

THIS WEEK:

- **Aggravated Sexual Battery; Consent**
- **Jury Charges; Right to Public Trial**
- **Rule 403; Evidence of Gang Affiliation**
- **Closing Arguments; Prosecutorial Misconduct**
- **Rule 404 (b); Intent**
- **Right to Counsel; Communications with Counsel**
- **Prosecutorial Misconduct; *Giglio***
- **Victim's Character; Violent Acts against Third Parties**

Aggravated Sexual Battery; Consent

State v. Williams, S19G0005 (2/10/20)

Appellant was convicted of aggravated sexual battery and other offenses. The victim was his four-year-old step-granddaughter. Relying on *Watson v. State*, 297 Ga. 718 (2015), *Duncan v. State*, 342 Ga. App. 530 (2017), and *Laster v. State*, 340 Ga. App. 96 (2017), the Court of Appeals reversed his aggravated sexual battery conviction because the trial court relieved the State from the burden of proving actual consent by instructing the jury that “a child under the age of 16 cannot legally consent to any sexual act.” The Court granted certiorari.

The Court found that because *Watson*, *Duncan*, and *Laster* were decided after appellant’s trial but before his appeal was complete, the Court of Appeals used the “pipeline rule” to reach the merits of his claim. But, the Court held, this was error because the record showed that appellant did not object to the trial court’s jury instruction about the age of consent as it related to aggravated sexual battery. Therefore, the matter could only be reviewed for plain error.

Relying on *Watson*, the Court found that as with the sexual battery statute, the offense of aggravated sexual battery, which also lists lack of consent as a textual element of the crime, does not require that the prohibited conduct be sexual in nature. For example, it is possible that the intentional penetration with a foreign object of an underage individual’s sexual organ or anus could include non-sexual conduct such as the insertion of a rectal thermometer into an infant or the performance of a pelvic exam on a teenage girl. Thus the logic in *Watson* extends to the offense of aggravated sexual battery. Accordingly, the Court held, the State is not exempt from proving lack of consent at trial merely because the victim is under the age of sixteen when establishing a violation of the aggravated sexual battery statute. However, the Court continued, its analysis did not end here. The third prong of the plain error test still requires a determination of whether the trial court’s erroneous instruction likely would have affected the outcome of the proceedings such that a defendant’s substantial rights were impacted.

And here, the Court found, while relieving the State from proving an element of the crime can certainly be harmful error affecting the outcome of a proceeding, it was unlikely, given the evidence presented in this case, that the instruction at issue affected appellant's substantial rights. It was undisputed that the victim was four years old when appellant, on several occasions, intentionally penetrated the victim's vagina with his finger. There was no allegation or contention that appellant's conduct was benign or non-sexual in nature, and the evidence of his actions was substantial. Thus, the Court stated, it is hard to fathom any context in which a child of such a young age would have the capacity to consent to such conduct by an adult, in particular an adult who is an authority figure and familiar to the child as appellant was. Under the circumstances of this case, where the victim was so very young, the conduct was clearly sexual in nature, the adult was an authority figure in the child's life, and the evidence was strong, it was unlikely that the trial court's instruction affected the jury's decision to return a verdict of guilty for the charge of aggravated sexual battery.

In other words, the jury instruction error did not constitute plain error here, given the circumstances. Even had the jury been instructed that the State had to prove lack of consent, no rational juror, based on the evidence, could have concluded that the State had failed to prove that element in this case. Accordingly, the Court reversed, the judgment of the Court of Appeals as it pertained to appellant's conviction for aggravated sexual battery.

Jury Charges; Right to Public Trial

Walker v. State, S19A1520 (2/10/20)

Appellant was convicted of malice murder. He contended that the trial court committed reversible error when it charged the jury that reasonable doubt "does not mean a vague or arbitrary or capricious doubt, *nor does it mean the possibility that the defendants may be innocent.*" (Emphasis supplied.) The Court stated that it has "emphatically disapproved" this language. However, this instruction is not cause for automatic reversal. Instead, reversal is not required if, when viewing the charge as a whole, the State's burden of proof is adequately defined. And here, the Court found, the trial court properly instructed on appellant's presumption of innocence, correctly charged that appellant had no burden of proof, and properly advised that the State had the burden of proof to establish the allegations and elements of the charged offenses beyond a reasonable doubt. Therefore, the Court concluded that, viewing the charge as a whole, the jury instruction did not mislead the jury as to the standard of proof required by due process.

Appellant also argued that he received ineffective assistance of counsel when the trial court ordered that no one be permitted to enter or exit the courtroom during closing argument or the jury charge, and his trial counsel failed to object.

The record showed that at the hearing on appellant's motion for new trial, trial counsel testified that he welcomed the trial court's decision, as it facilitated an unfettered and uninterrupted closing argument and jury charge. The Court stated that counsel's decision was not patently unreasonable trial strategy, as trial counsel may have reasoned that a less-distracted jury would better suit his client. Accordingly, counsel did not act deficiently in this regard.

Nevertheless, the Court found, even if counsel did act deficiently, appellant failed to demonstrate prejudice. The transcript reflected that the public was permitted to be present in the courtroom during trial and that, during closing argument and the jury charge, individuals were present in the gallery. In short, the trial court simply restricted movement in and out of the courtroom during the time in question. Appellant did not identify anyone who was excluded from the courtroom;

likewise, he did not show that the trial court's order rendered his trial fundamentally unfair or that it somehow altered the outcome of trial. Accordingly, the Court concluded, appellant was not entitled to relief on this claim either.

Rule 403; Evidence of Gang Affiliation

Appellant v. State, S20A0306 (2/10/20)

Appellant was convicted of murder and other related offenses. The evidence, very briefly stated, showed that appellant offered a gun for sale on Instagram. The victim responded to the ad and they arranged a meeting where the victim would pay appellant \$300.00. Vu, appellant's friend, drove appellant to the meeting. Appellant shot the victim and stole his buy money.

Appellant contended that the trial court erred when it allowed a gang expert to testify that a letter sent by appellant to Vu after their arrest (and that Vu considered to be threatening) contained numerous gang references. According to appellant, the gang testimony was not relevant under OCGA § 24-4-401, and any probative value of the testimony was substantially outweighed by the danger of unfair prejudice under OCGA § 24-4-403 because appellant was not indicted for criminal gang activity and the expert's testimony improperly suggested that the killing was gang-related. The Court disagreed.

The Court stated that it is well-established that there is no requirement for a defendant to be charged with criminal street gang activity before otherwise relevant evidence of gang activity may be admitted. And here, the Court found, the letter was largely incomprehensible to someone unfamiliar with the vernacular of appellant's gang, and the expert testimony was relevant (and had significant probative value) because it showed that the letter instructed Vu to keep quiet about the victim's murder. Also, it was important to show that the letter was designed to keep Vu quiet because appellant's attempt to conceal his involvement in the crimes was evidence of his guilt. Finally, given that other evidence showed that appellant (and Vu) were members of a gang, the admission of evidence that appellant used gang vernacular in his letter to Vu was not significantly prejudicial. Consequently, the Court concluded, the trial court did not abuse its discretion when it rejected appellant's claim that the probative value of the gang expert's testimony was substantially outweighed by the danger of unfair prejudice.

Closing Arguments; Prosecutorial Misconduct

London v. State, S19A1637 (2/10/20)

Appellant was convicted of malice murder. He contended that his trial counsel was ineffective in failing to object and move for a mistrial in light of the prosecutor's numerous improper statements during closing argument impugning the character of trial counsel.

The record showed that during her initial closing argument, the prosecutor argued that a number of statements made by appellant's trial counsel in his opening statement had not been supported by the evidence. In that context, she contended that the jury had been "purposely misled" by trial counsel, and that trial counsel had made "disturbing," "disgusting," and "shameful" statements. The prosecutor characterized trial counsel as "very smug" and asserted that trial counsel "doesn't get to decide whose life is valuable." The prosecutor maintained that trial counsel ought to "apologize to the victim's

family.” Following closing argument by the defense, the prosecutor argued that trial counsel was “playing fast and loose with the facts.”

The Court noted that appellant's trial counsel testified at the motion for new trial hearing that he had strategic reasons for not objecting to the State's closing argument. He maintained that he did not want to “draw attention” to the prosecutor's comments and that, in addition, he was then able to “respond in kind” in his own closing argument. Indeed, the transcript showed that in his closing argument trial counsel employed some of the same terminology used by the prosecutor.

The Court stated that generally, closing argument is appropriate as long as it is based on evidence that is properly before the jury. The prosecution and defense are afforded wide latitude in making closing argument in a criminal trial and the Court assesses closing arguments in the context in which they are made. However, counsel should adhere to the highest standards of professionalism and proper courtroom decorum, and, accordingly, the Court stated, it finds distasteful any argument that unnecessarily impugns the integrity of opposing counsel, even if obliquely.

And here, the Court stated that it did not approve of the prosecutor's use of inflammatory language tending to impugn the character of trial counsel or her direct personal attacks on trial counsel, particularly her characterization of him as “smug,” and her assertion that he should apologize to the victim's family. The trial court would not have abused its discretion in sustaining an objection to such remarks. Nevertheless, there are often sound tactical reasons for not objecting to every improper statement made by the prosecution during closing argument. And, the Court found, apart from several improper remarks, the prosecutor made a closing argument based on the evidence, and trial counsel responded with a closing argument based on the evidence while appropriating, as a rhetorical device, some of the language previously employed by the prosecutor. Thus, the Court concluded, it was within the wide range of reasonable professional assistance for trial counsel to decline to object to the prosecutor's improper remarks and therefore did not constitute ineffective assistance of counsel.

Rule 404 (b); Intent

Naples v. State, S19A1571 (2/10/20)

Appellant was convicted of felony murder, one count of cruelty to children in the first degree, cruelty to children in the second degree (as a lesser offense included of a second count of cruelty to children in the first degree), two counts of aggravated assault, and one count of aggravated battery. The evidence, very briefly stated, showed that appellant lived with Beck and her two daughters, Kaylee and K.B. Appellant's son, seven-year-old G.N., also lived with them. Around 2:00 a.m., Beck found Kaylee lying lifeless at the bottom of the stairs leading to the basement. Subsequent investigation revealed that appellant caused the fatal injury to Kaylee, either by slamming her head against a hard object or throwing her down the stairs.

Appellant argued that the trial court erred when it admitted other-acts evidence under Rule 404 (b) that showed his violent behavior towards his daughter with his first wife (A.T.) and G.N. The trial court determined in a pretrial order that this evidence was relevant to show "intent and lack of mistake or accident."

Appellant argued that the evidence was inadmissible to prove intent. The Court disagreed. First, the other-acts evidence about G.N. and A.T. satisfied the first prong of the Rule 404 (b) test because this evidence was relevant to prove appellant's intent with regard to the charged crimes against Kaylee. A defendant who enters a not guilty plea makes intent a material issue, and the State may prove intent by qualifying Rule 404(b) evidence absent affirmative steps by the defendant to remove intent as an issue. Here, appellant made no affirmative steps to remove intent as an issue, and he did not argue otherwise.

Second, the relevance of other-acts evidence offered to show intent is established when the prior act was committed with the same state of mind as the charged crime. Here, appellant's intent in committing the prior acts against G.N. and A.T. was the same as the intent the State needed to prove with respect (at least) to the charged offense of cruelty to children in the first degree—the offense on which appellant's felony murder charge was predicated. Such an offense is committed when a person "maliciously causes a child under the age of 18 cruel or excessive physical or mental pain." OCGA § 16-5-70 (b). The mental state required to commit this offense must involve either the absence of all elements of justification or excuse and the presence of an actual intent to cause the particular harm, or the wanton and willful doing of an act with an awareness of a plain and strong likelihood that such harm might result. Appellant's violent acts toward G.N. and A.T.—which included swinging A.T. upside down and shaking her, as well as grabbing G.N. by the neck and throat—certainly could be described as "wanton and willful," committed with an awareness of a plain and strong likelihood that the children would suffer excessive physical or mental pain. Thus, the Court found, the Rule 404 (b) evidence concerning these two children was relevant to prove the intent appellant had at the time he caused Kaylee's injury.

The second prong of the Rule 404 (b) test requires the evaluation of the other-acts evidence under Rule 403. In this regard, the Court found that the evidence of appellant's abuse of A.T. and G.N. was highly probative. This evidence showed that appellant exercised supervisory and disciplinary authority over them, just as he did with Kaylee, and given the very young age of those two children, they had no more ability than Kaylee to escape or resist his violence. Moreover, Kaylee was found lifeless at the bottom of the stairs leading to the basement, and this fact created an obvious implication at trial that she had accidentally fallen down the stairs. Although the defense did not expressly contend that Kaylee's death was an accident, the State bore a heavy burden to overcome this implication, which was supported by appellant's account to one of the witnesses, and the evidence of appellant's intent toward Kaylee was instrumental in doing so.

Appellant also argues that "repeated testimony from multiple witnesses" about the abuse of G.N. and A.T. was erroneously admitted because it constituted "needless presentation of cumulative evidence" under Rule 403. The Court again disagreed. The testimony about those two children described mostly different incidents, and while there may have been some overlap, the Court stated it did not believe this evidence was so "needlessly cumulative" as to warrant its exclusion under Rule 403. Likewise, although some of the testimony about G.N. and A.T. had substantial prejudicial effect, the Court could not say that the high probative value of this evidence was so outweighed by the danger of unfair prejudice that the trial court abused its discretion when it admitted it.

Right to Counsel; Communications with Counsel

Gittens v. State, S19A1044 (2/10/20)

Appellant was convicted of the malice murder of a fellow inmate. He argued that he was denied his Sixth Amendment right to communicate effectively with his trial counsel because prison guards were present during his meetings with counsel. The Court disagreed.

The Court stated that encompassed in the right to counsel established by the Sixth Amendment is the right to communicate with counsel. This right may be violated where the government intrudes upon or interferes with a defendant's ability to communicate with his counsel, thereby stifling counsel's ability to render effective assistance. However, the Court found, in all the prior cases dealing with this issue, the alleged constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense. Thus, the Court stated, absent such impact on the criminal proceeding, there is no basis for imposing a remedy in the proceeding.

And here, the Court found, appellant's claim failed because he did not demonstrate how he was prejudiced by this alleged violation. The trial court found that, beyond a generalized expression of discomfort with the guard's presence, appellant failed to articulate how the mere physical presence of a guard in the interview room constituted an intrusion upon or otherwise limited his access to confidential communication with his attorney. This finding was supported by the record. And though appellant argued that he was "precluded from having an open conversation" with trial counsel, he did not allege that the guard could overhear his conversation with counsel, he did not explain how the guard's mere presence in the room limited his communications with counsel, and did not show prejudice of any kind, either transitory or permanent, to the ability of his counsel to provide adequate representation in his criminal proceedings.

Prosecutorial Misconduct; Giglio

DeLoach v. State, S19A1299, S19X1300 (2/10/20)

DeLoach was convicted of two counts of malice murder and other crimes in connection with the deaths of Biggins and Law. The trial court denied DeLoach's motion for new trial as to Law, but granted a new trial as to Biggins because of prosecutorial misconduct. DeLoach appealed and the State cross-appealed.

The relevant facts showed that after DeLoach had been arrested for Law's murder but before he had been indicted for Biggins' murder, DeLoach told a fellow prison inmate, Collins, about how and why he had killed Biggins. Collins, who was then in jail on drug charges, initiated contact with the detectives investigating Biggins' death, hoping that he might get leniency in his pending case for information concerning DeLoach's involvement in the Biggins shooting. At trial however, Collins claimed everything he had told the detectives during the interview was a lie. He testified that he had not talked to DeLoach, he was on drugs when he gave his recorded statement, and he did not receive leniency for testifying against DeLoach. In fact, when he testified at trial, Collins said that he had not yet been indicted.

The State contended that the trial court erred in granting DeLoach a new trial on the ground that the prosecutor knowingly failed to correct Collins' false testimony that he had not been offered a plea deal in exchange for his agreement to cooperate with the State in its prosecution of DeLoach. The Court agreed.

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 6, 2020

Issue 10-20

The Court stated that under *Giglio v. United States*, 405 U. S. 150, 153 (92 SCt 763, 31 LE2d 104) (1972), the knowing use of material, false evidence by the State in a criminal prosecution violates due process. This rule applies equally when the State, although not soliciting perjured testimony, allows such testimony to stand uncorrected after learning of its falsity. Further, it is of no consequence that the falsehood bears upon the witness' credibility rather than directly upon the defendant's guilt. To prevail on this claim of error, DeLoach was required to show that the prosecutor knowingly failed to correct Collins' false testimony, and that the falsehood was material.

First, the Court found that the record supported the trial court's finding that Collins repeatedly testified that he had not been offered a deal by the State in exchange for his cooperation and agreement to testify in DeLoach's trial when, in fact, Collins had reached a plea agreement with the State in exchange for his cooperation in the DeLoach prosecution and that Collins entered a negotiated guilty plea prior to trial.

The Court found that Collins' plea agreement was disclosed during a status conference to the public defender then representing DeLoach by the assistant district attorney then prosecuting DeLoach under a 2015 indictment for the Law murder only. The prosecutor who disclosed the plea deal was not the same prosecutor who ultimately tried DeLoach for the murders of Law and Biggins. Nevertheless, the Court found, given that both prosecutors were part of the same office that prosecuted DeLoach, the trial court was authorized to impute the plea prosecutor's knowledge of the deal to the trial prosecutor.

Next, the Court addressed materiality. The trial court found that Collins' false statement that he had not been given a plea deal for his cooperation was material because the jury would have considered it in their assessment of Collins' credibility. The Court disagreed.

The Court found that the transcript of Collins' trial testimony plainly showed that he was not a cooperative State's witness. In fact, Collins did not honor the terms of his plea agreement when he recanted his prior statement and gave testimony favorable to DeLoach. Because Collins' trial testimony was inconsistent with what he had told a detective about the murders in his prior statement, the prosecutor had to confront Collins with his prior statement and lay a foundation for the statement's use as substantive evidence. That statement was recorded before any prosecutor had met with Collins to discuss offering him leniency in his pending drug possession case in exchange for his cooperation in the DeLoach prosecution.

Thus, the Court found, given these facts, it would have been in State's interest to correct Collins' false testimony about not having a plea deal and to offer evidence of the plea agreement. After correcting Collins' false testimony, the State could have argued that, when Collins gave his recorded statement to the detective, it was in his interest to provide useful, verifiable, truthful information about DeLoach's involvement in the murders in order to convince a prosecutor to give him a plea deal. The State also could have argued that Collins later breached his plea agreement to testify truthfully for the same reason that he changed his story at trial: he was afraid of DeLoach and his gang associates. Additionally, given that Collins' trial testimony was favorable to and tended to exculpate DeLoach, it would have been in DeLoach's interest not to impeach Collins' credibility and undermine his trial testimony. Consistent with that approach, DeLoach's counsel attacked Collins' prior recorded statement, arguing that Collins had lied to the detective about DeLoach's involvement in the murders because Collins hoped to be offered a plea deal. Finally, Collins amply demonstrated his questionable

credibility at trial: He testified that he was on drugs when he gave his prior statement, and he claimed to be on medication during his trial testimony. He testified that he did not recall much of his statement and that he had lied to the police. Collins also admitted that he had prior criminal convictions and pending criminal charges. Under these circumstances, the Court concluded, there was no reasonable likelihood that Collins' false testimony about his plea agreement could have affected the jury's assessment of Collins' credibility and contributed to the verdict. Consequently, because the false statement in this case was not material, the trial court erred in granting DeLoach's motion for a new trial on this basis.

Victim's Character; Violent Acts against Third Parties

White v. State, S19A1257 (2/10/20)

Appellant was convicted of malice murder and other offenses in connection with the stabbing death of Bell. Appellant argued that the trial court erred by barring evidence that Bell was involved in an altercation with a third party on the evening before the killing. Specifically, appellant asserted that the day before Bell was stabbed, Bell threatened a man named Frank with a knife.

The Court stated that admissibility of evidence of a victim's character is governed by OCGA §§ 24-4-404 (a) (2) and 405 (a), which generally limit evidence of a victim's character to reputation or opinion and not specific bad acts. The former exception to the general rule created by *Chandler v. State*, 261 Ga. 402, 407 (3) (c) (1991), allowing evidence of specific acts of violence by a victim against third persons when a defendant claimed a justification defense, is no longer viable under Georgia's new Evidence Code.

Here, the Court found, as the trial began, appellant's counsel expressly stated that he sought to admit evidence of the incident with Frank solely to show a state of mind "to support [appellant's] claim of self-defense..... And that's the only reason that — that we would introduce it." The trial court's ruling was tentative, noting that appellant had presented no evidence of self-defense "at this point in time," but might in the future. But, the Court found, appellant never asserted any claim of self-defense and presented no evidence, and the State likewise presented no evidence that could support a claim of self-defense. Nor did appellant request jury instructions on justification or self-defense. Thus, the Court concluded, the alleged earlier incident involving Bell and a third person was irrelevant to any issue presented at trial, and the trial court did not abuse its discretion in excluding it.