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Justification Defense; Possession of a Firearm by Convicted Felon

Johnson v. State, S19A1404 (2/28/20)

Appellant was indicted for murder and unlawful possession of a firearm by a felony first-offender probationer, both in connection with the fatal shooting of Tyrell Jordan in June 2016. Appellant contended that he shot Jordan only to protect himself and that the shooting was a justified use of force in defense of self under OCGA § 16-3-21 (a). But because appellant was a felony first-offender probationer generally forbidden to possess a firearm, the State argued that he is categorically barred by OCGA § 16-3-21 (b) (2) from claiming that the shooting was a justified use of force in defense of self. The State filed a motion in limine to bar appellant from asserting his theory of justification at trial, and pursuant to OCGA § 16-3-24.2, appellant filed a motion for pretrial immunity from prosecution for murder based on the same theory. Following an evidentiary hearing, the trial court granted the motion in limine and denied the motion for immunity, concluding as a matter of law that appellant cannot claim that the shooting was a justified use of force in defense of self. The Court granted appellant's petition for interlocutory appeal.

The Court noted that “[a] person is justified in threatening or using force against another when and to the extent that he ... reasonably believes that such threat or force is necessary to defend himself ... against such other's imminent use of unlawful force.” OCGA § 16-3-21 (a). The use of deadly force, however, is justified only by a reasonable belief that “such force is necessary to prevent death or great bodily injury.” And no person may claim that a use of force was justified in defense of self if he “[i]s attempting to commit, committing, or fleeing after the commission or attempted commission of a felony.” OCGA § 16-3-21 (b) (2). Convicted felons and felony first-offender probationers are generally forbidden to possess firearms, and if a convicted felon or felony first-offender probationer unlawfully possesses a firearm, he commits a felony. See OCGA § 16-11-131 (b). It follows that the *unlawful* possession of a firearm by a convicted felon or felony first-offender probationer will preclude the felon or probationer from claiming that his use of the firearm in defense of self was justified under OCGA § 16-3-21 (a).

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Consistent with the plain meaning of OCGA § 16-3-21 (b) (2), the felonious possession of a firearm by a convicted felon or felony first-offender probationer will preclude the felon or probationer from asserting that his use of the firearm in defense of self was justified. But even if conduct that otherwise would be a felony is itself justified, it is no crime at all, and it does not trigger the preclusive bar of OCGA § 16-3-21 (b) (2). Thus, the Court stated, the question presented in a case like this one, is not whether a convicted felon or felony first-offender probationer may claim that his use of a firearm was a justified use of force in defense of self when, at the time of its use, the felon or probationer was in unlawful possession of the firearm because such a claim of justification is squarely precluded by OCGA § 16-3-21 (b) (2). Rather, the pertinent question is whether the possession of the firearm actually was unlawful — or instead was justified — at the moment of its use.

The Court stated that by its plain terms, OCGA § 16-11-138 affords “an absolute defense” to “any violation” of Title 16, Chapter 11, Article 4, Part 3. That “absolute defense” requires a showing of “[d]efense of self or others, as contemplated by and provided for under [OCGA § 16-3-21].” By its own terms, OCGA § 16-3-21 provides a justification defense, but only for crimes that involve “threatening or using force.” It offers no defense at all for crimes that merely consist of possessing or carrying a firearm. Accordingly, if OCGA § 16-11-138 were understood to apply only when OCGA § 16-3-21 applies by its own terms, it would be entirely unnecessary (because OCGA § 16-3-21 would already afford a defense of justification), and it would also appear almost entirely useless (because nearly all of the prohibitions in Title 16, Chapter 11, Article 4, Part 3 concern the possession or carrying of weapons, not the use of such weapons). The only sensible understanding of OCGA § 16-11-138 is that it effectively amends OCGA § 16-3-21 (a) so as to potentially justify not only threats or uses of force in the circumstances described in OCGA § 16-3-21 (a), but also the possession or carrying of a weapon in violation of Title 16, Chapter 11, Article 4, Part 3.

Thus the Court stated, as it understands it, OCGA §§ 16-3-21 (a) and 16-11-138 in combination effectively provide this rule of law:

A person is justified in threatening or using force against another, or in engaging in conduct that is otherwise prohibited under Title 16, Chapter 11, Article 4, Part 3 of the Code, when and to the extent that he or she reasonably believes that such threat or force or conduct otherwise prohibited under Title 16, Chapter 11, Article 4, Part 3 is necessary to defend himself or herself or a third person against such other's imminent use of unlawful force....

Accordingly, if appellant's possession of a firearm at the time of the shooting was justified under the rule of law produced by the combination of OCGA §§ 16-3-21 and 16-11-138, then it cannot be said that Johnson was “committing ... a felony” when he shot Jordan, and the preclusive bar of OCGA § 16-3-21 (b) (2) would not apply. Consequently, the trial court erred when it denied the motion for immunity and granted the motion in limine. The judgment of the trial court was therefore reversed, and the case remanded for further proceedings.

Contradictory Verdicts; Repugnant Verdicts

McElrath v. State, S19A1361 (2/28/20)

A jury found appellant guilty but mentally ill of the felony murder and aggravated assault of his adoptive mother, Diane, whom appellant killed by stabbing her over 50 times in a single episode. Based on the same episode, appellant was also found not guilty of the malice murder of Diane by reason of insanity. Appellant contended that the jury's verdicts were repugnant and that his conviction for felony murder must be reversed or vacated. The Court agreed.

The Court stated that there are three main classes of contradictory verdicts: “inconsistent verdicts,” “mutually exclusive verdicts,” and “repugnant verdicts.” As a general rule, inconsistent verdicts occur when a jury in a criminal case renders seemingly incompatible verdicts of *guilty* on one charge and *not guilty* on another. In *Milam v. State*, 255 Ga. 560, 562 (2) (1986), Georgia abolished the rule that inconsistent verdicts require reversal. But, the Court found, appellant's verdicts could not be classified simply as “inconsistent verdicts.”

Mutually exclusive verdicts occur generally when *two guilty verdicts* cannot legally exist simultaneously. Where there are mutually exclusive verdicts, it is insufficient for an appellate court merely to set aside the lesser verdict, because to do so is to speculate about what the jury might have done if properly instructed, and to usurp the functions of both the jury and trial court. But, the Court stated, because, appellant's verdicts are not two contradictory guilty verdicts, his verdicts cannot be classified as “mutually exclusive.”

Next, the Court addressed repugnant verdicts. The Court stated that though they do not involve two guilty convictions, repugnant verdicts suffer from a similar infirmity as mutually exclusive verdicts; they occur when, in order to find the defendant not guilty on one count and guilty on another, the jury must make *affirmative* findings shown on the record that cannot logically or legally exist at the same time. Where a jury renders repugnant verdicts, both verdicts must be vacated and a new trial ordered for the same reasons applicable to mutually exclusive verdicts.

And here, the Court found, the verdicts were repugnant because the not guilty by reason of insanity verdict on malice murder and the guilty but mentally ill verdict on felony murder based on aggravated assault required affirmative findings of different mental states that could not exist at the same time during the commission of those crimes as they were indicted, proved, and charged to the jury. Put simply, it is not legally possible for an individual to simultaneously be insane and not insane during a single criminal episode against a single victim, even if the episode gives rise to more than one crime. But, the jury must have determined that appellant was legally insane at the time that he stabbed Diane in order to support the finding that he was not guilty of malice murder by reason of insanity. Nonetheless, the jury also found appellant guilty but mentally ill of felony murder based on the same stabbing—a logical and legal impossibility. Accordingly, the Court concluded, the verdicts were repugnant, both verdicts must be vacated, and appellant's case must be remanded for a new trial.

In so holding, the Court noted that in *Blevins v. State*, 343 Ga. App. 539 (2017), the Court of Appeals, while analyzing *Carter v. State*, 298 Ga. 867 (2016), ruled that *Carter* supported the broad application of *Milam's* inconsistent verdict rule to abolish repugnant verdicts. However, *Milam's* inconsistent verdict rule does not abolish repugnant verdicts altogether. Therefore, the Court held, to the extent *Blevins* states otherwise, it is hereby overruled.

The State relied upon *Shepherd v. State*, 280 Ga. 245 (2006) to support the verdicts. But, the Court distinguished it from this case, at least as to the results of *Shepherd*. Nevertheless, the Court held, to the extent that *Shepherd* diverges from its analysis in this case, *Shepherd* is disapproved.

Voice Identification; *Miranda*

Kilpatrick v. State, S19A1580 (2/28/20)

Appellant was convicted of malice murder, felony murder, and two counts of aggravated assault. The police used wiretap evidence of phone calls between appellant and his brother to solve a cold case murder that occurred in 1998. Appellant contended that the trial court erred when it overruled his objection as to the sufficiency of the identification of the voices heard on certain wiretap recordings. The Court disagreed.

The Court found that the State presented evidence that investigators sought and obtained wiretap warrants for the phone numbers of appellant and his brother, allowing authorities to monitor and record their phone calls with each other and various other people. The lead investigator testified about the steps taken to identify and verify the target phone numbers, the process of monitoring the phone calls, and the procedures used to discern whether the recorded calls were pertinent to the investigation of the murder. While the investigator was on direct examination, the State introduced and played wiretap recordings of certain conversations allegedly between appellant and his other brother, another individual, and a conversation allegedly between appellant and someone who was with appellant when the incident took place. The investigator testified that he was able to recognize and distinguish the voices on the recordings because he had interviewed those individuals personally. Citing *United States v. Ross*, 686 Fed. Appx. 691, 693 (11th Cir. 2017), the Court stated that the investigator's testimony that he became familiar with appellant's voice during the wiretap surveillance was sufficient to satisfy the requirements of Rule 901 (b) (5). Thus, the Court concluded, this was sufficient identification of the voices to admit the recordings into evidence at trial.

Appellant also argued that the trial court erred when it failed to suppress video-recorded statements appellant made post-arrest and prior to receiving *Miranda* warnings. The Court again disagreed. The evidence showed that the interview was video-recorded. In the video, the lead investigator told appellant that he wanted to ask appellant some basic questions, and talk about what happened in 1998. He also told appellant he had already spoken with appellant's wife and the individual who was with appellant when the murder occurred. At that point, appellant told the investigator that he had been advised not to talk, and then stated, "You haven't read me my rights." Appellant immediately followed that statement with a question to the investigator as to whether he was being charged. The investigator responded affirmatively that appellant was being charged, and assured appellant that he would be reading appellant "his rights" before asking any questions. Appellant then stated that he would "love to tell [the investigator] exactly what happened." The investigator did not respond to this statement, but rather turned his attention to some paperwork. Then, without any questioning or prompting from the investigator, appellant said that he shot the victim in self-defense, proceeding to give his version of the night's events. The investigator sat listening to appellant until appellant invoked his right to counsel, at which point the recording stopped.

The Court found that the video-recording showed that appellant was not being interrogated when he made his pre-*Miranda* statements. The investigator did not respond to appellant's statement about wanting to tell what happened, but was completing paperwork. The Court stated that it was clear that, rather than waiting for his rights to be read, appellant expressed his desire to talk and then started talking of his own accord. Appellant's pre-*Miranda* statements were voluntarily and spontaneously uttered and, therefore, properly admitted at trial.

Adoptive Admissions; Accomplice-Corroborating-Accomplice Jury Instructions

Wilkins v. State, S19A1403 (2/28/20)

Appellant was convicted of two counts of malice murder in connection with the shooting deaths of Ison and Stevens. The evidence, very briefly stated, showed that appellant worked with Ison and Stevens at a restaurant. Ison was the executive chef; his girlfriend Stevens was part of the wait staff. Ison fired appellant. Appellant then landed a job at another restaurant where he worked with Jones, who was dating Burgess, appellant's sister. Appellant and Jones then ambushed the two victims in front of the victims' home, fatally shooting both of them.

Cooper worked with appellant and Jones at the restaurant. Cooper testified that he was standing outside the restaurant with Jones when appellant drove up. Jones walked to the back of the car and called Cooper over. Jones opened the trunk, showed Cooper a t-shirt with blood on it, and said: "This [is] the t-shirt we used to wipe the blood and our prints . . . off the gun." Appellant was standing by the door of the car, within earshot. While Jones was talking about the shirt, appellant looked at Jones, turned and gave Cooper a "quick look," and then turned back to Jones.

Appellant contended that the trial court erred in admitting Cooper's statement as an adoptive admission. The Court stated that under Georgia's current Evidence Code, a defendant's silence may, in certain circumstances, communicate that he has adopted another person's statement as true, making that statement admissible under OCGA § 24-8-801 (d) (2) (B), which defines "admissions" not excluded by the hearsay rule when offered against a party to include a statement of which the party has manifested an adoption or belief in its truth. For evidence to qualify as a criminal defendant's adoptive admission under Rule 801 (d) (2) (B), the trial court must find that two criteria were met: first, that the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond, and second, that there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement. The circumstances to be considered include any physical or psychological impediments to the party's responding to the statement (e.g., circumstances showing that a party feared to speak would negate any inference that the party agreed or adopted the statement).

Appellant argued that he could not be expected to respond to Jones's statement because it was ambiguous and he did not know what Jones may have told Cooper in any conversation leading up to the statement. However, the Court stated, even if appellant did not have the full context of Jones and Cooper's prior conversation, the trial court could reasonably determine that a statement referring to a bloody shirt in the trunk of the car that appellant drove up in and was standing next to as the shirt "we" used to wipe blood and fingerprints off a gun is the kind of statement that would normally prompt an innocent person to clarify that he was not part of the "we."

Furthermore, the Court found, the trial court's conclusion that appellant heard, understood, and acquiesced in Jones's statement was supported by Cooper's description of appellant's position standing by the car door within earshot, as well as the fact that appellant looked at Jones, briefly at Cooper, and then back at Jones while Jones was speaking. And there was no indication that any particular circumstances impeded appellant from speaking. Thus, the Court concluded, the trial court did not abuse its discretion in determining that Jones's statement was admissible under OCGA § 24-8-801 (d) (2) (B).

Appellant also contended that his trial counsel rendered ineffective assistance because counsel failed to object to an accomplice-corroborating-accomplice instruction given by the court. The Court agreed that it appeared that the accomplice-corroborating-accomplice instruction that the trial court gave was not applicable to this case. Specifically, the evidence at trial showed that appellant may have had two accomplices — Jones and Burgess. But only one of them — Burgess — testified as a witness at trial. Accordingly, if appellant's counsel had objected to the instruction, the trial court should have omitted it from the series of charges on accomplice testimony.

Appellant contended that he was prejudiced by his attorney's deficient performance. The Court disagreed. The Court noted that appellant's argument was premised on *Crosby v. State*, 150 Ga. App. 555 (1979), where the Court of Appeals held that the trial court committed reversible error when it instructed the jury on corroboration by a second accomplice even though only one accomplice testified. But, the Court stated, it never endorsed *Crosby's* holding, which runs contrary to the Court's cases that generally deem harmless a jury instruction that indicates that a defendant could be found guilty under a theory for which there was no evidence or even argument (and in this case the State never argued that there was testimony from a second accomplice). The Court also noted that in all of its subsequent cases where the accomplice-corroborating-accomplice instruction was determined to have been given without evidentiary support, the Court of Appeals distinguished *Crosby* and held the error to be harmless.

Accordingly, the Court held, "to the extent that *Crosby* can be read as establishing a rule that erroneously giving the accomplice-corroborating-accomplice instruction at issue here is always prejudicial, it is disapproved." And under the circumstances of this case, the Court found no prejudice. The jury was told that it could consider the testimony of one accomplice as corroboration of another accomplice's testimony, but because there was no testimony about the murders from a second accomplice, the jury necessarily had to look for other evidence — such as Cooper's testimony — for the necessary corroboration of Burgess's testimony. Because there is no reasonable probability that the result of the trial would have been different had the disputed jury instruction been omitted, appellant's ineffective assistance claim failed.

Adoptive Admissions; Rule 801

Westbrook v. State, S19A1120 (2/28/20)

Appellant was convicted of malice murder and possession of a firearm during the commission of a felony. The evidence showed that appellant walked into a convenience store and shot the store clerk to death, then left the store. At trial, an audio recording of a phone call that appellant made from jail to his friend, Cooper, was also admitted into evidence. During that call, appellant and Cooper discussed appellant shooting "up the hood," and Cooper told appellant that the police had shown a photograph of appellant on the news. Cooper added that a video of the shooting had been played on

the news and that Cooper recognized appellant in the video. Appellant contended that the trial court abused its discretion in admitting the audio recording as an adoptive admission. The Court disagreed.

The Court stated that OCGA § 24-8-801 governs the admission of evidence as adoptive admissions. Rule 801 (a) (2) defines a "[s]tatement" to include the "[n]onverbal conduct of a person, if it is intended by the person as an assertion," and Rule 801 (d) (2) (B) then defines "admissions" not excluded by the hearsay rule when offered against a party to include "[a] statement of which the party has manifested an adoption or belief in its truth." For evidence to qualify as a criminal defendant's adoptive admission under Rule 801 (d) (2) (B), the trial court must find that two criteria were met: first, that the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond, and second, that there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement.

Appellant contended that when Cooper responded to appellant's question whether people were talking about the video and said that he had not seen "everything that's goin' on," it meant that Cooper had not seen the video and that, therefore, when Cooper said, "that's all I need to see right there that's my n*****'s face, I know that face," he had to be referring to the photograph of appellant that Cooper and appellant had discussed earlier in the phone call, and not the surveillance video. According to appellant, he would have no reason to deny that it was him in the photograph, so the phone call was not admissible as an adoptive admission that he was depicted in the video.

But, the Court found, the context of the phone call showed otherwise. Indeed, appellant and Cooper's conversation about the photograph preceded the discussion about the video by some 10 minutes, and just before Cooper's statement that he recognized appellant, Cooper told appellant that appellant was "on the news," prompting appellant to ask if "[t]hey show[ed] the video." It was only at that point that Cooper said three times that he recognized appellant's face.

Thus, the Court found, based on this evidence, the trial court was authorized to conclude that Cooper was implicating appellant in the shooting of the victim by saying that he recognized him in the video of the shooting. Likewise, the trial court was authorized to find the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond, and that there were sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement.

Burden of Proof; Prosecutorial Misstatement of the Law

Debelbot v. State, S19A1474, S19A1475 (2/28/20)

Appellants, Albert and Ashley Debelbot, were convicted of the murder of their infant daughter, McKenzy. Appellants contended that their lawyers should have objected during closing argument to a gross misstatement of the law by the prosecuting attorney. The Court agreed.

At trial, the prosecutor argued as follows: "Reasonable doubt. The Judge will charge you on reasonable doubt. Just keep in mind, and he will charge you, reasonable doubt does not mean beyond all doubt. It does not mean to a mathematical certainty. Which means we don't have to prove that ninety percent. You don't have to be ninety percent sure. You don't have to be eighty percent sure. *You don't have to be fifty-one percent sure.* It does not mean to a mathematical certainty. And

it does not mean beyond a shadow of a doubt. That's just something the [television] made up. It's actually beyond a reasonable doubt. And that would be a doubt to which you can attach a reason. And I submit to you there is no reasonable doubt in this case.” (Emphasis supplied).

The Court stated that the argument that proof beyond a reasonable doubt requires something less than proof that leaves a jury with 51 percent certainty is “obviously wrong,” and there was no good reason that any reasonably competent lawyer would fail to object to such an egregious misstatement of the law. Thus, the Court found, appellants showed deficient performance.

With respect to prejudice, the Court stated that the failure to object to the mischaracterization of reasonable doubt was uniquely harmful in this case. Specifically, the Court stated, the case against appellants was almost entirely circumstantial, and although the evidence was legally sufficient to sustain their convictions under the standard of *Jackson v. Virginia*, even the application of that relatively undemanding standard, presented a “close question.” The evidence that McKenzie died of blunt force trauma and that her death was a criminal homicide was un rebutted. And the evidence that only two individuals — Albert and Ashley — had an opportunity to inflict such trauma was likewise un rebutted. But evidence that would have permitted the jury to specifically attribute the infliction of trauma upon McKenzie to either or both of her parents — evidence that Albert alone inflicted the trauma, evidence that Ashley alone inflicted the trauma, or evidence that Albert and Ashley both inflicted the trauma — was notably lacking. Moreover, the evidence that Albert and Ashley both shared a criminal intent to harm McKenzie — such that both would be complicit in the infliction of trauma, regardless of who actually inflicted it — was underwhelming.

Thus, the Court found, accepting the un rebutted expert testimony that McKenzie died as a result of the criminal infliction of blunt force trauma, accepting the compelling evidence that Albert and Ashley had essentially equal opportunities — and no one else had any opportunity at all — to inflict that trauma, in the absence of evidence suggesting that the trauma was inflicted specifically by one or the other, and irrespective of whether Albert and Ashley colluded, the logical probability that either of them inflicted the fatal trauma would be 50 percent. A 50 percent probability of guilt does not, of course, authorize a jury to find guilt beyond a reasonable doubt. But the prosecutor told the jury that something less than a 51 percent probability of guilt would be enough, shortly after telling the jury that, as between Albert and Ashley, the State did not “have to prove it was one or the other.” And although the trial court gave an instruction on reasonable doubt that would be sufficient in most cases to adequately advise the jury of the burden of proof, the charge did not cure the State's obviously wrong argument here, and to the contrary, may well have been understood by the jury as reinforcing it. Therefore, the Court concluded, appellants showed a reasonable probability that, but for the failure of their lawyers to object during closing argument to the gross misstatement of the law by the prosecuting attorney, the outcome of their trial would have been different. Accordingly, the Court reversed their convictions.

Continuances; Missing Witnesses

Smith v. State, S19A1098 (2/28/20)

Appellant was convicted of felony murder and other offenses. He argued that the trial court erred in denying his motion for a continuance of the hearing on his motion for new trial so that he could produce an alibi witness, Kristen Allen, to testify at that hearing. The Court disagreed.

OCGA § 17-8-25 sets forth certain requirements an applicant must meet to obtain a continuance based on an absent witness: “In all applications for continuances upon the ground of the absence of a witness, it shall be shown to the court that the witness is absent; that he has been subpoenaed; that he does not reside more than 100 miles from the place of trial by the nearest practical route; that his testimony is material; that the witness is not absent by the permission, directly or indirectly, of the applicant; that the applicant expects he will be able to procure the testimony of the witness at the next term of the court; that the application is not made for the purpose of delay but to enable the applicant to procure the testimony of the absent witness; and the application must state the facts expected to be proved by the absent witness.”

The record showed that at the motion for new trial hearing, appellant’s counsel informed the court that “there may be a third witness, Kristen Allen. ... I have not been able to reach her today. If she does not show up, I may ask for a continuance.” When the court inquired, “have you got her under subpoena?” counsel responded “I sent it to her by e-mail, your honor. I was not able to locate a physical address for her. ... She is not responding to my phone calls today.” Counsel then moved for a continuance “to get Ms. Allen here,” which the trial court denied.

The Court found that the record showed that motion for new trial counsel did not properly serve a subpoena on Allen. Indeed, email is not a proper means of serving a subpoena under OCGA § 24-13-24, and appellant made no assertion that he attempted to subpoena Allen as required by that statute. And when a statutory requirement for a continuance has not been met, a trial court does not abuse its discretion by denying the requested continuance.

Recording of a Recording; Admissibility

Edwards v. State, S19A1577 (2/28/20)

Appellant was convicted of felony murder and other crimes in connection with an attempted armed robbery of Phillips and Goodman that resulted in the shooting death of appellant's accomplice, Billy Favors. The evidence, very briefly stated, showed that appellant agreed to sell the victims marijuana. But, when, the victims showed up for the transaction, Favors started shooting. One of the victims returned fire, killing Favors.

Within days of the shooting, appellant called Travis Ridley — Favors' cousin — and described what happened when Favors was shot. Ridley used his cell phone to record appellant's call. Five days after the shooting, on December 18, 2016, Detective Griffin spoke with members of Favors' family, including Ridley, who played part of his recording of appellant's call. Detective Griffin used a recording device concealed in his front pocket to record his December 18 interactions with Favors' family, including the recording of appellant's call played by Ridley. Ridley died in an unrelated incident before appellant's trial, and Ridley's recording of appellant's call could not be located. Appellant filed a motion to exclude Detective Griffin's recording on multiple grounds, and the trial court held a hearing and orally denied appellant's motion, but gave a limiting instruction to the jury.

Appellant contended that the trial court erred in admitting the recording because the voices were not properly authenticated. But, the Court found, at trial, Goodman and Detective Griffin both testified that they had listened to the recording that was played for the jury and that they recognized appellant's voice on the recording. Goodman explained that he was familiar with appellant's voice from working with him, and Detective Griffin said that he was familiar with

appellant's voice from in-person conversations with him. Thus, the Court found, this testimony was sufficient to authenticate appellant's voice on the recording.

Appellant also contended that the recording was inadmissible hearsay. The Court noted that the recording captured, in addition to Ridley's recording of appellant's call, statements made by Ridley and Favors' mother, who were talking over the recording as Ridley played it for Detective Griffin. But to constitute hearsay, statements must be "offered in evidence to prove the truth of the matter asserted." OCGA § 24-8-801 (c). The trial court explicitly instructed the jury not to consider any voice on the recording other than appellant's "for the truth of the matter asserted" or as evidence of appellant's guilt, and the statements by Ridley and Favors' mother were not especially incriminating. And, appellant's own statements were admissions by a party-opponent, which are not excludable as hearsay.

Next, appellant contended that the admission of Detective Griffin's recording violated the "rule of completeness" expressed in OCGA §§ 24-1-106 and 24-8-822. Specifically, appellant contended that Detective Griffin's recording was incomplete, as Ridley did not play his entire recording of appellant's call for Detective Griffin. However, the Court stated, the rule of completeness does not make admissible parts of a statement that are irrelevant to the parts of the statement introduced into evidence by the opposing party. And here, the Court found, appellant did not show that any other parts of Ridley's recording of appellant's call still exist, much less that the other parts were relevant to the part that the jury heard.

Finally, the Court also rejected appellant's contention that the trial court abused its discretion in rejecting appellant's conclusory assertion that the probative value of the recording was substantially outweighed by the danger of unfair prejudice under Rule 403. Appellant's description to Ridley of what happened when Favors was shot was highly probative, and although it may have cast appellant in a prejudicial light, it was not an unfairly prejudicial light.

Constitutional Right to a Speedy Appeal

Hyden v. State, S19A1496 (2/28/20)

Appellant was convicted in 2004 of malice murder, felony murder, kidnapping with bodily injury, and various other offenses. He contended that his constitutional right to a speedy appeal was violated due to the 15-year delay between the filing of his motion for new trial and its resolution. The Court disagreed.

The Court stated that substantial delays experienced during the criminal appellate process implicate due process rights. And, speedy appeal claims are assessed by balancing the same four factors applicable to speedy trial claims as articulated in *Barker v. Wingo*, 407 U. S. 514 (92 SCt 2182, 33 LE2d 101) (1972).

As to the length of the delay, the Court noted that the State correctly conceded the 15-year delay between appellant's conviction and the trial court's ruling on his motion for new trial was significant and weighs in appellant's favor.

As for the reason for the delay, the Court found that the delay stemmed from reasons including negligence rather than from an intentional or strategic delay caused by the State. Specifically, after trial counsel filed a timely motion for new trial and stopped working on the case under the belief that the trial court would be appointing new appellate counsel, the trial judge died before new counsel was appointed. Nevertheless, the failure of the trial court to timely appoint appellate counsel

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and to effectively manage its docket weighed in favor of appellant. However, because the reasons for the delay are neutral, they are weighted less heavily.

Turning to the appellant's assertion of his right to appeal, the Court stated that even though appellant testified at the motion for new trial hearing that he wrote to his trial counsel three times in the years after his conviction, his counsel testified that he never received any letters or phone calls from appellant. The trial court was entitled to credit counsel's testimony over that of appellant's. Moreover, appellant conceded that he had never contacted the trial court to inquire about his pending motion during the entire 15-year timeframe between his conviction and the filing of his amended motion for new trial. Thus, in light of the limited efforts by appellant to raise any issue about an appeal for nearly 15 years, the Court found that he did not clearly assert his right to appeal. Accordingly, this factor weighed heavily against appellant

As to prejudice, the Court stated that the prejudice necessary to establish a due process violation based on post-conviction direct appeal delay is prejudice to the ability of the defendant to assert his arguments on appeal and, should it be established that the appeal was prejudiced, whether the delay prejudiced the defendant's defenses in the event of retrial or resentencing. And here, the Court found, the record revealed that appellant did not make the requisite showing of prejudice. Specifically, appellant claimed he suffered prejudice because, during the pendency of his motion for new trial, the original trial judge died, and his motion with respect to the general grounds had to be considered by a newly assigned judge. However, after a thorough review of the case, even a successor judge may exercise a significant discretion to grant a new trial on the general grounds. The newly assigned judge considered appellant's claims on the general grounds and rejected them after "having considered all relevant matter presented to or made known to [the] Court." Furthermore, appellant's implicit argument that the first judge may have disagreed with the successor judge's denial of his motion for new trial on the general grounds is wholly speculative.

Appellant also contended that, during the delay, the court reporter lost the original recording of his custodial interview, which deprived him of the opportunity of having the new judge hear the interview before deciding the issues raised in his motion for new trial. However, the Court found, despite the loss of the recording, the court reporter did produce a transcript of the interview. Appellant did not explain how hearing the interview (as opposed to reading it) would have changed the trial court's ruling, and generalized speculation that consideration of the recording would have somehow resulted in a different outcome is insufficient to show prejudice.

Finally, appellant contended, the delay was prejudicial because he was "completely without counsel" for 15 years. However, an absence of counsel alone does not equate to prejudice. Indeed, where, as here, the Court finds no merit to the other enumerations raised herein, appellant cannot show prejudice. This is so because there can be no prejudice in delaying a meritless appeal. Thus, the Court concluded, because appellant's other enumerations of error were meritless, he failed to establish a reasonable probability that, but for the delay, the result of his appeal would have been different. Accordingly, the Court affirmed the trial court's denial of appellant's speedy appeal claim.

Proximate Cause; Intervening Causes

Calhoun v. State, S19A1411 (2/28/20)

Appellant was convicted of felony murder and various misdemeanors in connection with the death of Shore, a passenger in appellant's vehicle. The evidence, briefly stated, showed that a deputy was travelling on I-85 when appellant's vehicle passed the deputy's vehicle at approximately ninety-five miles per hour. The deputy attempted to initiate a traffic stop, but appellant did not comply, and a high-speed pursuit ensued. At some point, Georgia State Patrol Trooper Saddler joined the pursuit and, following discussions with fellow law enforcement, performed a "PIT" maneuver — a tactical intervention in which a law enforcement officer matches the speed of a fleeing vehicle, uses his or her vehicle to "tap" the bumper of a fleeing vehicle, and causes the fleeing vehicle to "spin out," thereby ending the pursuit. Following the maneuver, appellant's vehicle left the road, flipped several times, and crashed into trees. Appellant survived the incident; Shore, however, was partially ejected and died as a result of her injuries.

Appellant contended that his trial counsel rendered ineffective assistance in preparing for trial. Specifically, trial counsel should have focused on developing a defense establishing that "the PIT maneuver was an intervening cause of ... Shore's death." However, the Court stated, assuming without deciding that counsel's trial preparation and defense presentation fell below an objective standard of reasonableness and, thus, constituted deficient performance, appellant failed to demonstrate prejudice.

Thus, the Court stated, the felony murder statute requires only that the defendant's felonious conduct proximately cause the death of another person. Proximate cause exists when the accused's act or omission played a substantial part in bringing about or actually causing the victim's injury or damage and the injury or damage was either a direct result, *or a reasonably probable consequence of the act or omission*. (Emphasis supplied.) In cases of felony murder, legal cause will not be present where there intervenes (1) a coincidence that is not reasonably foreseeable or (2) an abnormal response.

And here, the Court found, it was reasonably foreseeable — and not abnormal — that appellant's high-speed antics might cause another car — whether law enforcement or not — to strike appellant's vehicle or otherwise cause appellant to lose control of his vehicle, resulting in a catastrophic incident for appellant, his passengers, or occupants of other vehicles. Thus, the Court concluded, Trooper Saddler's actions did not amount to an intervening cause. As such, even if trial counsel's trial preparation and defense presentation were constitutionally deficient, trial counsel's failure in this regard did not affect the outcome of appellant's trial.