Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING OCTOBER 23, 2020
Issue 43-20

THIS WEEK:

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Forfeiture-by-Wrongdoing; OCGA § 24-8-804 (b) (5)

Welch v. State, S20A1010 (9/28/20)

Appellant was convicted of murder and other crimes in connection with the shooting death of Brown and the aggravated assault of Agee. Briefly stated, the evidence showed that Brown and appellant had both been involved with the same woman, Yakia Lewis. Appellant showed up at the home of the victims in a black Infiniti SUV. Appellant entered the home, engaged in conversation with Brown and then pulled a gun, wounding Agee and fatally shooting Brown. Appellant then left in the SUV.

Appellant contended that the trial court erred in allowing a police officer to testify pursuant to the forfeiture-by-wrongdoing exception found in OCGA § 24-8-804 (b) (5) that Lewis told an investigator that she traveled to Florida with appellant in a black Infiniti SUV after the crimes. The Court disagreed.

The Court stated that it is well established that one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation. There are three factors that the State must show by a preponderance of the evidence in order to admit a statement against a defendant under the rule of forfeiture-by-wrongdoing: (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 evidence showed contact between appellant and Lewis in which he instructed her not to "say s**t" after she was subpoenaed for his April trial and in which he showed his intent to procure her absence following a continuance and rescheduling of his trial to June by telling her to "stay down for a couple more months." Lewis indicated her assent by confirming that she was "gonna do that" ("stay down") before she left her home and did not appear at appellant's trial. The Court found that it was clear that Lewis became unavailable as a witness after her conversations with appellant despite the State having subpoenaed her to appear at appellant's April trial and the State's efforts to serve her again just prior to the rescheduled June trial. Under these circumstances, the Court concluded that the trial court did not abuse its discretion by admitting Lewis's statement to police under OCGA § 24-8-804 (b) (5).

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Units of Prosecution; Sexual Exploitation of Children

Edvalson v. State, S19G1516 (9/28/20)

Appellant was convicted of 22 counts of sexual exploitation of children, OCGA § 16-12-100 (2012), for possession of 11 digital images depicting a minor engaged in sexually explicit conduct. With respect to each digital image, he was found guilty of both possession under OCGA § 16-12-100 (b) (8) and possession with intent to distribute under OCGA § 16-12-100 (b) (5). At sentencing, the trial court merged the "simple" possession counts under subsection (b) (8) into the counts of possession with intent to distribute under subsection (b) (5), and sentenced appellant on the remaining 11 counts to a total of 60 years, with 19 to be served in prison. Appellant appealed, asserting that the trial court erred in failing to merge his convictions into a single count. The Court of Appeals affirmed, concluding that OCGA § 16-12-100 (b) (5) permits a defendant to be separately convicted and sentenced for each of the images in his possession. See *Edvalson v. State* (Case No. A19A0492), 351 Ga. App. XXIV (June 28, 2019) (unpublished). The Court granted certiorari to consider whether the Court of Appeals erred in failing to merge the remaining 11 convictions under OCGA § 16-12-100 (b) (5) into a single conviction.

Relying on *Coates v. State*, 304 Ga. 329, 331 (2018), the Court concluded that the plain language of OCGA § 16-12-100 (b) (5), interpreted in the context of the entire statute, is unambiguous and permits only one prosecution and conviction for a single act of possession of child pornography, regardless of the number of images depicted therein. Specifically, OCGA § 16-12-100 (b) (5) provides that "[i]t is unlawful for any person knowingly to create, reproduce, publish, promote, sell, distribute, give, exhibit, or possess with intent to sell or distribute *any visual medium* which depicts a minor or a portion of a minor's body engaged in any sexually explicit conduct." (Emphasis supplied.)

In interpreting this Code section, the Court of Appeals did not read subsection (b) (5) concomitantly with the remainder of the statute so as to avoid rendering any portion of the statute meaningless, but observed only that "[t]he legislature's frequent use of the word 'any' throughout the statute suggests a lack of restriction or limitation with respect to the statute's intended scope." (Citations and punctuation omitted.) *Edvalson*, slip op. at 10.

However, the Court found, this reading was incorrect, as it did not take into account the multiple meanings of the word "any" in the statute construed as a whole. A proper analysis produces a result similar to that reached in *Coates*. Here, the term "any visual medium" in OCGA § 16-12-100 (b) (5) must be read in light of the definition provided by the General Assembly in OCGA § 16-12-100 (a) (5): "'Visual medium' means *any* film, photograph, negative, slide, magazine, or other visual medium." (Emphasis supplied.) Accordingly, "any visual medium" in subsection (b) (5) cannot refer to the *qualitative* sense of "any," as that meaning is provided by the definition in subsection (a) (1). Instead, "any" in the phrase "any visual medium" must be interpreted as a *quantitative* term, implying no specific quantity and having no limit. Thus, the Court concluded, as in *Coates*, the offense is the possession of any prohibited "visual medium" at all, whether one or one hundred. Accordingly, OCGA § 16-11-131 (b) is unambiguous and permits only one prosecution and conviction for the simultaneous possession of multiple items of "visual media."

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Consequently, the Court reversed the Court of Appeals' decision, and remanded for the Court of Appeals to vacate appellant's convictions and sentences for the 11 counts under OCGA § 16-12-100 (b) (5) and to return the case to the trial court for resentencing consistent with its opinion.

Competency to Stand Trial; Due Process

Gray v. State, S20A0884 (9/28/20)

Appellant was convicted of malice murder and other offenses. In his January 2018 second amended motion for new trial, appellant claimed for the first time that his constitutional right to due process was denied because he was legally incompetent at the time of his trial in June 2015. At the hearing on the motion for new trial, appellant presented the testimony of his mother Barbara Banks, his trial counsel, and expert forensic psychologist Dr. Jamie Dickson. The State presented the testimony of clinical psychologist Dr. Glenn Egan, the prosecutors in the case, jail and prison personnel, and evidence from audio recordings and transcripts of dozens of phone calls appellant made while he was incarcerated after trial.

The Court stated that the constitutional guarantee of due process forbids the conviction of a defendant who is incompetent. But, the threshold for competency is easily met in most cases, as the test for competency is merely whether at the time of trial the defendant is capable of understanding the nature and object of the proceedings, comprehends his own condition in reference to those proceedings, and is able to assist his counsel in providing a proper defense. When a finding of competency is challenged on appeal, the question is whether, after reviewing the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence that he was incompetent to stand trial.

Appellant argued that the trial court erred by finding that he had not met his burden of proving that he was incompetent at the time of his trial because Banks's and Dr. Dickson's testimony about his impairments was more credible than Dr. Egan's testimony that he was malingering. But, the Court stated, the credibility of the witnesses at the motion for new trial hearing was for the trial court to determine, and the court was entitled to credit Dr. Egan's opinion.

Moreover, the Court found, the trial court's conclusion was supported by substantial evidence other than Dr. Egan's testimony. Appellant's experienced trial counsel and two prosecutors on his case saw no indications before or during trial that appellant was incompetent, nor was any issue of appellant's competency raised in his four prior criminal cases. The trial court noted that its communications with appellant raised no concern about his competence during the trial, and appellant did not argue that the court should have conducted a sua sponte inquiry into his competency.

Additionally, the Court noted, appellant did not appear incompetent during his post-trial interactions with jail and prison personnel, and his comments to them demonstrated his understanding that he had been sentenced for murder and that he was working with his lawyer to appeal his convictions. Perhaps most telling, as the order denying the motion for new trial pointed out, the recordings of the jail phone calls showed that appellant understood his legal situation and was actively assisting his post-conviction counsel in preparing for the motion for new trial proceedings. Thus, the Court concluded, viewed in the light most favorable to the State, the evidence presented at the motion for new trial hearing was easily

sufficient to authorize a rational trier of fact to conclude that appellant failed to prove by a preponderance of the evidence that he was incompetent to stand trial.

Jury Charges; Abandonment

Satterfield v. State, S20A0878 (9/28/20)

Appellant was convicted of felony murder and other crimes in connection with the shooting death of a 78-year-old victim. The record showed that Tinch, who was granted immunity, testified that appellant had contacted him about stealing money from a house and, during the evening the victim was killed, Tinch met appellant and Young. Using Tinch's car, the trio drove to within a block of the victim's house. After Young and appellant exited Tinch's vehicle, Tinch drove around the corner and parked in front of an empty house; he was instructed via a phone call from appellant to approach the victim's house and ascertain if anyone was home by ringing the doorbell and knocking on the door. Tinch did as instructed and called appellant to report that no one was at home. Shortly thereafter, Tinch, now driving his vehicle, picked up appellant, who reported that someone had been in the house. Tinch and appellant then met Young, who was carrying three rifles and a handgun, near the side of the victim's home. Tinch testified that Young stated he "shot him" as Young entered Tinch's car. Jones, a neighbor of the victim, testified that appellant told him the day after the shooting that Young had shot the victim after appellant and Young had entered the victim's home through a window.

Appellant contended that his trial counsel was ineffective in failing to request a jury charge on the defense of abandonment. OCGA § 16-4-5 (a) provides that "When a person's conduct would otherwise constitute an attempt to commit a crime, . . . it is an affirmative defense that he abandoned his effort to commit the crime or in any other manner prevented its commission under circumstances manifesting a voluntary and complete renunciation of his criminal purpose." Appellant argued that the charge was authorized because there was at least slight evidence to support it. Specifically, a trier of fact could have drawn the conclusion that he never went inside the victim's house and that he did not know what happened in the house until being informed by Young. The Court disagreed.

OCGA § 16-4-5 (a) provides that an abandonment must be "a voluntary and complete renunciation of [the] criminal purpose." Such a renunciation does not include "[a] belief that circumstances exist which increase the probability of detection or apprehension of the person or which render more difficult the accomplishment of the criminal purpose." OCGA § 16-4-5 (b) (1).

Here, Jones's testimony showed that appellant admitted entering the victim's home and then leaving after Young shot the victim. On the other hand, Jerriel Brooks, who knew appellant from work, testified that appellant told him that he knew about a plan to rob his "home boy's" grandfather and went with others to the scene, but that he did not know who went in the house as he was "two houses . . . down," and wanted nothing to do with the planned robbery.

But, the Court found, neither Jones's nor Tinch's testimony showed that appellant voluntarily abandoned his criminal purpose within the meaning of OCGA § 16-4-5. Jones's testimony shows that appellant did not abandon an attempted burglary as appellant admitted to leaving the scene only after entering the house. Tinch's testimony indicated at most that appellant left the scene because he encountered circumstances that rendered the burglary more difficult or his apprehension more likely, or both. And Brooks's testimony showed that appellant had maintained he was merely present near the scene

and wanted nothing to do with the robbery—a claim that he never committed a crime, as opposed to having abandoned an attempt to commit a crime. Thus, the Court concluded, trial counsel was not deficient in failing to request a charge that the evidence did not support.

Juveniles; LWOP

Love v. State, S20A0802 (9/28/20)

Appellant was convicted of malice murder and other crimes in connection with the shooting death of Trejo. Appellant, who was 16 years old at the time the crimes were committed, argued that the trial court erred in sentencing him as a juvenile to serve life without parole. The Court disagreed.

The evidence, briefly stated, showed that late one evening, appellant cajoled a twelve and thirteen year old to walk with him to a fast food restaurant. When they got to the restaurant, only the drive-through was still open. They walked to a nearby gas station to ask for a ride home because appellant said he did not want to walk back home on the paths. Trejo, the third person they asked, agreed to give them a ride home. Appellant directed Trejo to a remote location where he shot Trejo multiple times, killing him. After pulling the victim out of the vehicle, appellant then threatened to kill his young companions if they "snitched" on him. A day later, appellant led officers on a high speed chase in Trujo's vehicle until it reached a dead end at which time he fled on foot. He was caught shortly thereafter.

Appellant contended that the trial court erred in sentencing him to serve life in prison without the possibility of parole because the evidence did not support a finding that Love was irreparably corrupt. The Court noted that at the conclusion of the sentencing hearing and in its lengthy order denying appellant's motion for new trial, the trial court stated that it considered the sentence in light of *Miller*, *Montgomery*, and *Veal* and recognized that children are constitutionally different from adults because of a child's diminished culpability and greater prospects for reform. The trial court also explained that it was mindful that whether a juvenile should be subject to such a sentence turns on whether he is irreparably corrupt, exhibiting such irreparable depravity that rehabilitation is impossible. The trial court then noted appellant's school records showing a history of incidents involving physical violence and his juvenile record showing a criminal propensity that had accelerated, including after his conviction in this case, despite regular supervision and visits by a juvenile probation officer, community service, and family counseling with his mother.

With respect to the circumstances of the underlying crimes, the trial court noted that the unarmed victim was only trying to help appellant when appellant shot him without provocation in front of 12- and 13-year-old children, whom he then threatened to kill as well. Appellant was not under the influence of drugs or impaired, has never been diagnosed with a mental disorder, and had no motive to kill Trejo. And when appellant later described killing the victim, he was flippant and disrespectful, showing no remorse. The trial court further found appellant was not acting under sudden compulsion or immaturity and that there was no outside pressure or negative influence. Rather, the evidence showed that appellant orchestrated and planned the murder in an isolated location and was the sole actor. Thus, the trial court concluded that appellant had shown a consistent disrespect for authority; that rehabilitation was not a realistic expectation; that appellant's crimes reflect that he is permanently incorrigible and irreparably corrupt; and that as a result, appellant is in the narrow class of juvenile murderers for whom a life without parole sentence is proportional under the Eighth Amendment.

Thus, the Court concluded, the record evidence the trial court carefully laid out in great detail supported its determination that appellant was irreparably corrupt. And although appellant noted that the trial court did not rely on any expert or medical testimony to support its determination, nothing in *Miller*, *Montgomery*, or *Veal* requires the use of an expert to aid a court in making a determination that a juvenile offender is irreparably corrupt. Accordingly, the Court found no basis to vacate appellant's sentence.

Nevertheless, appellant argued, although Georgia law currently permits a juvenile to be sentenced to life without the possibility of parole, the Court should nonetheless preclude such a sentence because a finding of irreparable corruption cannot be reliably made by experts, much less a trial court, and because the evolving standards of decency both in the United States and internationally weigh against imposing such a sentence. The Court disagreed.

The Court noted that although the U. S. Supreme Court has recognized that it is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption, and appellant pointed to certain states, foreign laws, and international treaties and customs that do not impose life without parole sentences for juveniles, the Supreme Court has nevertheless permitted courts to sentence juveniles who have committed homicide to life without parole, subject to a determination by the sentencing court that the juvenile is "irreparably corrupt." And the Court stated, it saw "no reason to depart from that precedent."

Moreover, although appellant contended that a number of states and the District of Columbia have banned life sentences without the possibility of parole for juvenile offenders, OCGA § 16-5-1 (e) (1) permits imprisonment for life without parole upon a conviction for murder. To the extent that appellant asserted that for policy reasons, life without parole sentences should not be permitted for juveniles, the Court stated that those types of considerations are best left to be weighed by our General Assembly.

Promises of Immunity; Statements against Interest

Lumpkin v. State, S20A0734, S20A0879 (9/28/20)

Lumpkin and Green were tried together and convicted of murder and other offenses in connection with a home invasion. Dozier and four others were also charged with crimes in connection with the home invasion. The record reflected that the State provided Dozier with a letter offering immunity in exchange for any information he was willing to provide about the crimes. Dozier then met with prosecutors and gave statements under the promise of that immunity. In his statements, Dozier essentially exonerated Green of criminal wrongdoing.

Later, Dozier apparently recanted some of the statements he made to the investigators. He then was tried and convicted of several offenses in connection with this incident. *Dozier v. State*, 307 Ga. 583 (2019).
He was subpoenaed to testify at Green and Lumpkin's trial, but by the time it began, Dozier had already been convicted and was seeking a new trial. He asserted his Fifth Amendment privilege against self-incrimination and refused to testify.

Green argued that the trial court abused its discretion by not admitting Dozier's statements to a police investigator suggesting that Green had not been involved in the planning and execution of the robbery. Green contended that because

Dozier was legally unavailable to testify at trial, his statements should have been admitted pursuant to the exception to the hearsay rule for statements against interest set forth in OCGA § 24-8-804 (b) (3). The Court disagreed.

The Court stated that a declarant is "unavailable as a witness" if the declarant is "exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement[.]" OCGA § 24-8-804 (a) (1). Here, the trial court accepted Dozier's assertion of his Fifth Amendment privilege, which made him legally unavailable under OCGA § 24-8-804 (a) (1).

The Court noted that OCGA § 24-8-804 (b) (3) provides that a "statement against interest … shall not be excluded by the hearsay rule if the declarant is unavailable as a witness[.]" Also, OCGA § 24-8-804 (b) (3) is materially identical to Federal Rule of Evidence 804 (b) (3). Thus, although there is a body of Georgia case law concerning the use of hearsay statements against a declarant's interests that was in place before the current Evidence Code came into effect, it must look to federal appellate decisions, particularly those of the United States Supreme Court and the Eleventh Circuit construing federal Rule 804 (b) (3), in interpreting OCGA § 24-8-804 (b) (3).

Here, the trial court found that Dozier made his statements to the State's investigators under a promise of use and derivative-use immunity. As a result, the trial court determined that Dozier's statements regarding Green's lack of involvement in the crimes could not expose Dozier to criminal liability and were therefore not against his penal interests. The trial court instead noted that, at the time Dozier made the statements, they were actually in Dozier's interests.

The Court agreed that a statement given under a promise of use and derivative-use immunity is not against the declarant's penal interest. Use and derivative-use immunity protect a witness from the use of potentially self-incriminating testimony and the fruits of that testimony against him in a future prosecution. Citing federal caselaw, the Court found that because such statements do not expose the declarant to criminal liability, they are not against the declarant's penal interests and are not admissible under OCGA § 24-8-804 (b) (3). Thus, the Court concluded, the trial court did not abuse its discretion by determining that Dozier's statements were not admissible as statements against interest under OCGA § 24-8-804 (b) (3).

Cross-Examination; Victim's Character

Griffin v. State, S20A0967 (9/28/20)

Appellant was convicted of felony murder in the stabbing death of Cheeley. The only witness who was present when the stabbing took place was Richard. The transcript showed that on direct examination, Richard testified that in his opinion, Cheeley was a peaceful person. Defense counsel then cross-examined Richard at length concerning the two armed robbery charges that had been brought against Cheeley. Richard repeatedly responded that the charges would not change his opinion about Cheeley's character trait for peacefulness, at one point explaining: "I don't tend to judge people by what they've done before. I tend to judge them from who I know them to be." When counsel followed up with: "And it wouldn't matter that on each occurrence a person was pistol whipped and struck with a handgun at each of those events?" Richard responded: "I don't know. You say he was charged with it. You didn't say he was convicted." Defense counsel approached the bench and sought permission to ask Richard whether the fact that Cheeley had pleaded guilty in 1992 to the lesser offense of robbery by intimidation would change his opinion. The court denied this request, ruling that defense counsel

had adequately cross-examined Richard's credibility and the basis of his opinion of Cheeley's character trait for peacefulness.

Appellant contended that the court's ruling improperly curtailed his cross-examination and left the jury with the impression that the defense was "bluffing" about Cheeley's criminal past. He also argued that he should have been able to cross-examine Richard with evidence of Cheeley's 1992 conviction because that conviction was admissible to prove Cheeley's character trait for violence and to show that Griffin was aware of Cheeley's violent nature and, therefore, that he reasonably believed that deadly force was required to prevent Cheeley from seriously injuring or killing him. The Court disagreed.

The Court stated that assuming without deciding that appellant's inquiry would have been permitted under Rule 405 (c), it was not an abuse of discretion to disallow it under these circumstances. The record showed that the trial court had already afforded appellant wide latitude to cross-examine Richard by asking him about the details of the two armed robbery charges that had been brought against Cheeley and, consequently, the court saw no reason for appellant to further test the basis for Richard's opinion. Moreover, even though appellant was entitled to a thorough and sifting cross-examination pursuant to OCGA § 24-6-611 (b), the right is not unlimited. And here, the Court found, the transcript showed that given the questions posed by appellant, the jury had sufficient information to make a discriminating appraisal of Richard's credibility and the basis for his opinion of Cheeley's character trait for peacefulness.

Appellant next contended that Cheeley's 1992 conviction for robbery by intimidation was admissible pursuant to OCGA § 24-4-404 ("Rule 404") to prove Cheeley's "role as [the] initial aggressor" and to show that appellant had knowledge of Cheeley's violent nature. But the Court noted, although Rule 404 (a) (2) allows a defendant to offer evidence of a victim's violent character when that trait of character is pertinent to the defendant's claim of self-defense, appellant did not seek to introduce character evidence for that purpose, nor had he sought a ruling on the admissibility of Cheeley's 1992 conviction for that purpose before or during his cross-examination of Richard. Moreover, appellant did not make these arguments when he asked the court for permission to cross-examine Richard's opinion of Cheeley's character trait for peacefulness with evidence of Cheeley's 1992 conviction. Consequently, the Court reviewed these claims only for plain error.

Under Rule 404 (a) (1) and (2), evidence of a "pertinent trait of character" of the defendant or of the alleged victim is admissible when offered by the defendant or by the State in rebuttal. However, under OCGA § 24-4-405, such character traits generally may be proved only with "testimony as to reputation or testimony in the form of an opinion," although Rule 405 (b) provides an exception to this rule: a character trait may be proved by specific instances of the person's conduct when the character trait "is an essential element of a charge, claim, or defense or when an accused testifies to his or her own character," OCGA § 24-4-405 (b).

First, the Court found, appellant provided no record citation in support of his contention that he was aware of Cheeley's alleged character trait for violence. Second, a victim's violent character is not an essential element of a self-defense claim. Third and finally, although Rule 405 (c) authorized appellant to cross-examine Richard's opinion testimony by inquiring whether he was aware of relevant specific acts of Cheeley's conduct, it did not require the admission of extrinsic evidence proving those acts. Thus, the Court concluded, appellant failed to show error — much less plain error — in the court's exclusion of this evidence.