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## Prosecutorial Misconduct; Comments on Post-Arrest Silence

*Glover v. State, S20A0133 (6/16/20)*

Appellant was convicted of malice murder and making a false statement in connection with the shooting death of Williams. The evidence, very briefly stated, showed that as appellant and his friend, Miller, walked into a convenience store parking lot, they were approached by the victim, a homeless man. The victim attempted to trade a cell phone for crack cocaine to Miller. Miller declined and then appellant and he went into the convenience store. When they came out, carrying drinks, they asked a person named Larry for a ride. After they got into the car, Miller called the victim over and asked about the cell phone. When the victim pulled out the cell phone, Miller snatched it from him and then appellant pulled a gun and shot the victim. Larry told appellant and Miller to get out of the car and the two fled. Larry called the police and the police retrieved the cups and straws which appellant and Miller left in the car. The police were able to obtain DNA from both cups to identify appellant and Miller. Subsequently, appellant was questioned and told the police he was not there, he was with his girlfriend at the time of the shooting.

Appellant contended that his counsel provided ineffective assistance by not objecting when, during closing arguments, the prosecutor addressed the charge of making a false statement by arguing as follows: "One thing [Glover] could do is invoke and [say] I just don't want to talk to you guys anymore. Instead he just goes video schmideo. Nope. He's still insisting he's not there. Because he doesn't know what else they know, right? He doesn't know there's going to be DNA. And, of course, he won't ever find out until much later...So he — though counsel wants to distance himself from this horrendous statement [—] is of all the things in America he could say, one of which is, no thanks. I want a lawyer, which you're allowed to say."

Appellant contended that the prosecutor's comments were prohibited because any comment upon the right to counsel or the right to remain silent is improper and objectionable. But, the Court found, here, the prosecutor's comment cannot be construed as a comment on appellant's post-arrest exercise of his right to counsel and right to remain silent because

appellant did not exercise either of those rights; rather, he chose to waive those rights and to make a false statement to police. The State commented on appellant's post-arrest waiver of his rights and the statements that appellant did make, which supported the charge of making a false statement. Furthermore, the Court stated, appellant pointed to no basis, nor could the Court discern one, on which counsel could have successfully objected to the prosecutor's comment about appellant's electing not to exercise his rights. And, the failure to make a meritless objection to the State's closing argument is not evidence of ineffective assistance.

## **Pre-Trial Habeas; Denials of Bond**

*Tumlinson v. Dix, S20A1277 (6/16/20)*

Appellant was arrested on May 19, 2019 and indicted on July 9, 2019 on two counts of aggravated sexual battery, three counts of child molestation, and three counts of sexual battery against a child under the age of 16. Appellant filed a motion for bond in the superior court. The court denied it and also denied appellant's request for a certificate of immediate review.

On October 22, 2019, appellant filed a petition for habeas corpus relief. Citing *Ayala v. State*, 262 Ga. 704, 705 (1993), he argued that he was being illegally detained because the trial court had flagrantly abused its discretion in denying his motion for bond. On April 13, 2020, the habeas court dismissed the petition without considering its merits or holding a hearing, stating that "habeas relief is unavailable on bail issues because they can be raised in the pending criminal case."

The Court stated that an order denying bond is interlocutory, and may be reviewed by an appellate court following the grant of a certificate of immediate review. Additionally, in those cases where the petitioner lacks an adequate remedy in the trial court or appellate court, as when he is unable to seek an interlocutory appeal from an order denying bond because the trial court has denied a request for a certificate of immediate review, a habeas court has the authority to review the merits of a habeas petition in which the petitioner claims that he is being unlawfully detained based on the alleged illegal denial of bond. A trial court may dismiss or deny such a petition without a hearing, however, if the petition and any exhibits attached thereto reveal without contradiction that the petitioner's cognizable claims (which include claims under *Ayala*) are without merit. Here, however, the habeas court made no finding in its dismissal order that appellant's petition and any exhibits attached to it revealed, without contradiction, that his claims were without merit.

Thus, the Court held, because the record showed that appellant exhausted his efforts to seek an interlocutory review of the trial court's order denying him bond in this case, and because he had no other adequate remedy for meaningful review of the lawfulness of his continued detention, the habeas court erred in concluding that it lacked the authority to consider the merits of his petition for pre-trial habeas relief on this basis. Accordingly, the Court remanded the case and directed the habeas court to consider appellant's petition and any exhibits thereto and, if necessary, to conduct a hearing.

## **Jury Verdicts; Hung Juries**

*Medina v. State, S20A0505 (6/16/20)*

Appellant was indicted for malice murder (Count 1), felony murder (Count 2), aggravated assault (Count 3), and possession of a firearm during the commission of a felony (Count 4). The procedural facts, briefly stated, showed that during the third day of deliberations, the jury sent a note stating that they had a unanimous verdict on Count 1, but were

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split 8-4 on the other counts. Both parties requested a mistrial on all counts. The judge called the jury into the courtroom and stated, "I am going to declare a mistrial. Whatever your verdict is, we do not know this, I will ask you to come back with a copy of the jury form signed, indicating what your verdict is on Count 1." The judge then excused the jury back to the jury room.

After again questioning the State and defense and both again agreeing to a mistrial on all counts, the judge brought the jury back in. The judge asked the foreperson to "give the verdict form to the bailiff, and I will announce it in open court." The trial court then announced: "The verdict form reads, as to Count 1, malice murder, we find the defendant not guilty. There is no resolution as to Count 2, 3, and 4. So I do hereby declare a mistrial on all four counts because the facts in this case are governed — the allegations are governed by all of the facts presented to the jury, so the case will have to be mistried and will have to be retried." Prior to retrial, appellant filed a plea in bar as to all four counts, which the court denied.

The Court stated that ordinarily, when a defendant moves for, or consents to a mistrial, jeopardy continues and a retrial is allowed. But that assumes that the declaration of a mistrial is valid. In other words, a purported mistrial declared on a count for which the jury has already returned a valid verdict is a legal nullity. And here, the jury's verdict was valid. It was unanimous, in writing, signed by the foreperson, and delivered in open court, where it was read by the judge directly. Thus, no mistrial, consented to or otherwise, actually occurred as to Count 1.

Nevertheless, the State argued, the trial court declared a mistrial before it read the jury's verdict as to Count 1. But, the Court found, the record clearly showed that the trial court did not grant a mistrial until after the jury returned its verdict on Count 1. Although the court announced that it was "going to declare a mistrial" (of unspecified scope) before it asked the jury to return with its verdict, it did not do so at that time. After sending the jury out to complete the verdict form, but before the jury returned with a verdict, the court asked counsel whether, "if [the jurors] come back with a verdict on one count," that verdict would become "the law of the case as to that count," and then added that the court did not "see how it can be a mistrial when the jury has arrived at a verdict on Count 1." And despite this concern, the court did not actually declare a mistrial until after the verdict was returned and published, saying at that time, "So I do *hereby declare* a mistrial on all four counts." (Emphases added). The jury's return of a verdict of not guilty as to that count therefore barred the State from retrying appellant for malice murder. As a result, the trial court erred in denying appellant's plea in bar based on double jeopardy as to the malice murder count.

Appellant also argued that the not guilty verdict on the malice murder count collaterally estops the State from retrying him on the other counts because the jury necessarily found he was justified in defending himself. The Court disagreed. First, because appellant requested or consented to a mistrial, he could not now assign error to the trial court's mistrial ruling as to the remaining counts.

Second, the record did not show that the jury's verdict on Count 1 must have been based on a finding that appellant acted in self-defense. The jury might rationally have found appellant not guilty of malice murder because he was justified in shooting the victim — a finding that would also apply to the other charges. But the jury also could rationally have found appellant not guilty of malice murder based on a conclusion that the evidence did not prove malice beyond a reasonable doubt, while being undecided on the different issue of whether the evidence proved the general intent to inflict injury needed for aggravated assault (Count 2), which was the predicate for the felony murder count (Count 3) and one of the predicates for the charge of possession of a firearm during the commission of a felony (Count 4). Thus, the Court

concluded, appellant failed to carry his burden of establishing that the jury necessarily determined that he acted in self-defense. Consequently, he may be retried on Counts 2, 3, and 4.

## **Prosecutorial Misconduct; OCGA § 17-8-75**

*Dobbins v. State, S20A0402 (6/16/20)*

Following a hung jury resulting in a mistrial, appellant was retried and convicted of malice murder and other crimes. During the direct examination of a witness, the State—in the process of trying to call the witness's attention to a prior inconsistent statement—said, "I'm handing you a copy of the transcript from the previous trial." Defense counsel asked to approach the bench, and, at a sidebar conference, said: "Your Honor, the State just mentioned a previous trial. I would move for a mistrial. This is not information that the jury is allowed to know." The Court denied the motion and offered to give a curative instruction, which defense counsel declined.

Appellant contended that the trial court erred when it failed to grant his motion for mistrial, rebuke the prosecutor, or give a curative instruction, in accordance with OCGA § 17-8-75. The Court disagreed.

First, the Court found, it need not decide if the trial court abused its discretion in denying appellant's motion for mistrial because appellant waived his right to complain about the trial court's denial of his motion for mistrial when trial counsel refused the trial court's offer to give a curative instruction. Similarly, appellant could not complain that the trial court erred by failing to give a curative instruction. The trial court offered to give a curative instruction but appellant declined it.

However, the Court stated, it must still evaluate appellant's contention that the trial court erred when it failed to rebuke the State's prosecutor under OCGA § 17-8-75, which provides that a court "shall rebuke [ ] counsel" "[o]n objection made." Here, the Court found, although the record showed that trial counsel moved for a mistrial after the State referenced appellant's "previous trial," trial counsel did not make a specific objection on that ground. Pretermitted whether appellant's motion for mistrial constituted a proper objection to the State's reference to appellant's "previous trial" under OCGA § 17-8-75, and even assuming that the trial court erred by failing to rebuke counsel, any such assumed error would be harmless. The evidence of appellant's guilt was strong. Moreover, the trial court instructed the jury both before opening statements and after closing arguments that the lawyers' statements are not evidence. As a result, the Court concluded that it was highly probable that the trial court's alleged error in failing to comply with OCGA § 17-8-75 did not contribute to the verdicts.

## **Sufficiency of the Evidence; OCGA § 24-1-104 (a)**

*Scott v. State, S20A0125 (6/16/20)*

Appellant was convicted of the rape and murder of Lisa Pynn as well as the rape of three other women and various other offenses. Appellant contended that the evidence was insufficient as to the rape of Pynn. The Court agreed.

The evidence showed that on the evening of January 17, 2014, Pynn put her son to bed and later that night, her son heard her taking a bath. She sent a text message at 11:21 p.m., but she failed to respond to a text sent to her at 12:30 a.m. The next morning, she was found dead in an upstairs bedroom of her home. Her body was lying on a bed, and she was fully

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clothed, although she was not wearing the same clothes as those she had worn when she put her son to bed. Her neck was bruised, and she had petechiae in both eyes, symptoms that are consistent with strangulation. A forensic examination of her body confirmed that strangulation was the cause of her death, and the forensic examiner found DNA on her neck that was later matched to appellant. Law enforcement officers searched her home, and they discovered that cash and four firearms were missing. One of those firearms later was recovered from a man who said that he had gotten it from appellant. Officers also found a cigarette butt in a trash can in Pynn's home, and DNA extracted from the cigarette butt was matched to appellant.

In January 2014, appellant was staying with his girlfriend, who lived in the same neighborhood as Pynn. Cellular telephone location records confirmed that appellant was in the neighborhood on the evening of January 17. According to the son of his girlfriend, appellant left her house on that evening between 11:20 and 11:45 p.m., and he was gone for about 45 minutes. After returning briefly to his girlfriend's house, appellant left quickly and was not seen again in the area for several weeks.

The Court found that there was no physical evidence that Pynn was raped at all. To support the rape conviction, the State pointed only to evidence that Pynn took a bath on the night that she was killed and that her body was found in clothes other than those she wore when she put her son to bed, the testimony of a medical examiner who said that there often is a "connection" between strangulation and sexual assault, and the evidence that appellant raped other women. But, the Court stated, although that evidence may suggest a possibility that Pynn was raped, it was not enough to prove beyond a reasonable doubt that she was raped. Therefore, the Court reversed appellant's conviction for the rape of Pynn.

Next, appellant contended that the trial court erred in admitting the testimony of an "unavailable" witness who lived in a neighboring county. At trial, the prosecution offered evidence under OCGA § 24-4-404 (b) that appellant had robbed another woman, and the trial court admitted that evidence, which consisted of a certified copy of a conviction for the robbery and the prior testimony of the victim. With respect to the prior testimony of the victim, the trial court determined that she was "unavailable" under OCGA § 24-8-804 (a) (4)—which provides that a witness is unavailable if she "[i]s unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity"—and that her testimony was admissible, therefore, under the exception to the hearsay rule provided by OCGA § 24-4-804 (b) (1). In making its determination of unavailability, the trial court relied in part on a letter from a physician treating the victim, who wrote that her medical condition left her unable to travel to the courthouse. Appellant contended that a physician's letter is an inadequate evidentiary basis for a determination of unavailability under OCGA § 24-8-804 (a) (4), and consequently, the admission of the prior testimony under OCGA § 24-8-804 (b) (1) was an abuse of discretion. The Court disagreed.

The Court stated that other than the rules of privilege, the usual rules of evidence do not apply to the resolution of "[p]reliminary questions concerning . . . the admissibility of evidence." OCGA § 24-1-104 (a). See also OCGA § 24-1-2 (c) (1) ("The rules of evidence, except those with respect to privileges, shall not apply [to] . . . [t]he determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under [OCGA §] 24-1-104."). Whether the victim was unavailable presented a question of fact to be determined by the trial court as a preliminary matter to the admissibility of her prior testimony under OCGA § 24-8-804 (b) (1), and there was no error in its consideration of the physician's letter in resolving that question. Moreover, the trial court did not rely on the letter alone. The prosecuting attorney represented to the trial court that he had verified with the office of the physician that the

letter was authentic, and more importantly, appellant's lawyer represented to the trial court that he had spoken with the physician and that the physician confirmed the substance of the letter. Thus, the Court concluded, the letter and the representations of counsel were an adequate basis for the determination by the trial court that the victim was unavailable under OCGA § 24-8-804 (a) (4), and the trial court did not abuse its discretion when it admitted her prior testimony.

## **Sentencing; State's Right to Appeal**

*Gardhigh v. State, S20A0227 S20X0228 (6/16/20)*

Appellant was convicted of voluntary manslaughter, felony murder, and other crimes in connection with the beating death of Grady. The Court affirmed appellant's convictions and then addressed the State's cross-appeal.

The State argued that the trial court erred by sentencing appellant for voluntary manslaughter and vacating the felony murder count because the *Edge* modified merger rule did not apply. The Court noted that it held in *Edge v. State*, 261 Ga. 865 (1992) that when a defendant is found guilty of both voluntary manslaughter and felony murder based on the same underlying aggravated assault, the defendant should be convicted and sentenced only for voluntary manslaughter. The *Edge* Court found that it must be presumed that the jurors found the underlying aggravated assault to be the product of provocation and passion, and reasoned that to hold otherwise would eliminate voluntary manslaughter as a separate form of homicide. This was so because almost every voluntary manslaughter involves a felonious assault.

The Court noted that it has extended this modified merger rule to other fact patterns in which the felony murder is premised on another underlying felony that is equally integral to the homicide and susceptible of mitigation by the sort of provocation and passion that voluntary manslaughter involves, including in particular the underlying felony of aggravated battery.

Here, the jury found appellant guilty in pertinent part of voluntary manslaughter (as a lesser offense of malice murder), felony murder based on aggravated assault and aggravated battery, aggravated assault with a deadly weapon, and aggravated battery. The trial court found that "[b]ecause the aggravated assault and aggravated battery were both integral to the killing of [Grady], the underlying felonies are subject to the modified-merger rule" and thus, the court sentenced appellant for the voluntary manslaughter conviction. The Court found that this ruling was correct.

Nevertheless, the State argued, *Edge* does not address a situation in which the jury has found an independent basis for malice, apart from an aggravated assault. Thus, *Edge* did not apply in this case because the jury found appellant guilty of aggravated battery, which requires a finding of malicious intent. The Court stated that *Edge* does not actually suggest the limitation that the State contended, and the State's argument is directly contrary to the holding in *Sanders v. State*, 281 Ga. 36, 37-38 (2006). Moreover, almost every voluntary manslaughter involves an underlying aggravated battery as well as an aggravated assault, so to hold as the State suggests would essentially eliminate voluntary manslaughter as a separate form of homicide in this State.

The State also argues that *Edge* does not apply because there was evidence that appellant first threw Grady onto a hard surface and then punched him, so the jury could have found that Grady suffered non-fatal injuries from appellant's first act (which the State said formed the basis for the aggravated assault count and could support the voluntary manslaughter

verdict), and then suffered fatal injuries from appellant's second act (which the State said formed the basis for the aggravated battery count and supported the felony-murder verdict). The Court found this assertion that an aggravated assault that caused non-fatal injuries could support the voluntary manslaughter verdict puzzling, because to be guilty of voluntary manslaughter, a defendant must commit an act that "causes the death of another human being." OCGA § 16-5-2 (a). In any event, the Court found the State's newly crafted distinctions between the conduct underlying the counts was not how it indicted or proved its case.

The indictment did not distinguish between the conduct forming the basis of the aggravated assault and aggravated battery counts in the way the State proposed. The aggravated assault with a deadly weapon count was based on appellant's alleged conduct in "beating and punching [Grady] and grabbing and throwing [Grady] down multiple steps," and the aggravated battery count was likewise based on appellant's alleged conduct in "beat[ing] [Grady], sling[ing] [Grady] down some steps, and [engaging] in a physical altercation with [Grady] which resulted in a fall and injuries to the face and head of [Grady.]" The malice murder count also was based on appellant's "beating [Grady], slinging [Grady] down some steps, and seriously injuring [Grady] in a physical altercation which resulted in [his] death," and the felony murder count alleged simply that "aggravated assault and aggravated battery [ ] resulted in [Grady's] death[.]"

Thus, the Court concluded, the State did not seek to prove the charges with the distinctions it imagined on appeal. The medical examiner determined that Grady's death was caused by blunt force head trauma but did not identify a particular fatal blow; to the contrary, she testified that all of his injuries were consistent with being sustained contemporaneously, and when asked which of the injuries was the most serious, she replied, "You can't separate them." The witnesses similarly described the altercation between appellant and Grady as involving multiple wounds inflicted in quick succession, which generally do not constitute distinct criminal acts. And although the closing arguments were not transcribed, the State did not represent that it made any argument that distinct acts supported the separate counts. Thus, there was no reason to believe that the jury actually found appellant guilty of voluntary manslaughter and felony murder based on distinct conduct causing Grady's death, and the trial court did not err in applying *Edge* to vacate the felony murder count and sentence appellant for voluntary manslaughter.

Next, the State argued that the trial court erred by giving the jury a charge on voluntary manslaughter. However, the Court found, OCGA § 5-7-1 lays out an exhaustive list of grounds for a State appeal, and it does not authorize the State to appeal or cross-appeal this jury instruction issue. Accordingly, the Court dismissed this portion of the cross-appeal.

## **Rule 404 (b) Evidence**

*Heard v. State, S20A0064 (6/16/20)*

Appellant was convicted as a party to malice murder and other crimes in connection with the fatal shooting of James Daniel Evers ("Daniel"), the armed robbery of Donald Evers ("Donald"), and the aggravated assaults of Emmons and Elledge, Jr. The facts, very briefly stated, showed on April 4, 2013, three individuals committed the offenses at the home of Daniel and Donald in Clayton County. They found Donald alone at the house and bound him with duct tape. When Daniel and the other two victims arrived, they shot Daniel and shot at the other two as they fled.

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Appellant was linked to the crimes by cell phone records, and he was seen near a green SUV near the scene of the armed robbery and murder. The perpetrators drove a stolen green Mountaineer. The Mountaineer was stolen at the Four Seasons Apartments in Atlanta and was subsequently burned after the crimes about a mile from the apartments. The gun used to kill Daniel was used two days before the murder at the Four Seasons Apartment. Appellant's cellmate testified at appellant's trial, allegedly based on appellant's admissions concerning his participation in the crimes. The cellmate testified that appellant told the three individuals that Daniel, an alleged drug dealer, had money, basically oversaw the crimes, and later helped burn the Mountaineer.

Appellant testified and contended that his cellmate read the discovery packet from his case which was how the cellmate gained his knowledge of the case. He also admitted being at the Four Seasons Apartments, but claimed he was there selling drugs to a woman. He denied knowing the three perpetrators before the crimes occurred, but testified that he became friendly with them in jail after he was arrested.

The State was permitted to admit other-acts evidence pursuant to Rule 404 (b) to show intent, plan, identity and motive. The evidence, briefly stated, showed that on June 13, 2013, Ashleigh Brown briefly left her four-door Acura sedan running in the Conley area while she took her youngest child into his grandmother's house. Her other two children, who were nine years old and four or five years old at the time, remained in the car. While Brown was in the house, appellant jumped into the car. The younger child, who was in fourth grade at the time of trial, testified that appellant, whom she identified in a photographic lineup after the incident, shoved her older brother out of the car, drove a short distance with her scared and crying in the backseat, and then pulled over and left her in a yard, where someone saw her and called 911. The vehicle was found burned, at 4:00 a.m. the next morning 1.3 miles from the Four Seasons Apartments in Atlanta.

Appellant contended that the trial court erred in allowing this other-acts evidence to be admitted. The Court agreed. First, the Court found that although the trial court instructed the jury that the other-acts evidence could be considered to show appellant's motive, the State never argued at trial that the evidence should be admitted for that purpose, and the State made no argument that the later crimes showed appellant's motive in committing any of the charged crimes. Accordingly, the trial court abused its discretion by admitting evidence of appellant's later acts to show motive.

As to intent, the State contended that the evidence of the later crimes showed appellant's "intent to participate in the acts of obtaining stolen vehicles before committing theft-related crimes" and his intent to "dispose of the vehicle permanently thereafter." But, the Court noted, the State did not charge appellant with any crimes related to the theft or disposal of the Mountaineer. And, whatever intent appellant may have had with regard to stealing or disposing of the Mountaineer was not a fact that the State had to establish to prove appellant's guilt in this case and thus, was not a fact "of consequence to the determination of the action." OCGA § 24-4-401. Accordingly, the trial court also abused its discretion by admitting the other-acts evidence to show intent.

Next, evidence admitted under Rule 404 (b) to show the defendant's plan or preparation often shows the planning of or preparation of the charged offense. But here, there was no evidence that appellant's later acts were part of his plan in robbing Daniel.

The trial court also allowed the evidence in for the purpose of proving identity. The State argued that the charged crimes and appellant's later crimes involved (1) the "use of a stolen vehicle" that (2) was later abandoned and burned. But, the

Court stated, these two features of the charged and uncharged crimes may not be commonplace, but they are not especially distinctive. It was true that the Mountaineer involved in the charged crimes and the Acura involved in the later crimes were stolen in the same general vicinity and then abandoned in somewhat closer locations, and similar locations can be pertinent to the identity analysis. But, the Court stated, when the locations are not identical, the location feature must be combined with a greater number of more unusual similarities to indicate a signature crime. And although the charged and uncharged crimes were not very far apart in time (two and a half months), they were not connected as part of an ongoing crime spree.

Moreover, the Court found, the similar (but not unique) features of the charged and uncharged crimes in this case were undermined by the major differences between them. There was no reason to believe that the person who alone directly stole an Acura sedan from a woman, assaulted one of her children, and kidnapped her other child in front of a house in Conley was the same person who by entirely unknown means, and possibly working with other persons, stole a Mountaineer SUV from an apartment complex miles away in Atlanta more than two months earlier. Nor were the stolen vehicles used for anything like the same crimes. Not a single detail of appellant's driving to Gwinnett County with an unidentified friend and stealing a purse in an unidentified manner from a woman there matches the crimes committed with the Mountaineer, in which appellant and three other men drove the SUV to a house a few miles away in Conley to commit an armed robbery of an alleged drug dealer, with appellant directing his associates from a location nearby as they snuck into the trailer behind that house, detained one man there, and then shot the alleged drug dealer in the driveway before fleeing without appellant. Thus, the Court concluded, because the State did not establish that the features of the charged crimes and the later crimes, viewed individually or as a whole, marked those crimes as the unique "signature" of the same perpetrator, the trial court abused its discretion by admitting evidence of those other acts to show a distinctive plan and identity.

Finally, the Court addressed whether the admission of this other-acts evidence was harmless. After reviewing the evidence at length, the Court found that it could not say with confidence that it was highly probable that the trial court's error in admitting the evidence of appellant's later crimes under Rule 404 (b) did not contribute to the jury's guilty verdicts on the charged crimes. Accordingly, the Court reversed appellant's convictions.

## **Service by Publication; Motions for a More Definite Statement**

*Crowder v. State of Georgia, S19A0931 (6/16/20)*

In October 2016, the State initiated forfeiture proceedings after law enforcement seized \$46,820 in cash from Shara Cumins, James Crowder's daughter. In the ensuing in rem forfeiture proceeding under OCGA § 9-16-12, the trial court awarded Crowder the property. The Court of Appeals, however, reversed. See *Crowder v. State of Georgia*, 348 Ga. App. 850 (2019). The Court then granted certiorari to consider two questions: 1) In an in rem forfeiture proceeding, may the forfeiture complaint be served by publication in the first instance when an interest holder resides out of state? and 2) Must a trial court rule on a pending motion for more definite statement before striking a claimant's answer as insufficient?

The relevant facts, briefly stated, showed that the State attempted to serve Crowder, who lives in Alabama, by personal service. But, when such service could not be effected, the State served him by publication pursuant to OCGA § 9-16-12 (b) (3). Crowder argued that because subsection (b) (3) says only that "notice of the complaint" shall be published and does

not say that “service may be made by publication”—whereas OCGA § 9-16-12 (b) (2) explicitly says that “service of the complaint and summons shall be as provided” by the personal service provision of the Civil Practice Act, OCGA § 9-11-4 (e)—personal service is required in all in rem forfeiture proceedings under § 9-11-4 (e). (Emphasis supplied.) Relatedly, he argued that because OCGA § 9-16-12 (b) (3) is merely a *notice* provision—not a *service* provision—the State must also provide notice by publication in *all* in rem forfeiture cases. The Court disagreed.

The Court stated that the plain language of OCGA § 9-16-12 (b) (3) allows for service by publication where, as here, the owner of property subject to an in rem forfeiture proceeding “resides out of this state.” And, the structure of OCGA § 9-16-12 shows that subsections (b) (2) and (b) (3) set forth alternative methods of service for in rem forfeiture proceedings. First, by beginning with the word “[i]f,” the text of subsection (b) (3) indicates that the type of service set forth in that subsection creates an exception to the personal service requirement set forth in subsection (b) (2). Second, under OCGA § 9-16-12 (c) (1), an owner or interest holder who has been served personally under subsection (b) (2) has “30 days after the service” to file an answer, whereas an owner or interest holder who has been served by publication under subsection (b) (3) and not personally served has a different timeline for answering: “within 30 days of the date of final publication.” OCGA § 9-16-12 (c) (1). If—as Crowder urged—personal service were required in every in rem case involving every “owner or interest holder,” irrespective of whether they reside inside or outside of Georgia, then OCGA § 9-16-12 would only need to provide a uniform, 30-day deadline from the date of service in which to file an answer, and the third sentence of OCGA § 9-16-12 (c) (1) would be meaningless. But a statute is not to be read in a way that renders any part of the statute meaningless. Accordingly, the Court rejected Crowder’s argument that OCGA § 9-16-12 requires the State to provide personal service and service by publication in all in rem forfeiture proceedings.

Nevertheless, the Court stated, the plain-language interpretation of OCGA § 9-16-12 (b) (3) may well implicate constitutional concerns regarding due process. The Due Process Clause requires every method of service to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Whether a proceeding is in rem or in personam, due process requires that a chosen method of service be reasonably certain to give actual notice of the pendency of a proceeding to those parties whose liberty or property interests may be adversely affected by the proceeding. Because notice by publication is a notoriously unreliable means of actually informing interested parties about pending suits, the constitutional prerequisite for allowing such service when the addresses of those parties are unknown is a showing that reasonable diligence has been exercised in attempting to ascertain their whereabouts.

And here, the Court noted, Crowder claimed in the trial court that the State’s service by publication under OCGA § 9-16-12 (b) (3) did not comport with due process principles. Because the trial court ruled that OCGA § 9-16-12 required personal service on Crowder, however, it did not address Crowder’s due process claim. The Court therefore remanded the case to the Court of Appeals with direction to remand to the trial court to consider Crowder’s due process arguments in the first instance.

The Court then turned to the second issue upon which it granted certiorari. The Court noted that OCGA § 9-16-12 (c) (2) provides that if the State’s attorney determines that an answer fails to comply with the requirements of OCGA § 9-16-12 (c) (1), “he or she may file a motion for a more definite statement.” “If the motion is granted and the order of the court is not obeyed within 15 days after notice of the order, or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.” OCGA § 9-16-12 (c) (2).

The State conceded that this statutory text, read in its most natural and reasonable way, permits a trial court to strike the pleading to which the State's motion is directed only if the trial court grants the State's motion and "the order of the court is not obeyed within 15 days after notice of the order, or within such other time as the court may fix." OCGA § 9-16-12 (c) (2). Therefore, the Court held, the Court of Appeals erred by concluding that, because "Crowder's answer failed to comply with the special pleading requirements of OCGA § 9-16-12 (c) (1)," "the trial court erred in denying the State's motion for judgment on the pleadings or, alternatively, in failing to dismiss Crowder's answer." *Crowder*, 348 Ga. App. at 855.

However, the State argued, the Court could nonetheless affirm the Court of Appeals' ultimate decision in favor of the State because the State was entitled to a default judgment under OCGA § 9-16-12 (e) based on Crowder's failure to file a timely answer. In this regard, the record showed that the State moved for a default judgment against Crowder under OCGA § 9-16-12 (e) on the ground that he had failed to timely answer the complaint. The Court found that the State is correct that Crowder's answer was untimely. He did not file his answer until December 29, 2017—well past his deadline of 30 days from the April 26, 2017 "date of final publication" under OCGA § 9-16-12 (c) (1).

However, the Court stated, it could not affirm based on the State's default judgment theory because first, the trial court must address the due process concerns Crowder raised about service by publication. If the trial court concludes that the State's method of service did not comport with due process principles, the trial court should grant Crowder's motion to dismiss for insufficient service of process. Second, because Crowder is entitled to move the trial court to open any default under OCGA § 9-11-55 (b), he has the statutory right to ask the trial court to address the default judgment issue in the first instance. Accordingly, the Court reversed the Court of Appeals' judgment that the State was entitled to a judgment on the pleadings or to the dismissal of Crowder's answer.

## **Miranda; Custodial Interrogation**

*State v. Pauldo*, S20A0191 (6/16/20)

Appellant was indicted on one count of malice murder, one count of felony murder, and three counts of aggravated assault in connection with the death of Smith. The trial court granted Pauldo's motion in limine to exclude the portions of his custodial interview with police after he invoked his rights to remain silent and to counsel on the ground that police failed to honor Pauldo's invocation of those rights by continuing to interrogate him. The State appealed.

The facts, briefly stated, showed that the Court had the benefit of a video of the interview of Pauldo. The detective began by telling Pauldo that he had to read him "his rights." Pauldo responded by asking if he was being arrested and the detective responded, "Not at this time." After reading Pauldo his *Miranda* rights, Pauldo unequivocally asserted his right to remain silent, explaining, "[M]y mom and my lawyer feel that I'm being more treated as ... not a victim and [as] a suspect ... . So they told me it would just be best if I did not speak with you guys." The detective clarified, "Okay, so you don't want to talk to us?" Pauldo replied, "No, sir."

While the detective was writing on the waiver form that Pauldo invoked, his right to remain silent, an agent working with the detective asked Pauldo if he minded taking a gunshot residue test to see if he shot a gun that day. When Pauldo asked

if he had to consent, the detective said no, but he was going to get a search warrant and do it anyway. Pauldo responded, "Alright." The detective then added "and the clothes that you have on, we're gonna have to take those. So, once you get out to the jail, once you take those off, we will take those as evidence." Pauldo asked again whether he was being arrested, and the detective confirmed that he was, and after Pauldo asked what he was being arrested for, the detective responded, "Homicide." Pauldo asked why, and the detective explained that they had talked to "a lot of people," and they had identified him as the shooter. Pauldo then started talking again, saying, "Sir," but the detective interrupted to say: "You've already told me that you wanted your lawyer here. They told you not to talk to me. Now, if you want to talk to me, that's up to you." Pauldo replied that he did not understand why he was being arrested and that he "did not do this," asking again, "Why am I being arrested?" In response, the detective asked, "Ray, do you want to talk to me?" Pauldo replied, "I mean, I will talk to you. I'm sitting here; I'm talking to you now. I'm telling you, like, why . . . ." The detective again interjected, "Do you want to talk to me about this incident?" Pauldo replied, "I will talk to you about this incident, sir[,] first stating that he was not there, then correcting himself to say that he was there, but asserting that he was not responsible for the shooting. Pauldo then asked the detective, "What [do] you want to know?"

At that point, the detective stated that if Pauldo wanted to talk to the detective, he needed to sign the waiver-of-rights form. The detective again asked Pauldo, "So you're changing your mind, and you want to talk to me?" Pauldo replied, "I will talk to you, yeah, to benefit me, anything . . . I don't want to be arrested for homicide." Pauldo then signed the waiver form, the agent witnessed his signature, and the interrogation began. The entire exchange unfolded over approximately seven minutes on the video recording.

The Court stated that the issue was whether the detective failed to scrupulously honor Pauldo's invocation of his rights under *Miranda*. Specifically, whether the requests and statements the detective made after Pauldo invoked his rights constituted improper interrogation or its functional equivalent or whether they were more akin to permissible statements attendant to arrest, custody, and other logistical issues. The Court stated that it was a close question.

First, the Court examined police requests for consent. The Court stated that no Georgia appellate court has directly addressed the circumstances under which police officers may request consent to collect evidence from a defendant who has invoked his rights. However, in reviewing federal and other states' caselaw, the Court found that requests for consent to search are not designed to elicit testimonial evidence and a defendant's consent was not an incriminating statement. Therefore, law enforcement do not violate a defendant's constitutional right to remain silent by requesting consent to search his car after a defendant has invoked that right. This was particularly true here light of the fact that the detective made only brief statements and requests in connection with the collection of gunshot residue and did not otherwise comment on the strength of the evidence against Pauldo. Also, the requests were phrased in a way that allowed Pauldo to consent or not without giving an incriminating response. Thus, the Court concluded that the trial court erred in finding that the requests for consent to the gunshot residue test constituted interrogation in violation of Pauldo's invocation of rights.

Turning to the detective's statements that he could get a search warrant for the gunshot residue test and that Pauldo's clothes would be collected for evidence at the jail, the Court noted that these statements were short, were not open-ended, and did not invite further discussion about the details of the investigation. Neither the requests to consent to a gunshot residue test nor the statement about the search warrant actually resulted in Pauldo providing an incriminating response. He neither agreed nor refused to submit to the test, and he simply acknowledged the detective's statement about the search

warrant. Moreover, the detective's statement about the search warrant was made only after Pauldo asked whether he was required to consent to the gunshot residue test. The statement about taking Pauldo's clothing at the jail appeared to be a part of his response to Pauldo's question about consenting to the gunshot residue test, explaining that police would get a search warrant to obtain gunshot residue testing and that his clothes also would be taken as evidence at the jail. Thus, the Court concluded, they were not the functional equivalent of interrogation in violation of Pauldo's rights and that the statements were not reasonably likely to elicit an incriminating response, nor should the detective have known that they were reasonably likely to do so. Therefore, the trial court also erred in determining that this exchange between the detective and Pauldo demonstrated a failure to honor Pauldo's rights.

Furthermore, Pauldo's questions about his arrest and his subsequent statements were not in response to the detective's requests to consent to the gunshot residue test or the statements about the search warrant and collecting the clothing. If anything, Pauldo was responding to the detective's statement that Pauldo was going to jail. Thus, because Pauldo's incriminatory statements were not a foreseeable result of the requests and statements made by the detective about collecting evidence, they also could not be considered the product of custodial interrogation, even if it was assumed that the statements constituted interrogation, and the trial court erred in excluding them on this basis as well.

Next, the Court examined whether Pauldo reinitiated contact with law enforcement authorities. The Court concluded that he did when he asked questions about why he was being arrested and made statements about the crimes being investigated even after being reminded that he had invoked his rights and that these statements and questions evinced a willingness and a desire for a generalized discussion about the investigation.

Finally, the Court examined whether Pauldo knowingly, intelligently, and voluntarily waived his rights. The Court noted that Pauldo was 21 years old at the time of his interview and a junior in college. He stated in the interview that he had conferred with his mother and an attorney and that they had advised him to invoke his rights and not speak to law enforcement because they felt that he was being treated as a suspect. Pauldo became voluble only after learning that he would be arrested for homicide, and he said that he did not want to be arrested and that he wanted to talk to benefit himself. Although only a few minutes elapsed between Pauldo's invocation of his rights and his waiver, the conversation during that interval related to the collection of evidence and answering Pauldo's questions about his arrest. Also, the detective read Pauldo his rights minutes before, at the start of the interview, and then made sure that Pauldo understood his rights again after Pauldo stated that he wanted to talk. Thus, the Court concluded, under the totality of the circumstances, Pauldo knowingly, intelligently, and voluntarily waived his rights. Accordingly, the Court reversed the trial court's grant of Pauldo's motion in limine.