

THIS WEEK:

- **Discovery Violations; Expert Witness Testimony**
- **Motions for New Trial; General Grounds**
- **Evidence of Aggravated Child Molestation; Statements**
- **Sufficiency of the Evidence; Jury Deliberations**
- **Jury Charges; Justification**
- **Rule 404 (b); Motive**
- **Opening Statement and Closings Arguments; Prosecutorial Misconduct**

Discovery Violations; Expert Witness Testimony

Green v. State, S19A0644 (10/31/19)

Appellant was convicted of the murder of Pitts following a traffic accident. The evidence, very briefly stated, showed that appellant's truck rear-ended the SUV driven by Pitts. When Pitts got out to survey the damage, appellant's truck moved forward, pinning Pitts. Appellant then back up and ran over Pitts who had fallen down.

Prior to trial, appellant identified to the State Alexander, an accident reconstructionist, and that he would be expected to explain the vehicle damage and unguided uphill path of appellant's vehicle, and that defense counsel would be meeting with Alexander later in the week. Defense counsel did not otherwise submit any written summary of Alexander's opinions to the State prior to trial or seek an extension of time to do so from the court. After the State finished presenting its case-in-chief at trial, it moved to exclude Alexander from testifying based on appellant's alleged failure to comply with OCGA § 17-16-4 (b). The trial court agreed and excluded Alexander from testifying.

Appellant contended that the trial court erroneously excluded Alexander from testifying at trial. The Court agreed. The Court noted that the parties and the trial court seemed to have been operating under the assumption that a defendant's intention to present any expert testimony required the defendant, in this case appellant, to make available or to serve a report summarizing the entirety of the expert's opinion under OCGA § 17-16-4 (b) (2). Thus, because appellant did not do so with respect to Alexander, the trial court excluded the entirety of Alexander's opinion. However, the Court stated, that is not what Georgia law requires. As provided by the plain language of OCGA § 17-16-4 (b) (2), the statute does not require a report to be prepared and made available or served unless a defendant intends to introduce in evidence in the defense's case-in-chief or rebuttal the results of "scientific tests or experiments." Therefore, to the extent Alexander would offer testimony independent of any scientific tests or experiments, such testimony was not subject to the requirements of OCGA § 17-16-4 (b) (2).

And here, the Court found, Alexander's opinion about the movement of appellant's vehicle was based on various sources of information, only one of which could be considered a scientific test or experiment for purposes of OCGA § 17-16-4

(b) (2). Alexander took a truck similar to appellant's and, with the engine idling, let the truck roll from a stop along a path similar to that taken by appellant's truck at the accident scene, noting its speed, which was comparable to the speed which he had already calculated based on other information. Assuming, without deciding, that this qualified as a scientific test or experiment, the trial court could prohibit appellant from introducing into evidence only the results of that scientific test or experiment, as he failed to serve or make available the requisite report as required under OCGA § 17-16-4 (b) (2).

However, the Court found, the State did not carry its burden in showing that OCGA § 17-16-4 (b) applied in the first instance, that Alexander's remaining testimony was dependent upon the results of this arguable "scientific test or experiment," and that he would not have been able to or would not have in fact given the same opinion without relying on these results. Although the State seemed to argue that all of Alexander's testimony required a report, his opinion was based almost entirely upon information that was available to both parties and which did not convey the results of any scientific tests or experiments. More specifically, in formulating his opinion, Alexander reviewed pictures taken at the scene and video of the vehicles driving along the road, physically examined both appellant's and Pitts' vehicles, and made measurements so as to create three-dimensional maps of those vehicles and the scene. Alexander used this information to mathematically calculate vehicle speed and to reconstruct the accident. Alexander's opinion was therefore based almost entirely upon his own observations and measurements of the available evidence, as well as application of established principles of mathematics and physics to those measurements, which did not constitute a "scientific test or experiment" requiring disclosure. Alexander's testimony at the motion for new trial hearing indicated that it was possible for Alexander to reach his opinion as to the speed and path of appellant's truck without referencing the results from the roll-test he did of a similar truck, which yielded a speed close to that he had calculated based on the other information. Therefore, the trial court abused its discretion in excluding Alexander's entire testimony from trial.

Moreover, the Court found, under the circumstances of this case, the trial court's exclusion of Alexander was not harmless. Accordingly, the Court reversed appellant's convictions.

Motions for New Trial; General Grounds

State v. Beard, S19A0535 (10/31/19)

Beard was convicted for the malice murder of Selemon Belai; felony murder predicated on the aggravated assault of Belai; three counts of aggravated assault with a deadly weapon of Belai, Lee Bailey, and Benny Martin;; and the possession of a firearm during the commission of a felony. The trial court granted Beard's motion for new trial, exercising its discretion as the "thirteenth juror." The State appealed.

The Court noted that after presiding over Beard's trial and a hearing on Beard's motion for new trial, the trial court issued an 18-page order, which recounted testimony from individual witnesses, pointed out inconsistencies in the evidence and credibility issues with the witnesses, and concluded that "the eyewitness evidence presented by the State, including the three victims hurt by the crossfire, was weak." Among other things, it specifically found that the "record is filled with conflicting evidence and credibility concerns as to almost every eye witness and the chief investigating officer." The trial court also found that witnesses Martin, Jeffries, and Bailey "h[e]ld almost no credibility as it appeared all were trying to minimize their participation in the events leading up to the shooting"; that "[c]ertain omissions in the evidence left many unanswered questions about what transpired and further suggested that those testifying may not have been entirely

forthright”; and that “[t]he strongest evidence against Beard came from two witnesses, the decedent's girlfriend and an investigating officer, but this testimony also presented credibility issues.”

The State argued that the jury's verdict was demanded by the “great physical laws of the universe.” The Court called the argument “bizarre” and disagreed. An appellate court will not disturb the first grant of a new trial based on the general grounds unless the trial court abused its discretion in granting it and the law and the facts demand the verdict rendered. And here, the Court found, having reviewed the entire record, and considering that the trial court was authorized, as the thirteenth juror, to discount the State's witnesses and to credit Beard's version of events, and bearing in mind the standard of review set forth in OCGA § 5-5-50, the Court found that the trial court did not abuse its substantial discretion in granting Beard a new trial on the general grounds.

Evidence of Aggravated Child Molestation; Statements

Daddario v. State, S19A0684 (10/31/19)

Appellant was convicted of aggravated child molestation for having sexual intercourse with his 14-year-old daughter, which resulted in a very painful and potentially life-threatening childbirth approximately nine months later. Appellant argued that his conviction for aggravated child molestation was invalid as a matter of law, because a pregnancy or childbirth — no matter how painful, and no matter how much damage it does to the child victim's body — is not a physical injury within the meaning of Georgia's aggravated child molestation statute. The Court disagreed.

The Court noted that child molestation does not require as an element that any particular result flow from the immoral or indecent act. Aggravated child molestation, by contrast, requires as an additional element that the immoral or indecent act produce a particular result. Specifically, the act of molestation must “physically injure[] the child.” In other words, an act of child molestation becomes aggravated child molestation when it “physically injures the child.” OCGA § 16-6-4 (c).

Here, the indictment charged appellant with aggravated child molestation by alleging that he had sexual intercourse with his underage daughter, which resulted in physical injury to his daughter related to the delivery of her child. The evidence the State offered at trial was sufficient to support a finding beyond a reasonable doubt of the physical injury element of the charge. Specifically, the State presented evidence that appellant's act of sexual intercourse with his 14-year-old daughter proximately caused her physical injury by showing that she suffered severe tearing of her vaginal area and life-threatening blood loss during childbirth, that she required so many stitches afterwards that it looked like “plastic surgery,” and that she suffered a great deal of pain not only during the delivery itself, but for the next six weeks, for which she was given prescription pain medication.

Moreover, the Court found, appellant's act of unprotected sexual intercourse with his 14-year-old daughter, in a natural and continuous sequence, unbroken by any efficient intervening cause, produced injury to her in the form of a childbirth with severe tearing and potentially life-threatening blood loss, as well as pain during the delivery and for the next six weeks that was serious enough to warrant treatment with prescription pain medication, none of which would have occurred but for appellant's immoral and indecent act of molestation. Accordingly, the Court concluded, appellant's claim that his conviction and sentence for aggravated child molestation are invalid as a matter of statutory interpretation failed.

Appellant also contended that the trial court erred in admitting incriminating statements that he made to a CASA volunteer who spoke with him while he was in jail and represented by counsel in his criminal case. Specifically, appellant argued, the CASA volunteer did not advise him of his *Miranda* rights before asking him questions, so his answers were inadmissible at trial. But, the Court stated, as the trial court found, the CASA volunteer was not a government employee, and she did not go to the jail to question appellant at the behest of any law enforcement officer. Thus, the CASA volunteer was not required to advise appellant of his *Miranda* rights. The trial court therefore did not err in admitting appellant's incriminating statements to the CASA volunteer.

Sufficiency of the Evidence; Jury Deliberations

Jones v. State, S19A1264 (11/4/19)

Appellant was convicted of murder, possession of a firearm by a first offender, and other offenses. The evidence, briefly stated, showed that appellant was first offender probationer, who sold drugs in his neighborhood. Richardson had recently been released from prison. Appellant told Richardson that he would assist Richardson in getting “stamped” into appellant’s gang if he would rob or extort money from the victim, a rival drug dealer in the neighborhood. Appellant gave Richardson a firearm. Richardson engaged the victim in a shootout, which left the victim dead. Richardson then returned the weapon to appellant.

Appellant contended that the evidence was insufficient to sustain his conviction for the unlawful possession of a firearm by a first-offender probationer because the only evidence that he committed this crime came from Richardson’s testimony, which was that appellant provided him with the gun and that he returned the gun to appellant after the murder. The Court agreed.

Nevertheless, the State, citing *Lebis v. State*, 302 Ga. 750, 758 (II) (B) (2017), argued that the evidence showed appellant *constructively* possessed the weapon. The Court disagreed. The defendant in *Lebis* was found to be responsible for the illegal possession of the murder weapon—despite the fact that she had neither actual nor constructive possession of it—based on her status as a party to her co-defendant's unlawful possession of that weapon. Here, however, the evidence showed that appellant was a party to numerous crimes committed by Richardson. But appellant was not a party to the crime of possession of a firearm by a first-offender probationer because no evidence was presented that Richardson had been sentenced to probation as a first offender. And although OCGA § 16-2-21 allows a person to be convicted as a party to a crime even where the person claimed to have directly committed the crime has not been prosecuted or convicted, it does require that there be proof that the crime was actually committed. As a result, the Court reversed appellant's conviction for the unlawful possession of a firearm by a first-offender probationer.

Appellant also argued that the trial court abused its discretion under OCGA § 15-12-172 when it excused a juror after deliberations had begun and substituted an alternate juror in her place. Here, the record showed that the trial court received a note from the juror at issue, which stated that she wanted to be excused from the jury. During a colloquy with that juror, the juror repeatedly broke down and said she was “through” deliberating. When the trial court asked if the juror was saying that she was not able to deliberate, the juror responded, “Yes, ma'am.” And when the trial court conducted a colloquy with the foreperson, it appeared that the juror at issue had, indeed, stopped participating in deliberations. Under the totality of the circumstances, the Court held that the trial court did not abuse its discretion when it replaced the juror with an alternate

after determining, based on the words and demeanor of both the juror at issue and the foreperson, that the juror was unable to perform her duties.

Jury Charges; Justification

Guerrero v. State, S19A1129 (11/4/19)

Appellant was convicted of murder in the shooting death of his girlfriend. The evidence, briefly stated, showed that the evening before the murder, police officers were dispatched to the victim's home after appellant threatened to kill her if she broke up with him. The next day, appellant shot and killed the victim in her home (and with her own gun) and then fled the state.

At trial, appellant's defense was that the victim accidentally shot herself during a struggle for her gun. Appellant testified that the victim threatened him with her gun, that he attempted to get the gun away from her, and that the gun discharged accidentally during the struggle. Appellant repeatedly testified that he never gained control or possession of the gun as he struggled with the victim and that he did not shoot her intentionally or otherwise.

Appellant contended that the jury could have found that the shooting was justified and, therefore, that the trial court erred when it charged the jury on accident but refused his request to charge the jury on justification. The Court disagreed. It is well-established that it is not error to refuse a justification charge where there is no evidence to support it. And where the defense is supported by only the slightest evidence and is inconsistent with the defendant's own account of the events or with the main defense theory presented at trial, the failure to give a charge on the defense generally will be harmless in any event.

And here, appellant's defense (and evidence) was that the victim shot herself, not that she was killed by his hand (intentionally or otherwise). Conversely, the State presented evidence that appellant intentionally shot the victim with her own gun from several feet away, and it did not argue that appellant did anything unlawful related to a struggle for the gun.

Furthermore, the Court stated, premitting whether the trial court should have charged the jury on justification, it was highly probable that the jury would have reached the same verdict even had the trial court given the charge. In order to find that appellant killed the victim but was justified in doing so, the jury would have had to independently concoct a theory of the victim's death that was inconsistent with the State's theory of the case, inconsistent with appellant's own account of the events, and instead based upon a combination of inferences from a variety of evidentiary sources, which no witness or lawyer at the trial ever suggested. As a result, the Court concluded, any error in the trial court's failure to charge on justification was harmless.

Rule 404 (b); Motive

Mattei v. State, S19A1332 (11/4/19)

Appellant was convicted of malice murder and other offenses related to the shooting death of his wife. The evidence, briefly stated, showed that two months prior to the June 2011 murder, appellant and the victim entered into a "marriage of convenience." The two did not move in together and kept their marriage largely a secret. The victim told a family member

that the purpose of the marriage was for her to assist appellant with a drug trafficking scheme involving a trip to the Bahamas. However, the same day that they married, appellant added the victim as his spouse to his insurance policy. Under the terms of appellant's family-rider policy, appellant would collect \$150,000 upon his spouse's accidental death. Appellant then shot the victim days before they were scheduled to travel.

At trial, Crystal Bridges, appellant's former roommate, testified that shortly after she moved in with appellant in December of 2009, he approached her about an insurance fraud scheme involving him running her over with his truck so they could file an insurance claim. Appellant contended that the trial court erred by admitting into evidence Bridges's testimony about appellant's 2009 conversation with her regarding a proposed insurance scheme. Appellant contended the conversation was extrinsic evidence that had no logical relation or relevance to the charged murders. The Court disagreed.

Here, the trial court found that Bridge's testimony was admissible for the proper purpose of showing motive. Evidence of motive is relevant even if it incidentally places a defendant's character in issue. Overall similarity between the charged crime and the extrinsic offense is not required when the offense is introduced to show motive, but the extrinsic evidence must be logically relevant and necessary to prove something other than the accused's propensity to commit the crime charged.

As to relevance, the Court found that appellant's willingness to harm another person for the specific purpose of collecting insurance money was relevant to show his motive in killing the victim for the purpose of obtaining insurance money. Indeed, the trial court instructed the jury that the extrinsic evidence could be considered only with respect to appellant's motive to commit murder. The insurance scheme was not admitted to show appellant's alleged propensity to commit the charged offense of murder or some other crime with which he was charged, but was relevant to his potential reason for killing his wife.

Next, the Court addressed the probative value of the evidence versus its prejudicial value. Here, the State needed the extrinsic evidence to rebut appellant's contention that his act of insuring the victim and his possession of paperwork for filing an insurance claim were consistent with the normal activities of a newly married husband, rather than the actions of a person who was motivated to kill his wife in an effort to collect insurance proceeds. Furthermore, the conversation with Bridges occurred just 18 months prior to the victim's death, meaning it was not so remote as to be lacking in evidentiary value. And, the Court found, any danger of unfair prejudice to appellant was mitigated by the limiting instruction that the trial court gave to the jury. Thus, the Court held, the trial court did not abuse its discretion by concluding that the probative value of Bridges's testimony regarding appellant's other recent insurance scheme was not substantially outweighed by the danger of unfair prejudice to appellant at his murder trial.

Opening Statement and Closings Arguments; Prosecutorial Misconduct

Moore v. State, S19A1171 (11/4/19)

Appellant was convicted of malice murder in connection with the strangling and beating death of his girlfriend, Kaiser. The evidence showed that appellant and Kaiser had health problems and abused drugs, and appellant had a peripherally inserted central catheter ("PICC line") in his arm.

In his closing argument, defense counsel posited that, on the night of her death, Kaiser had attempted to remove appellant's PICC line while he was ingesting cocaine through it, trying to "chill." In his closing argument, the prosecutor questioned that suggestion, saying, "[c]ocaine is a stimulant," "not a drug you take when you just want to, you know, watch Netflix and chill." Defense counsel did not object to the prosecutor's closing at this point. The prosecutor continued on for several sentences, then said: "[Defense counsel] comes in at the very end, and he offers to you that ... Kaiser tried to pull a PICC line from the defendant. He did this for a reason; okay? ... Because with voluntary manslaughter, words alone is not enough. ... He knows that."

At that point, defense counsel objected, saying it was "improper" for the prosecutor to "say that I'm doing something sinister or wrong" in making a closing argument. The trial court did not rule on the objection explicitly, saying: "All right. Gentlemen, let's keep to the facts of the case and what the evidence shows or has shown."

Appellant argued that the trial court erred by implicitly overruling his objection, because the State accused trial counsel of acting improperly without any basis for doing so. But, the Court stated, a prosecutor is granted wide latitude in the conduct of closing argument, the bounds of which are in the trial court's discretion. And, the Court found, given this wide latitude, there was no abuse of the trial court's discretion.

Appellant also argued that the prosecutor's reference to cocaine being a stimulant was improper because it referenced matters not in evidence. But, the Court noted, he made no such objection at trial, merely objecting to another part of the prosecutor's argument on the basis that it suggested that defense counsel had done something improper. Consequently, appellant's argument that the prosecutor's comment about the properties of cocaine improperly referenced matters not in evidence was waived for appellate review.

Appellant also argued that trial counsel was ineffective in failing to move for a mistrial or otherwise object when the State told the jury during its opening statement that it would "hear from other female victims of [appellant]" who have "been ruled admissible." Appellant argued that trial counsel should have objected because the prosecutor's statement improperly "gave that evidence the judge's seal of approval." But, the Court stated, the failure to make a meritless objection cannot serve as a ground for an ineffective assistance claim and appellant pointed to no basis on which counsel could have objected to the remark successfully.

It is well established that a prosecutor may set forth in her opening statement what she expects the evidence adduced by the State will show. And preliminary questions concerning the admissibility of evidence are to be determined by the trial court. The prosecutor's reference to the trial court's pre-trial evidentiary ruling was accurate and noted the limited purpose for which the evidence would be used.

Telling the jury that the trial court had determined the other acts evidence was "admissible" was not at odds with the jury's authority in those respects.

Here, the Court found, the prosecutor simply restated the evidentiary ruling by the trial court. The prosecutor's remark contained no suggestion that the trial court had made any determination about the reliability or credibility of the evidence or whether appellant had actually committed the acts in question. Thus, the Court concluded, the prosecutor's remark was no so improper under our case law that defense counsel performed deficiently in failing to object.