

THIS WEEK:

- **Body-Cam Evidence; Relevancy**
- **Ineffective Assistance of Counsel; Mental Health Issues**
- **Jury Charges; Revenge for a Prior Wrong**
- **Jury Deliberations; Removal of Jurors**
- **Harper; Fingerprint Evidence**
- **OCGA § 15-6-21 (c); Notice of Orders**
- **Right to Public Trial; Courtroom Closure**
- **Discovery Violations; Marijuana Testing**

Body-Cam Evidence; Relevancy

Robinson v. State, S20A0265 (4/20/20)

Appellant was convicted of malice murder, armed robbery, and possession of a firearm during the commission of a felony in connection with the death of Moore. The evidence, very briefly stated, showed that Moore cleaned firearms and repaired cell phones from his home. One evening, appellant came to the door and asked Moore to clean a small handgun. Moore cleaned it and returned it to appellant. Appellant asked to see Moore's AR-15. Moore went back in the house and retrieved it. Appellant then shot Moore, stole the AR-15 and fled.

At trial, the State made two separate presentations of body-camera footage recorded by police officers involved in the response and investigation of the alleged crimes. The first video was taken by an officer during appellant's arrest and showed the process of taking appellant into custody. It showed officers with weapons drawn, encountering appellant lying on the floor, placing handcuffs on appellant, and leading him into a police vehicle. The arresting officer testified throughout the presentation of the video about what was occurring during the arrest. The video was fast-forwarded to avoid playing certain portions of the video and hearsay. The second video depicted the crime scene in the minutes immediately following the shooting of Moore. The video showed Moore in his home, lying in a pool of blood, with his wife, Dawn, attempting to stop his blood loss while in extreme emotional distress. The video also showed the police officer removing Moore's two young children from the house, placing the children in a police vehicle, and attempting to comfort the children, who also appeared to be in extreme distress. Appellant objected to the playing of both videos.

Appellant argued that the trial court abused its discretion in playing the arrest video because it provided no information that was not otherwise available through prior testimony and violated his right to be free of indicia of guilt while in the presence of the jury. The Court noted that the arrest took place over a month after Moore's death, and the video neither showed appellant's flight nor did it provide any evidence of appellant's guilt or demeanor at the time he fled. But the jury heard testimony that appellant was arrested for murder, and also saw him sitting at the defendant's table. And given the compelling evidence against appellant including eyewitness testimony and appellant's own inculpatory statements, the

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 22, 2020

Issue 21-20

Court held that the admission was harmless error because it was highly probable that the arrest video alone did not contribute to the verdict.

Next, appellant argued that the trial court abused its discretion in playing the crime scene video because it had no probative value, and that its only purpose was to inflame the jury's prejudice against him. Specifically, he argued that the video was unnecessary to establish any new evidence for the jury, as the State established Moore's identity within the first five minutes of trial, and the State elicited detailed descriptions of the crime scene from witnesses.

The Court found that the portion of the video showing Moore lying in his home, while gruesome, was relevant to show his location and condition immediately following the shooting. It was also relevant to corroborate the witness testimony regarding the condition of the crime scene, and Dawn's testimony regarding her attempts to tend to Moore. Photographic evidence that fairly and accurately depicts a body or crime scene and is offered for a relevant purpose is not generally inadmissible under Rule 403 merely because it is gruesome. The same is true of crime scene videos. Thus, the Court stated, although "[i]t is a close call, because the video had limited probative value," appellant failed to show that the probative value of the video was substantially outweighed by the unfair prejudice of the video. Consequently, the trial court did not abuse its discretion in admitting this portion of the video.

However, the Court found, the last three minutes of the video showed little of the home and yard, nothing of Moore, and focused primarily on the emotional turmoil of Moore's five-year-old daughter and seven-year-old son. In this portion of the video, the officer picks up the crying children, and takes them outside to a patrol car. The young children asked the officer, "who shot my daddy?" and repeatedly said, "I want my daddy." The prosecutor repeated these requests and questions from the children in opening and closing arguments, and acknowledged to the jury the prosecutor's purpose in introducing the evidence: "I just want to stir your emotion? Yeah, I do. There's no bones about it because I want you to feel the emotion that Dawn Moore felt. I want you to feel the emotion that [Moore's son] felt, that [Moore's daughter] felt, as their daddy lay gunned down six feet away from them by that man sitting right there."

The Court stated that "[t]his portion of the video did not have even the remotest shred of relevance. Even viewing the video in the light most favorable to admission, there was no conceivable probative value to the video, so the probative value was substantially outweighed by the danger of unfair prejudice from its emotionally charged content. Admitting the last three minutes of the recording was plainly an abuse of discretion, particularly when considered in light of the State's problematic closing argument."

Furthermore, the Court found that the video was admitted for no purpose other than to inflame the prejudice of the jury and in fact, the prosecutor even said as much. It is more likely that harm resulted from the video's erroneous admission when the video had no other purported purpose. However, the Court noted, the trial court instructed the jury that closing argument was not evidence and that they should not "show favor or sympathy to one party or the other," and of course, qualified jurors are presumed to follow trial court instructions. And the video played a minor role in the State's case, given the evidence against appellant. Here, the evidence of appellant's guilt was particularly strong, including eyewitness testimony, appellant's statements to another witness on the night of Moore's death that he "just shot somebody," appellant's statements to another inmate confessing to the crime, and appellant's flight. Again, the Court held, while it was a "close call due to the complete lack of probative value for which this video could have been admitted," the admission of this portion of the video was harmless in the light of the compelling evidence of appellant's guilt.

Page 2

1590 Adamson Parkway, Fourth Floor, Morrow, Georgia 30260 • (770) 282-6300 • www.pacga.org •

Facebook: <https://www.facebook.com/GAProsecutors> • Twitter: <https://twitter.com/GAProsecutors>

Instagram: <https://www.instagram.com/gaprosecutors/>

LinkedIn: <https://www.linkedin.com/company/prosecuting-attorneys-council-georgia/>

Ineffective Assistance of Counsel; Mental Health Issues

Sullivan v. State, S20A0056 (4/20/20)

Appellant was convicted of malice murder and other crimes in connection with the shooting death of Benton. Appellant was seen chasing Benton down in an apartment complex parking lot, and firing a gun at Benton. Appellant never contended that he did not shoot Benton, but basically claimed that he was tired of Benton and Benton's associates bullying him to buy drugs from them or give them money. When Benton and his associates confronted appellant, appellant pulled a gun, then chased and shot Benton to death. Appellant later admitted to a detective that he shot Benton, would do it again, and would "piss on [Benton's] grave."

Appellant contended that his trial counsel's failure to procure and present to the jury expert testimony about appellant's mental health and its effect on his criminal responsibility constituted constitutionally ineffective assistance of counsel. Specifically, appellant contended that the jury should have heard expert testimony about his post-traumatic stress diagnosis to properly evaluate his criminal liability in this case.

The Court noted that appellant advised trial counsel before trial that appellant had a history of mental health issues, and trial counsel obtained and reviewed appellant's mental health records from the hospital and from the county jail. As part of his preparation for trial, trial counsel also requested and obtained a psychiatric evaluation to determine whether appellant "was mentally competent at the time of the alleged incident," and whether appellant was "competent to assist counsel and to stand trial." The psychiatrist who completed appellant's evaluation concluded that although appellant suffered from depression, cannabis use disorder, methamphetamine use disorder, and antisocial personality disorder, "at the time of the offense his mental illness did not affect his criminal responsibility" and "at the time of the evaluation, [appellant] was competent to stand trial."

The Court stated that generally, in noncapital cases, a trial counsel's decision to forego or curtail further investigation of an accused's mental health, even when there has been a previous mental hospitalization, is reasonable when an expert has determined that the defendant is fit to stand trial or that he was sane at the time of the offense. And here, the expert who performed appellant's psychiatric evaluation concluded that appellant was "competent to stand trial" and was competent "at the time of the offense." Moreover, the trial court concluded that trial counsel did not perform deficiently in part because trial counsel "obtained mental evaluations [and] consulted medical records." Thus, the Court found, given this record, even if other attorneys might have explored the mental issue further, it could not conclude that the investigation by and tactical judgment of appellant's attorney was outside the wide range of reasonably effective assistance.

Moreover, although appellant contended that trial counsel should have "explain[ed] how his client's mental health condition would have fueled his fear of Benton and his criminal company," and that "more was needed," this was not a case where trial counsel made no effort to investigate the potential for a defense based on mental health issues or relied exclusively upon his own lay evaluation of the mental health of his client. And appellant's presentation of new expert testimony at the motion-for-new-trial stage diagnosing him with post-traumatic stress disorder and opining about its potential effect on appellant's mental state when he shot and killed Benton did not transform trial counsel's constitutionally adequate performance into deficient performance. According, the Court concluded, appellant's claim of ineffective assistance of counsel therefore failed.

Jury Charges; Revenge for a Prior Wrong

Collins v. State, S20A0158 (4/20/20)

Appellant was convicted of felony murder in connection with the stabbing death of 14-year-old Hand. Briefly stated, the evidence showed that appellant got into a fight with a group of individuals outside a MARTA station. Appellant believed that during the fight, someone in the group stole his cell phone, \$150 in cash, and his bracelet, and he thought that Hand, Drake, and Odem were part of the group. About forty minutes later, appellant attacked the three boys as they waited for a train on the platform, killing Hand with a knife.

Appellant contended that the trial court plainly erred by giving the jury the State's requested instruction on "revenge for a prior wrong." The Court noted that during the charge conference, the trial court agreed to give the instruction, explaining that it appeared "to be within the scope of the evidence as a part of the charges on murder." The trial court then gave the jury an instruction that essentially tracked the pattern jury instruction on that issue. See Georgia Suggested Pattern Jury Instructions, Vol. II: Criminal Cases, § 3.16.30 ("Revenge for Prior Wrong"). Appellant objected to the charge at the charge conference, but stated that he had "no objection" at the conclusion of the court's charge to the jury.

The Court found that the evidence authorized the "revenge for a prior wrong" instruction: Appellant told the police during his second interview that he was defending himself when he stabbed Hand once after Hand supposedly said, "Let's get this dude," and reached into his pocket; Hand's friends identified appellant as Hand's assailant; before the stabbing, appellant accused Hand, Drake, and Odem of taking his cell phone after a fight in which he thought the teenagers were involved; appellant then followed the three of them down to the train platform before attacking them; and appellant admitted to his friend that he "retaliated against the boy who stole his cell phone" by stabbing the boy. Thus, the Court held, because some evidence supported the theory that appellant may have stabbed Hand out of revenge for the prior incident between them, there was no error from the giving of this charge.

Nevertheless, appellant argued, the challenged instruction undermined his misidentification defense, which he contended was his only defense at trial. The Court disagreed. Misidentification was not appellant's sole defense, as his counsel argued in closing that the State had to prove not only the identity of the perpetrator but also his intent, saying, "If you decide that [appellant] was there on the evidence and he lashed out . . . , you have to decide that beyond a reasonable doubt at that moment, he had the specific intent to take the life of Mr. Hand." And the trial court gave the jury instructions on the State's burden of proving appellant's intent as well as the defense of identity.

Finally, appellant contended that the challenged instruction constituted an improper judicial comment on his guilt. The Court again disagreed, citing *Rector v. State*, 285 Ga. 714, 716 (2009).

Jury Deliberations; Removal of Jurors

Mills v. State, S20A0364 (4/20/20)

Appellant was convicted of malice murder and aggravated assault. The evidence, very briefly stated, showed that appellant and Moses Bolar were members of a street gang. Early one evening, they were at the home of another, socializing. The victim arrived and got into an argument in another room with his former girlfriend. Bolar asked the victim, "what did you

say?" The victim responded that he "ain't said a mother f***ing word," and walked towards Bolar. Bolar pointed his gun at the victim. Appellant stood up and also pointed his gun at the victim. Appellant and Bolar both fired at the victim, killing him.

The record showed that after four hours of deliberation, the jury sent a note to the court stating: "We have a juror that believes the defendants are not guilty, based on the evidence presented." The court informed the jury that they had been deliberating a relatively short time and directed that they "go home and relax" and return the following morning to resume their deliberations. After deliberating for two hours the next morning, the judge received a second note stating, "Your Honor[,] we have a juror that does not believe any of the witness testimony, does not believe any of the evidence that was submitted by the D.A. for this case, and says that there is no *proof* that [appellant] or Moses were in the house on Dec. 23, 2017. And the only thing that would change their mind, would be to see a clear resolution video from within the house showing both [appellant] and Moses firing the guns. Is this a hung jury?" (Emphasis in original.). The court then brought the jury into the courtroom and removed the juror for being unable to follow the court's instructions regarding burden of proof.

Appellant contended that the trial court erred in removing the lone holdout juror during deliberations without conducting a sufficient inquiry or without having a good or legal cause to do so. The Court agreed.

The Court found that the jury's notes, when considered in the context of the trial court's very limited inquiry, show that the juror had concluded that neither defendant was guilty based on the evidence presented. The first of the two notes at issue simply said as much. As more specifically explained in the jury's last note, the juror did not believe any witness testimony or any of the State's evidence, and she found no proof that either appellant or Bolar were in the house. It was appropriate for the juror to assess the credibility of the State's witnesses and other evidence. And nothing in the jury's notes showed that the juror had refused or ceased to participate in the jury's deliberations; rather, it could be reasonably inferred from the jury's communications that the juror had reached a decision different from that of the other jurors.

Furthermore, the Court stated, the last note said that "the only thing that would change [the juror's] mind, would be to see a clear resolution video from within the house showing [both defendants] firing the guns." However, the juror was not demanding that the State present a clear resolution video in order to satisfy its burden of proof. Instead, the juror's indication to other jurors that only a clear resolution video would change her mind was consistent with her having followed the trial court's instructions regarding the burden of proof and coming to the conclusion, based on the evidence presented, that the State had failed to carry its burden of establishing the defendants' guilt beyond a reasonable doubt.

Finally, the trial court's very limited inquiry into the juror's possible incapacity fell short of providing a sound basis for her excusal. That the juror had reached a conclusion different from that of the other jurors did not show that she was incapacitated or legally unfit to serve. Therefore, the Court concluded, the trial court abused its discretion in removing the juror and because such an error was harmful, appellant's convictions were reversed.

Harper; Fingerprint Evidence

Santana v. State, S20A0563 (4/20/20)

Appellant was convicted of malice murder and related offenses. He argued that his trial counsel provided ineffective assistance by failing to file a *Harper* motion to exclude fingerprint testimony the State intended to present at trial. The Court disagreed.

The Court found that appellant failed to make any showing—much less a strong one—that the fingerprint evidence used in this case had not reached a "scientific stage of verifiable certainty," such that the evidence would have likely been excluded under the *Harper* standard. In fact, the Court noted that it has already recognized that fingerprint evidence is not novel, and has been widely accepted in Georgia courts. And to the extent appellant argued that the specific fingerprint methodology or analysis used in this case was not scientifically supported, he offered no argument to support such an assertion.

Moreover, the Court held, to the extent that appellant's argument rested on trial counsel's testimony that he would have filed a *Harper* motion "in hindsight," that argument failed because hindsight has no place in the *Strickland* analysis. Accordingly, the Court concluded, because appellant failed to show that the fingerprint evidence would have been suppressed had trial counsel filed a motion, the trial court properly found that trial counsel's performance was not deficient.

OCGA § 15-6-21 (c); Notice of Orders

Moore v. State, S20A0344 (4/20/20)

Appellant appealed from the trial court's denial of his motion to set aside a September 2017 order denying his motion for an out-of-time appeal. He contended that the trial court abused its discretion by denying his motion to set aside because he was not given proper notice of the September 2017 order. The Court disagreed.

The Court noted that OCGA § 15-6-21 (c) provides "When [the judge] has so decided [a motion], it shall be the duty of the judge to file his or her decision with the clerk of the court in which the cases are pending and to notify the attorney or attorneys of the losing party of his or her decision. Said notice shall not be required if such notice has been waived pursuant to subsection (a) of Code Section 9-11-5 [by a failure to file pleadings]. When the trial court does not give the notice required by OCGA § 15-6-21 (c) to the losing party, that party should file a motion to set aside, and the trial court should grant the motion and re-enter the judgment, whereupon the 30-day appeal period would begin to run again. When considering the motion to set aside, the trial court must first make a finding regarding whether the duty imposed by OCGA § 15-6-21 (c) was met.

However, the Court stated, the duty imposed by OCGA § 15-6-21 (c) only requires that the trial court give notice to the losing party, not that the notice must be sent and received. Thus, if the trial court has in fact given notice, then a motion to set aside may be properly denied whether or not the losing party actually received the notice.

And here, the Court noted, in its order denying appellant's motion to set aside, the trial court expressly found, and the record supported, that appellant had been given notice of the September 2017 order as required by OCGA § 15-6-21 (c).

The court credited the Chief Deputy Clerk's testimony that she used adequate postage to mail a copy of the September 2017 order to appellant at his record address and that the copy was never returned to the clerk's office. Accordingly, the court did not abuse its discretion by denying appellant's motion to set aside.

Right to Public Trial; Courtroom Closure

Morris v. State, S20A0176 (4/20/20)

Appellant was convicted of malice murder and other offenses. He argued that the trial court's direction to close and lock the doors to the courtroom while the court charged the jury violated his right to a public trial under the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, Sec. I, Par. XI (a) of the Georgia Constitution of 1983. However, the Court stated, the improper closing of a courtroom is a structural error requiring reversal only if the defendant properly objected at trial and raised the issue on direct appeal. Thus, the Court held, because the record reflected that appellant did not make a contemporaneous objection to the locking of the courtroom doors at trial, he waived his right to appellate review of the trial court's action.

But, appellant contended, his trial counsel provided ineffective assistance by not objecting to the locking of the doors during the trial court's charge to the jury. The Court noted that although appellant waived appellate review of the trial court's decision to lock the courtroom doors by failing to object, he may raise a claim that he was denied his right to a public trial in the context of a claim of ineffective assistance.

Premitting whether the failure to object to the locking of the courtroom doors constituted deficient performance, the Court found that appellant failed to show how he was prejudiced by counsel's lack of objection. The record reflected, and appellant conceded, that the locking of the courtroom was announced in advance by the trial court, that the court gave those in the gallery the opportunity to remain in the courtroom after the doors were shut and locked, and that some individuals did so. Most importantly, appellant did not show that any person who wished to be present in the courtroom for the charge of the jury was prevented from entering or remaining in the courtroom while the charge was given. Appellant therefore failed to articulate how the trial court's locking of the courtroom and his counsel's failure to object to this action prejudiced his constitutional right to a public trial. Accordingly, his claim of ineffective assistance failed.

Discovery Violations; Marijuana Testing

Keller v. State, S20A0006 (4/20/20)

Appellant was convicted of felony murder and related crimes in the death of a two-year-old. He contended that the trial court abused its discretion in refusing to allow Dr. France to testify that appellant had post-traumatic stress disorder, on the basis that appellant did not disclose him as an expert witness in a timely fashion. The Court disagreed.

Under the reciprocal discovery rules, a defendant's attorney must furnish opposing counsel with information on defense witnesses no later than five days prior to trial. OCGA § 17-16-8 (a). Otherwise, the trial court may, upon a showing of prejudice and bad faith, prohibit the defendant from introducing the evidence not disclosed. OCGA § 17-16-6.

Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE

WEEK ENDING MAY 22, 2020

Issue 21-20

Here, the Court found, appellant called Dr. France as a witness on the fifth day of trial. The State objected on the basis that appellant had not provided the State with the required notice or a summary of Dr. France's testimony. In the ensuing colloquy, trial counsel acknowledged that she knew about Dr. France three days earlier but did not provide his name to the State or file a witness list until the day that she called Dr. France as a witness. Moreover, the State had no opportunity to review Dr. France's proposed testimony or prepare for cross-examination. Thus, the Court held, the trial court did not abuse its discretion in excluding Dr. France's testimony.

Furthermore, the Court noted, appellant testified on his own behalf at trial and informed the jury of his PTSD diagnosis and its effects on his personality and memory. Thus, the Court also found that in light of the strong evidence of appellant's guilt, the exclusion of Dr. France's testimony was harmless error, if error at all, as it was highly probable that the exclusion of this evidence did not contribute to the jury's verdict.

Appellant also contended that the trial court erred in admitting evidence regarding the testing of the marijuana discovered in appellant's home. The record showed that the officer who initially tested the marijuana and prepared the report was under subpoena, but he had retired, apparently was unaware of the trial, and was out of town during the week of the trial. Rather than ask for a continuance, the State requested that another officer re-test the marijuana and prepare a new report. The State provided a copy of the new report to appellant and offered to make the officer who prepared the new report available for trial counsel to interview. Appellant objected to the witness and the report because he had not been given notice at least ten days before trial.

The Court noted that OCGA § 17-16-6 provides that, upon the State's failure to comply with discovery requirements, "the court may order the state to permit the discovery or inspection, interview of the witness, grant a continuance, or, upon a showing of prejudice and bad faith, prohibit the state from introducing the evidence not disclosed or presenting the witness not disclosed, or may enter such other order as it deems just under the circumstances." This Code section grants the trial court a broad discretion to fashion a remedy appropriate under the circumstances.

And here, the Court found, appellant did not show that the trial court abused its discretion in allowing this remedy for the absence of the original officer. Nor did appellant show prejudice because the retesting produced the same result, and appellant admitted at trial that he smoked marijuana, that the substance found by police in his house was marijuana, and that it belonged to him.