interview were admissible as intrinsic evidence.

Here, the Court found, Campbell made a number of statements regarding drug use and possible drug sales by appellants on the street corner outside the house where she and Hearn lived. These statements explained, in part, how Campbell and Hearn knew appellants and how they were aware of appellants' relationship to the vehicle they fired upon. Moreover, these statements established Campbell's and Hearn's connection to the shootings and explained, to some extent, how they were able to identify appellants as the shooters. Campbell's statements regarding the use and possible sale of drugs by appellants were thus inextricably intertwined with the other evidence Campbell and Hearn provided regarding the shootings.

Moreover, the State's theory of the case, as outlined in its opening statement and its closing argument, was that the shootings of the two victims were the culmination of a series of drug-related robberies back and forth between appellants and persons who had been seen driving the vehicle (which Hearn referred to as "the black car"). Campbell's statements that appellants had previously been seen using and (perhaps) selling drugs on the street corner where the shooting occurred advanced this theory of the case and were necessary to complete the story of the crime for the jury. Thus, because the evidence was intrinsic, it was outside the reach of Rule 404 (b).

Finally, the Court found, because the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice to appellants, the trial court did not abuse its discretion by admitting Campbell's statements.

Right of Confrontation; Prosecutorial Misconduct

Myrick v. State, S19A0616 (10/7/19)

Appellant was convicted of felony murder and a firearm offense. The evidence, briefly stated, showed that the victim and Andrea Barry were at an apartment when appellant and Kari Staymoss arrived. Barry retreated into a bedroom. The victim told appellant he was not welcome there and asked appellant to leave. Appellant responded by shooting the victim.

Barry died before trial. Because of her unavailability, at the beginning of trial, the prosecutor told the trial court that he had spoken to appellant's counsel and agreed that he would not introduce any of Barry's statements to police, because such statements would violate the Confrontation Clause of the Sixth Amendment to the United States Constitution. Notably, the State did not agree that it would eliminate any mention of Barry from the trial, nor did appellant argue for such.

Appellant argued that the trial court erred in denying his motion for a mistrial. The record showed that the investigating detective repeatedly referenced to appellant (which interview was played for the jury) that there were two witnesses to the crime, including twice telling appellant that the two witnesses had identified him as the shooter. Appellant contended that these references violated the trial court's pretrial order not to introduce Barry's statement. The Court disagreed.

The Court noted that because Barry was unavailable, the Confrontation Clause prohibited the State from introducing into evidence any of her testimonial hearsay statements. But even assuming that the statements by Barry that the detective was purporting to convey to appellant were testimonial (a question the Court stated it need not decide), the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. Thus, the Court stated, the hearsay determination turns on whether the detective, through his recorded statements to appellant, told the jury what Barry said about the crime and whether that testimony was offered to prove the truth of what Barry said.

As to the first question, the Court assumed for the sake of appellant's argument that the jury understood the two witnesses to whom the detective referred to be Staymosse and Barry. But, as to the second question, the Court found that the detective's statements were clearly not meant to establish as true that others had implicated [appellant], but were simply a part of an interrogation technique. Notably, the detective's description of the two witnesses who said they "saw" appellant have an altercation with the victim and then shoot him was actually inconsistent with Staymosse's testimony that Barry immediately went into a different room and did not see the shooting or what led up to it. And assuming for the sake of argument that the jury figured out who the two witnesses were, the detective never named them. Thus, the Court found, the detective's statements were clearly designed to convince appellant to speak, rather than to provide him — or the jury — true accounts of witness statements. Accordingly, to the extent the jury could infer anything that Barry supposedly said from the detective's references to two witnesses in the recorded interview, those supposed statements were not hearsay, and their admission did not violate the Confrontation Clause. Therefore, the trial court did not err in denying a mistrial on this ground.

Nevertheless, appellant argued, the prosecutor committed misconduct by willfully violating the purported trial court order and the State's agreement not to discuss Barry at trial. The Court again disagreed. When a defendant alleges a factually specific claim of prosecutorial misconduct, the defendant must show actual misconduct and demonstrable prejudice to his right to a fair trial in order to reverse his conviction. Here, the Court found, appellant showed neither. First, he failed to show actual misconduct because there was no order on this issue and playing the detective's statements did not violate the State's agreement about Barry's statements. Second, appellant failed to show that the detective's statements were prejudicial. The detective's oblique references to two witnesses who identified appellant did not likely add anything to the other testimony the jury heard — without appellant's objection — that was clearly about Barry, including the detective's trial testimony that he spoke to Barry and developed appellant as a suspect based in part on what she told him.

Stipulations; Prior Convictions

Bentley v. State, S19A0696 (10/7/19)

After appellant's first two trials ended in mistrial, appellant was convicted of malice murder and other offenses, including two counts of possession of a firearm by a convicted felon. The record showed that shortly before the State rested its case, the prosecutor tendered State's Exhibit 40 for the purpose of proving the element of a prior felony conviction. The prosecutor described the exhibit to the jury simply as "a certified copy of indictment number CR97-0187, a conviction for [appellant] for rape and incest." The exhibit included appellant's January 1997 indictment for rape and incest, which alleged that he repeatedly raped his under-12-year-old sister, and the judgment of conviction after he pled guilty to those

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crimes four months later. The trial court admitted the exhibit without objection; the prosecutor did not publish it to the jury, although it was given to the jury with the other exhibits during deliberations.

Appellant contended that his trial counsel provided ineffective assistance by failing to offer to stipulate to his status as a convicted felon, which resulted in the admission of evidence that he had committed rape and incest. Appellant argued that his counsel performed deficiently because the trial court would have been required to accept such a stipulation under the United States Supreme Court's holding in *Old Chief v. United States*, 519 U.S. 172 (117 SCt 644, 136 LE2d 574) (1997) and the Court's adoption of that holding in *Ross v. State*, 279 Ga. 365 (2005).

The Court noted that *Ross* was decided under Georgia's old Evidence Code, and so *Old Chief* — an interpretation of Federal Rule 403 — was not controlling on the Court at the time *Ross* was decided. But, ironically, because *Ross* was decided under the old Evidence Code, *it* is no longer the controlling authority for the Court, because in OCGA § 24-4-403 the new Evidence Code adopted Federal Rule of Evidence 403 “as interpreted by the Supreme Court of the United States,” Ga. L. 2011, pp. 99, 100 § 1. Thus, the Supreme Court's interpretation of Rule 403 in *Old Chief* is now the most controlling decision on this issue.

And here, the Court found, even assuming appellant's trial counsel performed deficiently by failing to offer to stipulate to his prior convictions under *Old Chief*, appellant could not prove that this alleged error likely affected the jury's guilty verdicts. First, during the entire trial, the prior offenses were identified only twice in passing. Second, the trial court gave an extensive instruction strictly limiting the jury's consideration of the evidence to those two counts, explaining that the jury was “not to consider [the] evidence for any other purpose, whatsoever.” And, because the Court ordinarily presumes that jurors follow such instructions, the disputed evidence was only a minor consideration at the trial.

Furthermore, the evidence of appellant's guilt was compelling. Three eyewitnesses identified him as the shooter in photo lineups and at trial and testified that no one else had a gun that night. And during a recorded jail phone call, appellant did not dispute that he was the shooter.

Nevertheless, appellant argued, he was prejudiced by his lawyer's failure to stipulate to the rape and incest convictions because evidence of the nature of his convictions was not admitted during his two previous trials, which resulted in mistrials after the juries failed to reach unanimous verdicts. He contended that the admission of the prior offenses during his third trial — the one on appeal — induced the jury to find him guilty. But, the Court stated, no two trials are the same. Even multiple trials of the same case will have differences in evidence and arguments — some apparent on the record and some, like changes in witness tone and demeanor, that are not readily discernible from a transcript. And the evidence and arguments are considered by wholly unique juries. The juries for appellant's two prior trials may have hung for any number of reasons, such as vociferous disagreement, confusion about the evidence or law, or exhaustion after the intensity of trial.

Thus, the Court found, even assuming that a jury's failure to reach a unanimous verdict at an earlier trial can help to support a conclusion that the evidence at a later, different trial in the case was less than overwhelming, the prior mistrials in this case did not do so. Accordingly, the Court concluded that the admission of the exhibit referencing appellant's rape and incest convictions had no probable effect on the outcome of the trial, and therefore, appellant could not prevail on this claim of ineffective assistance.