

THIS WEEK:

- **Right to a Fair Trial; Visible Security Measures**
- **Voir Dire; Dismissal of a Jury Panel**
- **Ineffectiveness of Counsel; Necessity of Remand**
- **Right to be Present; Jury Questions**
- **Juror Misconduct; Impeachment of Jury Verdict**
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Right to a Fair Trial; Visible Security Measures

Hill v. State, S20A0285 (5/4/20)

Appellant was convicted of malice murder. He and his co-defendant, Rodriguez, were permitted to represent themselves at trial. The evidence showed that appellant, an inmate in a state correctional facility, was the leader of the prison's Muslim community. Appellant ordered and oversaw the murder of another inmate who had a reputation for attacking Muslim inmates and stealing their possessions.

Appellant contended that the trial court abused its discretion when it required him to be visibly shackled in front of the jury with handcuffs, a waist chain, and leg irons and that this error prejudiced his right to a fair trial. The State argued that the trial court did not err, but to the extent that it did, any error was harmless.

The Court stated that it is well established that no person should be tried while shackled except as a last resort. This is so because shackling is an inherently prejudicial practice that undermines the presumption of innocence in the eyes of the jury, hampers the defendant's ability to participate in his own defense, and impacts the overall dignity of the judicial process. Nevertheless, under some circumstances, shackling is necessary for the safe, reasonable and orderly progress of trial. A trial judge has the discretion to take account of special circumstances, including security concerns that may call for shackling, but any such determination must be case specific; it should reflect particular concerns, special security needs or escape risks related to the defendant on trial.

A trial court's decision to shackle a defendant must be subjected to close judicial scrutiny to determine if there was an essential state interest furthered by compelling a defendant to wear shackles and whether less restrictive, less prejudicial methods of restraint were considered or could have been employed. And, the Court noted, while it is deferential to the security determinations of a trial court, the record must provide a basis for those determinations.

Here, the Court found, the trial court made two separate decisions concerning whether it would shackle appellant — the first supposedly occurred pre-trial with the trial court's initial security plan, and the second occurred immediately before voir dire. But, the Court found, the record did not support either of the trial court's decisions to visibly shackle appellant. Instead, the record was mostly silent as to what was included in the trial court's first security plan and why the trial court

came to its security decision. Although the trial court referenced numerous pre-trial meetings and hearings in support of its decision to keep appellant visibly shackled, the Court noted that neither the transcripts of those hearings nor the security plan itself were contained in the record. Even the trial court's limited discussion of this initial plan was vague. Thus, the Court stated, because it could not discern from the record what was included in the trial court's first security plan, or the reasons supporting the trial court's initial decision to shackle appellant, the Court had to conclude that the trial court abused its discretion for failing to make the required case-specific and individualized findings to support its initial decision to shackle appellant.

Furthermore, the Court stated, possibly more concerning was the trial court's decision on the morning of trial to keep appellant visibly shackled without first reassessing the appropriateness of such security measures in light of appellant's decision to proceed pro se. While the trial court's initial plan to have appellant sit at a separate table behind counsel would have shielded appellant's restraints from view, the court did not re-evaluate its plan in light of appellant's choice to represent himself. A trial court's security determination requires balancing the need for security measures with protection of the defendant's constitutional rights. Appellant's choice to represent himself introduced an additional factor that needed to be considered by the trial court — i.e., whether the shackles would impede appellant's ability to exercise his constitutional right to self-representation. However, the Court found, the trial court declined to revisit its decision in light of this new issue. Likewise, it refused to consider alternative and less visible security measures, even going so far as to blame the visibility of appellant's shackles on his assertion of his constitutional right to represent himself at trial. While visible shackling may be appropriate in some cases, even with a pro se defendant, the record must reflect that the trial court considered the impact of visible restraints upon the defendant's constitutional rights, and whether less visible alternatives could achieve the required level of security. But, the trial court failed to make a record of such considerations.

Finally, the Court found that while the trial court seemingly based its decision to keep appellant visibly shackled, in part, upon an alleged threat appellant had made that morning, appellant disputed the information proffered by the prosecutor, which appeared to have been hearsay as appellant claimed, and the trial court failed to establish a record — for example, by calling witnesses or holding an evidentiary hearing to support its determination that the threat warranted extra security measures. By the trial court's own admission, it changed the original security plan based on this purported threat, yet it failed to put new individualized findings on the record in support of the change. Indeed, while appellant was the only defendant alleged to have made a threatening statement prior to trial, the trial court forced both defendants to wear visible shackles. Moreover, when appellant requested that the trial court "state for the record what the security issues were with [him] that required restraints," the trial court refused to do so. Thus, the Court concluded, the trial court's decision prejudiced appellant's right to a fair trial.

Voir Dire; Dismissal of a Jury Panel

Whitehead v. State, S20A0171 (5/4/20)

Appellant was convicted of malice murder and other offenses. He contended that the trial court erred in allowing the District Attorney to participate in voir dire as a prospective juror instead of immediately excusing her for cause. The Court disagreed.

The Court noted that before the trial court excused her for cause, the District Attorney answered a few preliminary questions. She stated that she was familiar with the facts of the case, knew the attorneys and the judge, owned a gun, had a relative in law enforcement, and was familiar with the motel where the crimes occurred. The Court found that appellant failed to show that anything that the District Attorney did or said before she was excused for cause was inherently prejudicial and would have denied him the right to a jury free from a fixed opinion or a suspicion of prejudgment.

Nevertheless, appellant argued, the District Attorney's mere presence on the venire infected the integrity of the jury selection process, thereby denying him a fair trial. But, the Court noted, appellant cited no authority in support of his proposition, and the Court stated it had not found any.

Generally, the dismissal of a jury panel is required when, during voir dire, a prospective juror relays prejudicial information that is specific to the defendant and germane to the case for which the defendant is on trial. Dismissal is not required, however, when the statements establish only gossamer possibilities of prejudice. Thus, the Court held, because there was nothing in the voir dire transcript suggesting that the District Attorney relayed to the prospective jurors any prejudicial information specific to the defendant or germane to the case being tried, appellant failed to demonstrate any basis for reversal.

Ineffectiveness of Counsel; Necessity of Remand

Styles v. State, S20A0236 (5/4/20)

Appellant and his brother were convicted of felony murder, armed robbery and other offenses in relation to a home invasion. Others who were involved in the crimes pled guilty and testified against them at trial. Appellant contended, for the first time on appeal, that his trial counsel was constitutionally ineffective when he failed to object to the prosecutor's closing argument referring to appellant and his brothers as the "Styles family army." He argued that the statement was prejudicial and required reversal because it implied that appellant was involved in gang activity.

The Court stated that generally, when a preserved ineffective assistance of counsel claim is raised for the first time on appeal, the Court must remand for an evidentiary hearing on the issue. But remand is not mandated if the Court can determine from the record that the defendant cannot establish ineffective assistance of counsel under the two-prong test set forth in *Strickland v. Washington*. And here, the Court found, an evidentiary hearing was not necessary because it could determine from the record that the claim of error was without merit.

The trial transcript showed that the prosecutor, while recounting the testimony of the State's witnesses during closing argument, said: "Lamar Jones is a lieutenant in the Styles' family army here." The Court found that this colorful characterization of Jones' relationship with appellant and his brothers was based on Jones' testimony that he had participated in the charged armed robbery with appellant and his brother Michael and a prior armed robbery with appellant and his brother Dominique. There was no allegation by the State of gang activity or affiliation during the course of the trial.

A closing argument is to be judged in the context in which it is made, and a prosecutor has wide latitude to argue reasonable inferences from the evidence. Here, the fact that three of the Styles brothers had participated in armed robberies with Jones

was admitted in evidence. Thus, the prosecutor was afforded wide latitude in arguing inferences from that evidence, including characterizing appellant and his brothers as an "army" of robbers. Therefore, the Court held, because the argument was permissible, defense counsel was not constitutionally deficient for failing to object to it.

Right to be Present; Jury Questions

Carter v. State, S20A0022 (5/4/20)

Appellant was convicted of malice murder and two firearm offenses. The record showed that about an hour after beginning its deliberations, the jury sent a note to the trial court that asked, "Why wasn't GSR [gunshot residue] done on defendant?" The prosecutor and appellant's counsel agreed that the court should respond, "You must decide the case on the evidence presented to you during the trial," and the court did so. The court then took a recess. The trial transcript did not state explicitly whether appellant was present in the courtroom for this brief discussion. The transcript showed that a few minutes later the court went back on the record and, after stating that appellant was present with his lawyer, marked the jury's note as an exhibit for the record.

Appellant argued that the initial discussion of the jury's note during his alleged absence from the courtroom violated his constitutional right to be present. The Court noted that a defendant's right to be present attaches at any stage of a criminal proceeding that is critical to its outcome if the defendant's presence would contribute to the fairness of the procedure. But the right does not extend to situations where the defendant's presence would be useless, or the benefit but a shadow. Thus, a defendant who is represented by counsel need not be present for portions of a trial that involve questions of law and consist of essentially legal argument about which the defendant presumably has no knowledge. For example, a defendant's right to be present is not violated by his involuntary absence from the court's charge conference with counsel, or from a conference held by a trial court with defense and prosecuting counsel to discuss a response to a deliberating jury's substantive inquiry.

And here, the Court found, the initial discussion of the jury note presented a purely legal issue regarding how the trial court should respond to the jury's substantive inquiry about why certain evidence was not presented. The jury's question called solely for legal argument from the prosecutor and defense counsel, who were both present and in agreement that the court should simply refer the jurors to the evidence presented at trial. Thus, the Court concluded, even assuming that appellant was absent during the discussion, his right to be present was not violated.

Juror Misconduct; Impeachment of Jury Verdict

Collins v. State, S20A0195 (5/4/20)

Appellant was convicted of murder and other offenses. He was tried with co-defendant Stallworth, whose conviction was already affirmed on appeal. *Stallworth v. State*, 304 Ga. 333 (2018). The record showed that, at the conclusion of appellant's and Stallworth's trial, the trial court instructed the jury regarding the defendants' presumptions of innocence and to not consider either defendant's election not to testify when determining guilt or innocence. Immediately following the publishing of the guilty verdicts, counsel for the parties met with the jurors. A subset of approximately four jurors asked Stallworth's trial counsel why Stallworth had not testified. Stallworth's counsel responded that Stallworth had the

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constitutional right not to testify. When a juror asked again why Stallworth had not testified, his counsel did not answer and redirected the conversation.

Appellant contended that she was denied a fair trial due to juror misconduct. Specifically, she argued that several jurors, in a post-trial conversation with Stallworth's defense counsel, questioned why Stallworth had not testified, and that these questions about Stallworth showed that the jurors also held appellant's failure to testify against her, thereby raising a presumption of prejudice against her. The Court disagreed.

At the hearing on appellant's motion for new trial, Stallworth's counsel testified that none of the jurors indicated they had drawn a negative inference from Stallworth's failure to testify. The trial court's staff attorney, who was in attendance at the post-trial meeting, testified that the jurors' questions "seemed to go a little bit beyond curiosity" and that he "got the impression that they were considering [it] in their deliberations." Thus, appellant argued, although the trial court properly instructed the jury, the jurors engaged in misconduct by not following those instructions. She further argued that the trial court erred by not allowing her to subpoena jurors to help her meet her burden of showing juror misconduct.

However, the Court held, because neither the attorneys' impressions about what the jurors may have considered during their deliberations nor the jurors' own testimony about their deliberations is admissible evidence, appellant's claim of juror misconduct failed. Longstanding common-law principles prohibit using juror statements or testimony to impeach their own verdict. This prohibition is embodied within Federal Rule of Evidence 606, from which Georgia adopted its current rule regarding the admissibility of juror testimony. OCGA § 24-6-606 states, in relevant part: "Upon an inquiry into the validity of a verdict or indictment, a juror shall not testify by affidavit or otherwise nor shall a juror's statements be received in evidence as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the jury deliberations or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith; provided, however, that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the juror's attention, whether any outside influence was improperly brought to bear upon any juror, or whether there was a mistake in entering the verdict onto the verdict form." OCGA § 24-6-606 (b) ("Rule 606 (b)").

Thus, the Court held, as both the attorney testimony regarding juror statements made during the post-trial conversation, and the juror testimony appellant sought in order to bolster her claim, fall within Rule 606 (b)'s prohibition against using juror testimony or statements to impeach a verdict, appellant failed to produce admissible evidence of juror misconduct.

However, appellant contended, the jury's alleged consideration of her choice not to testify, by itself, constitutes extraneous prejudicial information and, therefore, the jurors' testimony on the issue fell within Rule 606 (b)'s exceptions. The Court again disagreed.

Georgia's Rule 606 (b) is borrowed from Federal Rule of Evidence 606 and, as such, when interpreting its meaning, the Court stated it must be guided by the decisions of federal appeals courts and particularly the Eleventh Circuit. When interpreting Rule 606 (b)'s exception regarding extraneous prejudicial information, the Eleventh Circuit distinguishes between "external" information, which comes from a source outside the jury, and "internal" matters, which include statements made during deliberations. *United States v. Foster*, 878 F3d 1297, 1309 (III) (D) (11th Cir. 2018). In fact, the Court stated, all federal appellate courts to have considered whether jurors' discussions regarding a defendant's decision

not to testify fall within Rule 606 (b)'s exception for extraneous prejudicial information have consistently held that such discussions do not, by themselves, constitute "external" information about which jurors can testify. Thus, the Court concluded, the trial court did not abuse its discretion when it ruled that the juror testimony sought by appellant was inadmissible. In addition, as appellant did not present any other admissible evidence under Rule 606 (b) that supported her claim of juror misconduct, her claim failed.

Statements; Hope of Benefit

Rosser v. State, S20A0103 (5/4/20)

Appellant was convicted of malice murder and other offenses in connection with the death of Vereen, with whom he had a contentious romantic relationship. He argued that the trial court erred by admitting certain statements he made while in police custody because such statements were given with the hope of benefit. The Court disagreed.

OCGA § 24-8-824 provides, in relevant part, that "[t]o make a confession admissible, it shall have been made . . . without being induced by another by the slightest hope of benefit[.]" The Court noted that it has consistently interpreted the phrase "slightest hope of benefit" not in the colloquial sense, but as it is understood in the context within the statute, focusing on promises related to reduced criminal punishment—a shorter sentence, lesser charges, or no charges at all.

Also, the Court noted that because the relevant facts arose solely from appellant's audio-recorded interview with Detective Coleman and were not in dispute, its review of appellant's custodial statement was de novo. And here, the Court found, the record showed that before speaking with Detective Coleman, appellant was given *Miranda* warnings. During the course of the interview, Detective Coleman began to press appellant as to the truthfulness of his accounts and encouraged him to tell the truth. Specifically, Coleman said, "[L]ying to me [isn't going] to make this any better; it's [going to] make it look worse. It's [going to] make it look like you did this s*** on purpose, all right?" The Court found that this type of exhortation to tell the truth is not improper.

After appellant told Coleman that he could not remember what happened, Coleman implored appellant not to blame Jackson, who was with appellant the night of the murder, for Vereen's death and went on to say, "You've got to come up off of it; that's the only way that the—the court is going to have any mercy for you at all, because if you go down—go down into this place—once you leave here, your story is locked in, you know what I'm saying?" (Emphasis supplied).

Appellant contended that Coleman's statement about "mercy" gave a hope of benefit if appellant confessed to Vereen's murder. But, the Court found, as with Coleman's earlier statement to appellant, this was not an improper interrogation tactic. Detective Coleman never told appellant that he would not be charged with murder, that he would be charged with a lesser crime, or that he would receive a shorter sentence if he told him what happened. Moreover, it is permissible for the police to tell a suspect that the trial judge may consider his truthful cooperation with the police. Thus, the Court held, Coleman's reference to the court having "mercy" on appellant was such a statement, and that type of exhortation by a law enforcement officer did not render a confession inadmissible under OCGA § 24-8-824.