

THIS WEEK:

- **Motions for New Trial on General Grounds; Sufficiency of the Evidence**
- **Out-of-time Appeals; Transcripts**
- **Voir Dire; Strikes for Cause**
- **Destruction of Evidence; Chain of Custody**
- **Severance; Gang Activity**
- **Testimonial Statements; Forfeiture by Wrongdoing**
- **Recorded Conversations with Minors; OCGA § 16-11-66 (b)**
- **Motions to Withdraw Guilty Pleas; *Boykin***

Motions for New Trial on General Grounds; Sufficiency of the Evidence

State v. Grier, S20A0633. S20X0634 (8/10/20)

Grier was convicted of felony murder and other crimes in connection with the robbery and fatal shooting of Yarborough. The evidence, very briefly stated, showed that the victims, Yarborough and Kaiser, were walking to a check cashing store to cash a \$1500.00 check. They accepted a ride from Jordan and Rawlings, who were strangers to them but they were in Grier's mother's car and they were friends with Grier. After cashing the check, the victims got back in the car. They rode around together and Yarborough purchased crack cocaine and marijuana from Jordan and kept the remainder of the money. Eventually Jordan parked the car and Rawlings got out. A man dressed in black approached the car, greeted Jordan and they ordered the victims out of the car at gunpoint. When Yarborough threw his jacket at the gunman, the gunman fired, killing Yarborough. Jordan, Rawlings and the gunman then drove off. Rawlings later identified Grier as the shooter (Kaiser was not able to do so) and testified for the State after being given immunity from prosecution.

After a hearing on Grier's motion for new trial, the court observed that Rawlings admitted during cross-examination that he was a party to the crime of armed robbery, as he was with Yarborough before the armed robbery, was present for its planning, and had prior knowledge it was going to occur. He then was present when the armed robbery and shooting occurred, fled the scene with the co-conspirators, and received \$50 to stay quiet about the robbery and murder. Furthermore, upon review of all the testimony presented at trial, the trial court concluded that Rawlings' accomplice testimony was insufficiently corroborated, so Grier was entitled to a new trial on the general grounds pursuant to OCGA §§ 5-5-20 and 5-5-21. The State appealed and Grier cross-appealed.

The State argued that the trial court abused its discretion when it granted the motion for new trial because Rawlings was not an accomplice, and even if he were, his testimony was sufficiently corroborated. The Court disagreed.

The Court found that the trial court properly exercised its discretion in making this determination in its capacity as the thirteenth juror. Consistent with the jury instructions on accomplice testimony, the jury could have returned a guilty verdict after concluding either that Rawlings was not an accomplice (in which case, his testimony alone was enough to convict) or that

Rawlings was an accomplice but his testimony was adequately corroborated. And here, there was some evidence from which the jury reasonably could have reached either conclusion. On the motion for new trial, however, the judge in his capacity as the thirteenth juror found that the weight of the evidence led to the conclusion that Rawlings was an accomplice, and the other evidence was not weighty enough to persuade the judge that the accomplice testimony had been corroborated. This determination was within the judge's substantial discretion, and thus, the Court affirmed the grant of the motion for new trial.

Grier, in his cross-appeal, argued that the trial court, while correct in granting his motion on thirteenth juror grounds, also should have concluded that the evidence presented at trial was legally insufficient to support his convictions. The Court disagreed with him too. As a matter of federal constitutional due process, see *Jackson v. Virginia*, 443 U. S. 307, 319 (III) (B) (99 SCt 2781, 61 LE2d 560) (1979), the evidence — viewed in the light most favorable to the verdict of the jury — was sufficient to sustain the convictions, regardless of whether it showed Rawlings to be an accomplice. The evidence authorized the jury to find that Rawlings was not an accomplice at all, notwithstanding that the trial judge in his capacity as a thirteenth juror found otherwise. And if the jury had found that Rawlings was not an accomplice, no corroboration of his testimony would have been necessary under OCGA § 24-14-8. Moreover, even if the jury had found that Rawlings was an accomplice, there was some evidence that would have authorized the jury to find sufficient corroboration of his testimony, notwithstanding that the trial judge as the thirteenth juror found corroboration wanting. Thus, the Court concluded, that different finders of fact — the jury and the trial judge in his capacity as the thirteenth juror — may have seen the evidence differently and reached inconsistent conclusions, did not mean that the evidence was legally insufficient to sustain either of their conclusions.

Out-of-time Appeals; Transcripts

Rutledge v. State, S20A0766 (8/10/20)

Appellant pled guilty to murder in February 2018. On July 1, 2019, he filed a pro se motion for an out-of-time appeal of his conviction, in which he asserted that "the only relevant effectiveness factor is whether the [defendant] had a possible ground for appeal, about which his lawyer failed to inform him." He also asserted his alleged right to be sent a copy of his case file and transcripts to timely amend his motion prior to the court's ruling. That same day, the trial court summarily denied his motion.

The Court, citing *Collier v. State*, 307 Ga. 363 (2019), stated that when a defendant alleges in a motion for an out-of-time appeal that he was deprived of his right to appeal due to his counsel's ineffective assistance, the trial court must hold an evidentiary hearing to determine whether counsel was in fact responsible for the failure to pursue a timely appeal. If the trial court did not make this factual inquiry, the case must be remanded for such a hearing and determination. And here, the Court found, appellant alleged in his motion that he was entitled to an out-of-time appeal from his guilty plea conviction if there was "a possible ground for appeal, about which his lawyer failed to inform him." Although the Court noted that this statement was not much of an allegation that his plea counsel's ineffective assistance was responsible for his failure to file a timely appeal, given his pro se status and the change in the law wrought by *Collier*, it was sufficient to require a factual determination by the trial court regarding the advice, if any, that plea counsel gave to appellant about an appeal. Accordingly, the Court vacated the portion of the trial court's order denying appellant's motion for an out-of-time appeal and remanded the case for the court to conduct an evidentiary hearing and determine whether plea counsel's ineffective assistance was responsible for appellant's failure to pursue a timely appeal.

Appellant also requested a copy of his case file and transcripts (which the Court took to mean at least the transcript of his guilty plea hearing). The Court stated that it has long been the law in Georgia that although an indigent criminal defendant has a basic right to a free transcript to perfect a timely direct appeal, after the time for appeal has expired there is no due process or equal protection right to a free copy of one's court records absent a showing of necessity or justification. A defendant may make such

a showing by an affidavit setting out the "particular reasons" why the transcript or other requested record is necessary and stating that the defendant and his attorney have never previously been supplied a copy of the record and that it is not otherwise available to him; if the request for records is free-standing, the defendant should also attach a copy of the pending or proposed habeas petition or other post-conviction relief, such as an out-of-time appeal, for which the transcript or other record allegedly is needed.

Here, the Court found, the time for appellant to file a timely appeal expired long before he requested his case records. He did make the request in conjunction with his motion for an out-of-time appeal; however, he made no showing by affidavit or other proof of the need for the records or that he or his lawyer had not previously been supplied with the records and that they are otherwise not available to him. Accordingly, the Court concluded, on the current record, the trial court did not err in denying appellant's request for his case file and transcript.

Voir Dire; Strikes for Cause

Stephens v. State, S20A0583 (8/10/20)

Appellant was convicted of malice murder and related offenses. He contended that the trial court erred by striking for cause Juror 30, arguing that there was inadequate evidence that Juror 30 was a convicted felon whose rights had not been restored. The Court disagreed.

The record showed that prior to trial and its associated voir dire, the State conducted criminal background checks on all prospective jurors by submitting their names to the FBI. In instances where FBI records indicated that any prospective juror had a criminal record, the State then ran checks of both federal and state databases to uncover criminal records. With regard to Juror 30, the State found a Florida felony conviction matching the juror's name. The birthdate contained in the Florida records matched the month and day of Juror 30's birth, but the birth year was off by one year from the year that Juror 30 gave when being questioned during voir dire. Some of the physical descriptions contained in the Florida records corresponded to Juror 30, though appellant contended that the height contained therein did not match Juror 30. The State, however, maintained that the height discrepancy was insignificant. Under examination, Juror 30 denied that he had a felony conviction in Florida, but admitted that he had been to Florida at some point.

Following the presentation of this evidence during voir dire, the State moved to dismiss Juror 30 on the basis that he was a convicted felon and he failed to disclose that status. Appellant objected and argued that Juror 30 could not be struck for cause because the birth year listed on the felony conviction was off by one year and the height contained in the Florida records was inaccurate. The trial court rejected appellant's contentions and found sufficient cause to strike Juror 30.

The Court stated that striking a juror for cause is a matter committed to the sound discretion of the trial court. An appellate court must pay deference to the finding of the trial court and this deference includes the trial court's resolution of any equivocations or conflicts in the prospective juror's responses on voir dire. Giving such deference to the trial court in this case, the Court concluded that the trial court did not abuse its broad discretion in deciding that Juror 30 should be struck for cause.

Moreover, the Court stated, even if appellant could show that the trial court erred in some way, the erroneous allowing of a challenge for cause affords no grounds for complaint if a competent and unbiased jury is finally selected. And here, the Court noted, appellant did not even attempt to show that his actual jury was not competent and unbiased.

Destruction of Evidence; Chain of Custody

McDowell v. State, S20A0739 (8/10/20)

Appellant was convicted of a 2002 murder. Appellant was arrested four days after the murder. At the time of his arrest, he was in a stolen car in which a subsequent search revealed a .40-caliber handgun. The serial number engraved on the gun was documented by police in the incident report. The gun was later transported to the GBI for ballistics testing, and, again, the serial number of the gun was recorded by the GBI. Ballistics tests confirmed that the spent .40-caliber shell casing from the murder scene was fired from the same weapon recovered from the vehicle in which appellant was a passenger at the time of his arrest. At some point towards the end of 2012, the gun was inadvertently destroyed. Although it had been made available to the defense prior to destruction, it was not available at the time of the trial.

Appellant contended that due to the destruction of the .40-caliber handgun prior to trial, the State could not prove an appropriate chain of custody for the handgun at trial, and the trial court erred by allowing the admission of evidence of that handgun. The Court disagreed.

Here, only evidence relating to the handgun was admitted at trial, not the handgun itself. Thus, the Court stated, appellant's argument, which was based on proving the chain of custody of the *handgun*, was generally misplaced. And, even if assuming without deciding that appellant's chain of custody argument could somehow apply to the evidence concerning the handgun which was admitted at trial, as opposed to the handgun itself, appellant's argument would still fail because OCGA § 24-9-901 (a) provides: "The requirement of authentication or identification as a condition precedent to admissibility shall be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

And here, the handgun bore a serial number, and the State made a prima facie showing that the handgun found in the stolen vehicle appellant was in just days after the murder was the same handgun the GBI tested. Specifically, the police officer who pulled over appellant in the stolen vehicle testified that the incident report he wrote at the time of the stop contained the serial number of the recovered handgun. That police officer testified at trial regarding the serial number, and his police report, which contained the serial number, was introduced as an exhibit. The GBI expert for the State testified that, upon completion of the ballistics report, she recorded the model and serial number of the handgun, which matched the number in the incident report. The GBI firearms examiner's official report was also introduced as an exhibit.

Therefore, the Court concluded, this evidence made out a prima facie case that the proffered evidence was what it purported to be, namely evidence that the specific handgun was found in the car with appellant. Furthermore, the Court noted, appellant's contentions about chain of custody go to the weight of the evidence, not its admissibility. As such, appellant's argument that evidence relating to the handgun was inadmissible due to the State's failure to prove a chain of custody had no merit.

Severance; Gang Activity

Rodriguez v. State, S20A0874 (8/10/20)

Appellant was convicted of felony murder in connection with the shooting death of Rivera. The evidence, very briefly stated, showed that appellant was a member of the Sureños13 gang, was the "boss" of El Combo, a local subset of Sureños13. Rivera was also a member of El Combo, and both men sold drugs. Rivera and appellant met at a hotel on July 16, 2015. Rivera had just stolen a large quantity of methamphetamine. Appellant wanted Rivera to give him the drugs. Rivera refused. A fight ensued and appellant attempted to shoot Rivera, but his gun jammed, so appellant fled. However, appellant shot and killed Rivera on July 17 for disrespecting him.

In July 2017, appellant attempted to have a co-defendant testify that Banuchi, another El Combo member, was the person responsible for Rivera's death. He also approached Banuchi and demanded that he sign an affidavit stating that he lied to detectives during the investigation of Rivera's murder. When Banuchi refused, Rodriguez assaulted him.

Before trial, appellant moved to sever the counts of the indictment so that there would be four separate trials with the counts divided as follows: the crimes related to appellant's drug trafficking and gang activity that took place between December 26, 2013, and July 25, 2017 (Counts 4, 5, 11, and 12); the crimes related to the assault of Rivera on July 16, 2015 (Counts 6 and 7); the crimes related to Rivera's death on July 17, 2015 (Counts 1-3, 8-10, 13, and 14); and the crimes involving Banuchi that took place on July 16, 2017 (Counts 15 and 16). The trial court denied appellant's motion.

Appellant conceded that severance was not mandatory because the charges were not joined solely on the ground that they were similar in nature. Nevertheless, he argued that the trial court should have exercised its discretion to sever the charges "in the interest of justice" and that its refusal to do so constituted reversible error. The Court disagreed.

The Court stated that whenever two or more offenses are joined for trial solely because they are of the same or similar character, a defendant has an absolute right to sever. But where the joinder of charges is based upon the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, severance lies within the sound discretion of the trial judge since the facts in each case are likely to be unique. In such a case, the trial court should grant a severance of offenses if it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each charge; in this regard, the question for decision is whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

Here, the Court found, the charged crimes all related to appellant's ongoing involvement in gang activity and drug trafficking. Although the charges that specifically related to appellant's gang activity and drug trafficking occurred over a four-year period, the crimes against Rivera occurred over the course of about 12 hours and were directly related to appellant's drug trafficking endeavors. The charges involving Banuchi arose from appellant's efforts to prevent Banuchi from testifying against him on the Rivera charges. Inasmuch as it was unlikely that the murder would have occurred but for the drug charges, the drug charges were inextricably bound to the murder and witness-influencing charges. Moreover, there was no evidence that the combined trial of the charges confused or misled the jury, and the verdict itself, including appellant's acquittal for malice murder, one count of felony murder, two counts of aggravated assault, and two counts of possession of a firearm, showed that the jury fully understood the law and evidence. Under these circumstances, the Court concluded that the trial court did not abuse its discretion by denying appellant's motion to sever.

Testimonial Statements; Forfeiture by Wrongdoing

Agee v. State, S20A0726 (8/10/20)

Appellant was convicted of murder in connection with the shooting of her husband, Peters, in 1992. The evidence, very briefly stated, showed that appellant and Sargent had an affair for three or four years prior to the murder. The evidence focused on appellant as the shooter although she claimed that some unknown person came into the house and shot her husband. Sargent repeatedly told officers during interviews that, if he told them the truth, "he'd get life or the electric chair." The District Attorney petitioned the superior court to grant use and derivative-use immunity to Sargent so that he could be compelled to testify before the grand jury without regard to his constitutional privilege against self-incrimination. The day before the immunity hearing,

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 18, 2020

Issue 38-20

however, Sargent and appellant were married. As a result, the marital privilege prevented Sargent from testifying against appellant. Trial evidence further showed that Sargent was still married to appellant on October 12, 2006, when he died as a result of a brain aneurysm. Years later, the case was reopened and a new investigation ended with appellant's indictment.

At trial, the court allowed the statements made by Sargent to law enforcement officers to be admitted under the doctrine of forfeiture by wrongdoing. Specifically, the court found, appellant exercised control over Sargent and married him for the purpose of using the marital privilege to prevent him from testifying against her. Appellant's marriage, the court said, was "a sham designed to procure the unavailability of a key witness."

Appellant argued that the trial court erred when it ruled that Sargent's statements to law enforcement were admissible. She contended that those statements were "testimonial," and because she did not have a prior opportunity to cross-examine Sargent, the admission of those statements violated the Confrontation Clause of the Sixth Amendment. The Court agreed.

The Court noted that the State did not dispute that Sargent's statements to law enforcement—including statements that he was afraid of receiving life imprisonment or the death penalty if he told the truth—were presumptively inadmissible under the Confrontation Clause. Those statements were "testimonial," and appellant did not have an opportunity to cross-examine Sargent about the statements. Thus, the only exception to the Confrontation Clause that arguably applied in this case was forfeiture by wrongdoing. To establish the equitable remedy of forfeiture by wrongdoing, the State must show (1) that the defendant engaged or acquiesced in wrongdoing, (2) that the wrongdoing was intended to procure the declarant's unavailability, and (3) that the wrongdoing did procure the unavailability.

Here, the Court found, the State failed to show the third prerequisite of forfeiture by wrongdoing—that appellant's conduct actually procured Sargent's unavailability at trial. Undisputed evidence showed that Sargent died from a natural cause—a brain aneurysm—years before appellant was even indicted. Thus, it was Sargent's natural death, not any conduct by appellant, which caused him to be unavailable to testify at her trial. Whether Sargent would have remained married to appellant but for his death or whether he would have continued asserting his marital privilege are matters of pure speculation. Thus, the Court concluded, because there was no causal connection between appellant's alleged wrongdoing and Sargent's unavailability at trial, the forfeiture-by-wrongdoing exception did not apply. Accordingly, the trial court erred when it ruled that Sargent's statements to law enforcement were admissible.

Furthermore, the Court found, although the State did not argue that the admission of Sargent's statements was harmless, such an argument would have had no merit even if it did. Sargent's statements—especially statements that he would receive life imprisonment or the death penalty if he told the truth—were highly incriminating. They were essentially an implicit admission of guilt, providing the most direct evidence that Sargent was involved in Peters's murder. These statements also cast a large shadow of suspicion over appellant, given her close association with Sargent at the time of the killing and their eventual marriage. Indeed, in its closing argument, the prosecution heavily emphasized Sargent's statements about his receiving life in prison or the death penalty if he told police what he knew about the murder. Thus, because it could not be said that the admission of Sargent's statements did not contribute to the verdict beyond a reasonable doubt, appellant was entitled to a new trial.

Recorded Conversations with Minors; OCGA § 16-11-66 (b)

Griffin v. State, S20A0789 (8/10/20)

Appellant was convicted for malice murder and other crimes. Appellant was 13 years old at the time of the crimes. He contended that his trial counsel rendered ineffective assistance for failing to object to testimony about tape-recorded conversations between him and Grant, who was also a minor. The evidence showed that Grant called appellant at the behest of law enforcement and that a detective recorded the conversation.

At trial, appellant's counsel objected to the admission of the recorded conversation because it was recorded in violation of OCGA § 16-11-66 (b). The prosecutor acknowledged that the State could not use the recording given the failure to obtain a court order, but represented that the State planned to have Grant and the detective testify about the conversation. Trial counsel did not voice any objection to that plan at that time. Grant later testified without objection about the phone call she had with Griffin, which she said took place when she was at the police station.

Griffin argued that his trial counsel performed deficiently by failing to object to this testimony. He contended that, just as the recording of Grant's conversation with him was inadmissible under OCGA § 16-11-66 (b), Grant's testimony about the conversation was inadmissible as well. The Court disagreed.

The Court noted that appellant cited no authority holding that failure to comply with the requirements of OCGA § 16-11-66 (b) before recording a conversation means that testimony about the conversation by a party to it is itself inadmissible. In fact, the Court stated, Georgia appellate case law suggests that such testimony is admissible. Thus, the failure to pursue a futile objection does not amount to ineffective assistance. And, the Court added, to the extent that the Court has not yet squarely decided whether testimony of the sort challenged here is admissible, trial counsel's failure to raise a novel legal argument does not constitute ineffective assistance of counsel. Accordingly, the Court concluded, because appellant failed to show that his counsel performed deficiently by failing to object to Grant's testimony under OCGA § 16-11-66 (b), his claim of ineffective assistance failed.

Motions to Withdraw Guilty Pleas; *Boykin*

Powell v. State, S20A0852 (8/10/20)

Appellant entered a guilty plea to two counts of malic murder. Thereafter, he filed a timely motion to withdraw his guilty plea. Following a hearing, the trial court denied the motion.

Appellant contended that the trial court improperly denied his motion to withdraw because he was not properly advised of the rights listed in *Boykin*. Specifically, he argued that he should be allowed to withdraw his plea because the prosecutor implied during the plea colloquy that he would be allowed to testify only with counsel's approval. The transcript showed that during the plea colloquy, the prosecutor advised appellant, "You understand that had you had the jury trial that [plea counsel] . . . would allow you to testify if y'all made the decision strategically to do so, or you have a right to remain silent at your trial?"

The Court agreed that the prosecutor's question to appellant may have inaccurately suggested that defense counsel decides whether a defendant may testify. But such a suggestion, inaccurate as it may be, does not run afoul of *Boykin*. *Boykin* did not mandate that a defendant be told that defense counsel's consent need not be obtained before testifying in order for a plea to be

Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE

WEEK ENDING SEPTEMBER 18, 2020

Issue 38-20

valid. Instead, it held that the knowing, intelligent, and voluntary waiver of three federal constitutional rights at the time of a guilty plea — including the privilege against compulsory self-incrimination — cannot be presumed from a silent record.

Here, the record supported the trial court's determination that appellant "knowingly and voluntarily entered his plea" and "fully understood the nature of the charges against him, the rights he was relinquishing, and the consequences of his plea." Appellant was specifically advised at his plea hearing that, by pleading guilty, he was waiving the right to be tried by a jury, the right to testify in his own defense, the right to call witnesses, and the right to cross-examine the State's witnesses. He was also specifically advised during the hearing that he had a right to remain silent at his trial. Appellant orally indicated that he understood those things. By signing the guilty plea acknowledgment and waiver of rights form, appellant also affirmed his understanding that he had the right to testify or not and that by pleading guilty he waived that right.

Furthermore, the Court noted, although appellant since has professed some ignorance as to whether he was aware, at least prior to his plea colloquy, that he could testify or not testify at his trial, plea counsel testified that she reviewed the plea waiver form with appellant and explained all of the rights that he would be waiving by pleading guilty. Acknowledging that appellant was "emotional" at the time, counsel also testified that he seemed to understand the form and asked no questions. The trial court explicitly credited plea counsel's testimony about her review of the plea form with appellant, discredited appellant's testimony that he did not understand the plea proceedings, and found that appellant "knowingly and voluntarily entered his plea." Thus, the Court found, the trial court did not abuse its discretion in denying the motion to withdraw appellant's guilty plea to the extent that it was based on his claim that he was not properly advised of the rights he was waiving in pleading guilty.