

## THIS WEEK:

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### Jury Master Lists; Voir Dire

*Hill v. State, S20A0781 (9/28/20)*

Appellant was convicted of malice murder and other crimes. He contended that, at the time of his trial in November 2014, Fulton County's method of removing jurors from the county master jury list violated the Jury Composition Rule, specifically by removing jurors based on legacy data or based on undeliverable mail, which disproportionately affects minority and lower-income jurors. Appellant argued that, as a result, the jury pool did not represent a fair cross-section of the community, and he was thereby deprived of his right to due process of the law.

However, the Court found, appellant challenged the master jury list for the first time in his third amended motion for a new trial. But, the Court stated, Georgia has long required a criminal defendant to raise a challenge to the jury lists at the time the jury is "put upon him" or else he waives his right to object. Neither the Jury Composition Reform Act of 2011 nor the Jury Composition Rule relaxed that requirement. Thus, by waiting until after conviction to challenge the composition of the jury list, appellant waived any such challenge.

Appellant also contended that the trial court erred in preventing him from examining a prospective juror and in failing itself to question the juror to determine if the juror was qualified to serve in light of his self-declared language barrier. The record showed that, during questions propounded by the trial court during voir dire, a prospective juror who was ultimately seated on the jury indicated that he had a hardship with serving on the jury. He stated, "I'm worried about the language, you know, some things I don't understand." The court asked the juror whether he had taken the citizenship exam, and the juror replied that he had. Noting that the citizenship exam is given in English, the court moved on to questioning other jurors about their hardships. Later during voir dire, defense counsel attempted to follow up with the juror's potential "language issues." The court instructed counsel, "Don't ask that. Move on from there." Defense counsel did not object at that point or raise the purported language barrier again. Defense counsel did not move to strike the juror for cause or use a peremptory strike to remove him, nor did she object to the jury selected.

The Court found that because appellant did not make a request to strike the juror for cause, the issue was waived for ordinary appellate review. And plain-error review is not available for this issue because such review is limited to the sentencing phase of a trial resulting in the death penalty, a trial judge's expression of opinion in violation of OCGA § 17-8-57, and a jury charge affecting substantial rights of the parties as provided under OCGA § 17-8-58 (b), and, for cases tried after January 1, 2013, with regard to rulings on evidence, a court is allowed to consider plain errors affecting substantial rights although such errors were not brought to the attention of the court. OCGA § 24-1-103 (d). Moreover, the Court stated, it would not extend plain-error analysis to other claims of error in the absence of a specific provision by the General Assembly.

Nevertheless, appellant contended, his trial counsel rendered ineffective assistance by failing to object or request to strike the juror for cause. But, the Court noted, at the hearing on appellant's motion for a new trial, his trial counsel testified that she did not object because the trial judge indicated that he did not believe the juror was telling the truth about having trouble understanding English but was just trying to get out of jury duty. Counsel testified that, after observing the juror's demeanor and his ability to respond to the questions during voir dire, she also had the impression that the juror had been trying to get out of jury duty.

Whether to strike a prospective juror who indicates a limited ability to understand legal proceedings in English is within the broad discretion of the trial court in qualifying a jury. Thus, the Court found, under the circumstances, counsel reasonably believed that trying to have the juror removed for cause would be futile and the failure to make a meritless motion or objection does not provide a basis upon which to find ineffective assistance of counsel. Accordingly, trial counsel did not render ineffective assistance.

## **Right to Resist and Unlawful Arrest or Detention; Interference with Government Property**

*Glenn v. State, S19G1236 (10/5/20)*

Appellant was arrested for loitering and prowling, obstruction and interference with government property and the State sought to revoke his probation based on these charges. The State alleged that appellant committed the offense of loitering and prowling by "walking along the wooded edge of an elementary school as the school was being let out." The evidence showed that appellant physically resisted his arrest and after he was finally handcuffed and placed in a patrol car, he kicked the inside of the door so hard that he damaged the hinges to the door.

The trial court found that appellant's arrest was unlawful and thus, he did not commit obstruction because the arresting officers were not in the lawful discharge of their duties. But, despite this ruling, the court found that appellant committed the offense of interference with government property, reasoning that he damaged the patrol car "outside the bounds" of the period when he had any right to forcibly resist the arrest. In other words, the trial court concluded that, once appellant was handcuffed and confined in a patrol car, he was obligated to submit to the detention and wait until he could contest the validity of the arrest and detention in court.

The Court of Appeals granted appellant's application for a discretionary appeal. The majority noted that appellant's argument was based in part on the right to use force against a police officer to resist an unlawful arrest and also noted that

there is a dearth of case law on whether that right extends to the use of force against property to counter an illegal arrest. *Glenn v. State*, 350 Ga. App. 12 (2019). Without resolving this question, the majority held that "given the lapse in time" between when appellant was placed in the patrol car and when he damaged the vehicle door, which the majority determined based on the responding officer's body camera footage to have been at least 15 minutes, "[appellant]'s damage to the vehicle was not in response to an immediate need to resist an unlawful arrest, but rather was an intentional act occurring sometime after he was detained." *Id.* at 16-17. The Supreme Court granted certiorari.

Appellant contended that the trial court and the Court of Appeals misconstrued Georgia law regarding the common-law right to resist an unlawful arrest or detention. Specifically, he argued that in Georgia a person has a common-law right to resist an unlawful arrest or detention with the degree of force necessary to achieve that purpose; that such resistance may include damaging government property in order to escape from an illegal detention; and that a detention following an unlawful arrest continues to be unlawful until such time as lawful process issues. The Court agreed.

First, the Court found that the Georgia General Assembly adopted the common law of England as of May 14, 1776, as Georgia's own law, except to the extent that Georgia's statutory or constitutional law displaced the common law, and that adoption remains in force today. Generally, under the common law, a person cannot be punished for fleeing from or physically resisting an unlawful arrest or escaping from an unlawful detention, so long as the person uses no more force than is necessary to achieve such purpose. And, because the common-law right to resist an unlawful arrest or detention is framed in terms of the proportionate use of force necessary to resist the force used to arrest or detain a person, the Court concluded that the right does not distinguish between the use of force against an arresting officer's person and the use of force against objects, including government property.

Next, the Court looked at whether this common law right has been modified or displaced by Georgia's constitutional or statutory law. After reviewing Georgia's constitutional and statutory provisions relevant to detentions and arrests, the Court concluded that the General Assembly has not done so and that the common law rule remains in effect in Georgia, at least with respect to charges of obstruction or interference with government property. And, the Court further concluded that the mere passage of time between an unlawful arrest and an attempt to escape from the ensuing detention has no bearing on whether the use of force was proportionate or necessary. Under Georgia law, therefore, a person may damage government property in an attempt to resist an unlawful, warrantless arrest or escape an unlawful, warrantless detention, using no more than proportionate force, even where, as in this case, officers handcuff an arrestee and place him in a patrol car before the arrestee's property-damaging conduct.

Accordingly, the Court held that the case should be remanded to the trial court to determine whether appellant's used force to resist the officers' actions was proportionate under the circumstances.

## **Jury Charges; Prosecutorial Misconduct**

*Horton v. State*, S20A0799 (10/5/20)

Appellant was convicted of malice murder, arson in the first degree, and related crimes in connection with the stabbing death of his neighbor, Jeff Hagan, and the burning of Hagan's home. The relevant evidence, very briefly stated, showed that Hagan's mother gave a statement to the police that on the night of the fire, she was about to go to bed when she heard

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a pounding on the back door. It was appellant, "covered from head-to-toe in blood" and "very distraught." He was frantic and saying, "Oh, God, oh, God, he's dead over there, I've killed him, I've killed Jeff." He told her that he must have passed out and when he came to, Jeff and the dog were both dead, and he supposed he must have killed the dog as well. Appellant's mother told investigators that she used two rags to wipe the blood off his face, and that he cleaned up outside and gave her his clothes, which she laundered twice. She said that he then told her that he was going back to Hagan's home "to finish it" or "to burn the house."

Appellant contended that the trial court committed plain error in failing to instruct the jury that the testimony of an accomplice must be corroborated after giving the single-witness instruction, contending that his mother was an accomplice. The Court disagreed.

Here, the Court found, the evidence did not show that appellant's mother aided or abetted the commission of the crimes or advised appellant to do so, that she was ever at the crime scene, or that she witnessed, participated in, or was even aware of the incident until appellant appeared at her door covered in blood and announced that he had killed Hagan. Appellant's mother then helped appellant clean up and washed his clothes. While she did not immediately call police then or when appellant said he was going back to the house, and initially denied to investigators that she knew anything, she shortly afterwards volunteered her story to the police, albeit at the urging of her daughter. These actions are more typical of an accessory after the fact than an accomplice. Furthermore, appellant pointed to no law clearly demonstrating that his mother could have been considered an accomplice, nor to any argument by his trial counsel or the State suggesting that she was an accomplice. Therefore, appellant could not meet the second prong of the plain error test by showing that any error was obvious beyond reasonable dispute. And, an error cannot be plain where there is no controlling authority on point. Thus, the Court concluded, the trial court did not commit plain error in failing to instruct the jury on corroboration of accomplice testimony.

Next, pointing to testimony at the preliminary hearing by a GBI agent that hairs were found in Hagan's hand and sent to the lab for testing, as well as a laboratory report showing the testing of hairs found on Hagan's clothing, appellant argued that the State violated his due process right to a fair trial under *Napue v. Illinois*, 360 U.S. 264, 269 (79 SCt 1173, 3 LE2d 1217) (1959), by allowing the medical examiner to testify falsely that there was no biological evidence found on Hagan's burned body and then relying on that false testimony in its closing argument to contend that no such evidence was found.

The Court noted that appellant relied upon a lengthy quote from the medical examiner's testimony to assert that the witness testified falsely. However, the Court found, this response was part of a series of specific questions posed by appellant's counsel on cross-examination regarding knives found in Hagan's home after the fire, some of which could have inflicted the wounds observed on Hagan, and whether any DNA evidence was recovered *from those knives*. It was clear from the witness' response that he was answering that specific question. Thus, it was true that the witness did not mention the hair samples recovered from Hagan or his clothing, but he was not asked about them; his testimony therefore was not false, but only arguably incomplete as he was not asked about hair samples and did not volunteer any nonresponsive information.

Moreover, to whatever extent the prosecutor allowed the medical examiner to testify in a misleading manner, appellant's claim was not preserved because it was not raised at trial. Because appellant did not raise this claim of prosecutorial misconduct at trial, it was not preserved for appeal.

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And, the Court stated, in any event, when a defendant alleges a factually specific claim of prosecutorial misconduct, the defendant must show actual misconduct and demonstrable prejudice to his right to a fair trial in order to reverse his conviction. Here, by the time Hagan's body was presented to the medical examiner, it was not only badly burned but had been handled by numerous persons and exposed to a substantial amount of foreign material. Firefighters stumbled over Hagan's body in the midst of the still-burning fire, covered with insulation and other debris that had fallen during the partial collapse of the home. They hastily dragged him by his feet out of the home, sprayed him with water to remove some of the debris, and then covered him with a tarp after emergency medical personnel examined him and declared him dead. The fire investigator removed more debris from Hagan's body in order to take photographs. Thus, the Court found, it was possible that an undetermined number of individuals not only disturbed any existing evidence, but also deposited biological material on the body. In addition, no testimony was presented concerning how long Hagan had worn the clothing in which he was found at the time of his death, or the number of persons he might have come in contact with while wearing it. Consequently, given the number of people on the scene and the manner in which Hagan's body was handled, all that the hair analysis could show was that an unidentified third person was in contact with Hagan at some point, possibly after his death. Consequently, appellant failed to show that a jury would have considered that unknown and inconclusive hair samples found on Hagan's clothing created a reasonable doubt in the face of all the evidence presented. Accordingly, premitting whether the prosecutor acted altogether properly, appellant failed to demonstrate prejudice.

## **Prosecutor's Right to Appeal; OCGA § 5-7-1 (a) (5)**

*State v. Wheeler, S20A0758 (10/5/20)*

Wheeler was indicted for malice murder, felony murder, arson, and other offenses. Her trial was scheduled to begin on September 3, 2019. On January 17, 2019, the State provided Wheeler with a "Notice of Intent to Present Evidence of Other Acts," and an amended notice on August 13, 2019, indicating that it intended to offer evidence under OCGA § 24-4-404 (b) ("Rule 404 (b)") of three prior instances in which Wheeler set or attempted to set a fire as proof of her motive and intent in this case. The State also filed the notice and amended notice with the trial court. The Court noted that it is not clear from the record whether the State also filed a separate motion related to the Rule 404 (b) evidence it intended to offer, but the record showed that the trial court held a hearing on August 26, 2019, at which the parties made presentations on the Rule 404 (b) issue. After the hearing, the trial court denied what it called the "State's 404 (b) motion" on September 3, 2019.

Between August 30 and September 5, the State filed one premature notice of appeal and three amended notices of appeal. Each invoked OCGA § 5-7-1 (a) (3), which permits the State to appeal from an order "sustaining a plea or motion in bar," even though the order the State appealed from pertained to the exclusion of evidence, and thus should have been appealed at that stage under subsection (a) (5). On January 22, 2020, more than four months after the trial court issued its order denying the State's Rule 404 (b) motion, the prosecuting attorney filed for the first time a § 5-7-1 (a) (5) (B) certification in the trial court, attesting that the appeal was "not taken for purpose of delay and that the evidence [was] substantial proof of a material fact in the trial of the case." She did so notwithstanding the fact that the State's initial (premature) notice of appeal and the three amended notices that followed invoked § 5-7-1 (a) (3) and not § 5-7-1 (a) (5). Then, on February 10, 2020, in its fourth amended notice of appeal (i.e., on its fifth attempt), the State clarified that it actually sought to appeal the trial court's September 3, 2019 order under § 5-7-1 (a) (5). At that point, over five months had passed since

the trial court issued its order denying the State's Rule 404 (b) motion, and the State's notice of appeal (which was actually its third amended notice of appeal) invoking § 5-7-1 (a) (3) had been docketed in the Court almost three weeks earlier.

The Court stated it is duty-bound to inquire into its jurisdiction to entertain each appeal. The Court noted that OCGA § 5-7-1 (a) (5) imposes several distinct requirements not found under the other subsections contained in § 5-7-1 (a). Premitting whether the motion by the State was filed 30 days prior to trial, the Court stated that the notice of appeal must be filed within two days of the order (§ 5-7-1 (a) (5) (A)) and the prosecuting attorney certifies to the trial court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a material fact in the proceeding (§ 5-7-1 (a) (5) (B)).

The Court found that the two-day deadline for filing a notice of appeal, which is expressly set forth in the text of § 5-7-1 (a) (5) (A), is a jurisdictional requirement the State must satisfy to comply with § 5-7-1 (a) (5). But, the Court noted, the text of subsection (a) (5) (B)—unlike the text of subsection (a) (5) (A)—does not impose an express deadline for the State to make that certification. Thus, the Court stated, it must decide whether the State's subsection (a) (5) (B) certification must be made by the same two-day deadline required of a subsection (a) (5) (A) notice of appeal.

The Court found that it does. Specifically, given that the State must already decide whether to seek an appeal under § 5-7-1 (a) (5) within two days of entry of the trial court order at issue (and presumably evaluate its potential appeal before and during that expedited timeframe), and that subsection (a) (5) (B) merely asks the prosecuting attorney to make a one-sentence certification about facts squarely within his or her knowledge at the time the State's notice of appeal is filed, it would be inconsistent to conclude that a subsection (a) (5) (B) certification made after a subsection (a) (5) (A) notice of appeal is filed could accurately certify that the appeal is not being taken for purposes of delay.

Here, the State satisfied OCGA § 5-7-1 (a) (5) (A) by filing a timely notice of appeal. But *both* subsections (a) (5) (A) and (a) (5) (B) must be satisfied for the State to comply with § 5-7-1 (a). And given that the State—which filed the prosecutor's certification with the trial court more than four months after entry of the trial court order the State sought to appeal—had not satisfied the subsection (a) (5) (B) requirement, the Court concluded that it lacked jurisdiction over this appeal and dismissed it accordingly.

## Photographic Evidence; Relevancy

*State v. Stephens, S20A0714 (10/5/20)*

Prior to a retrial (the first trial ended with a deadlocked jury), the State filed a “Motion to Include Relevant and Probative Evidence,” which sought a ruling on the admissibility of two photographs for use at Stephens's trial for the murder of Starks. One of those photographs purportedly depicts Stephens with a gun in his hand (“Exhibit 1”). The other photograph depicts Stephens's girlfriend as she points a handgun at the camera and Stephens in the background holding what the State described as a silver gun magazine (“Exhibit 2”). The State contended that the two photographs were admissible under OCGA §§ 24-4-401 and 24-4-403 because the gun in the photographs matched the witnesses' descriptions of the gun used to shoot Stark. The State also asserted that the guns depicted in the two photographs appear to be “strikingly similar” and the fact that Stephens had a large tattoo on his arm in one picture and not in the other stood “for the proposition that Stephens was in possession of or had access to the firearm over some period of time which was more than a fleeting few

days.” According to the State, these factors demonstrated that the photographs were relevant and that their probative impact was not outweighed by prejudice. The court admitted Exhibit 1, but not Exhibit 2 and the State appealed.

The State argued that the trial court abused its discretion in excluding Exhibit 2 as it matched the witnesses' descriptions of the murder weapon and was relevant to show that Stephens had access to a gun other than the .22-caliber gun his girlfriend described. In a 4-3 opinion, the Court disagreed.

The Court noted that the murder weapon in this case was never recovered. Although one witness originally identified the gun used in the murder as a .40- or .45-caliber weapon, the State did not point to any evidence identifying the caliber of the firearm pictured in Exhibit 2. While witnesses also described the murder weapon as “a black pistol” and “big and black,” and the gun pictured in Exhibit 2 also appeared to be a large black pistol, significantly, as the trial court noted, Stephens is not even holding the gun in Exhibit 2. Rather, Stephens's girlfriend is holding the gun.

Moreover, the State did not show when the photograph was taken. Although the prosecutor asserted at the first trial that it was taken before the murder, the State's pretrial motion did not point to any evidence to show when the photograph was taken, nor did the State present evidence to establish the date of the social media post from which law enforcement obtained Exhibit 2. Therefore, the Court found, the photograph merely demonstrates that Stephens, at some unidentified point in time, sat next to his girlfriend while she held what appears to be a large black gun. The State presented no evidence showing that Stephens's girlfriend had any involvement in Starks's murder, or that the silver object in Stephens's hand is even a gun magazine that would fit the gun his girlfriend was holding.

Furthermore, the Court stated, to find the Exhibit 2 photograph relevant to show that Stephens had access to the murder weapon used in this case, the jury would need to make not just one inference, but a series of them: (1) that the gun in the photograph was the murder weapon; (2) that because Stephens's girlfriend held the gun in the photograph, she had continued access to it; (3) that Stephens also had access to the gun to use it in a crime; and (4) most speculatively, that he had access to it at the time of the murder. Although the relevance standard under Rule 401 is a liberal one, it is not meaningless or without boundaries, and the determination of relevance remains within the trial court's discretion. Therefore, the Court concluded under these circumstances, without more information about the Exhibit 2 photograph, the trial court did not abuse its discretion in determining that the photograph would require the jury to stack too many increasingly strained inferences to find it relevant to the issue for which it was offered.

The State also argued that the exclusion of the evidence in the first trial negatively impacted the State's case; the Exhibit 2 photograph was proper evidence to impeach Stephens's girlfriend's testimony; and the photograph was relevant to counter defense arguments regarding the credibility of the State's witnesses and that another individual was the shooter.

However, the Court stated, to the extent that these arguments seek consideration of the trial court's ruling excluding the photograph during the first trial and the trial court's comments at the first trial, such arguments were not a proper subject of this pretrial appeal by the State. Appeals by the State in criminal cases are limited to the issues listed and the circumstances identified under OCGA § 5-7-1, and the trial court's rulings and statements in the first trial are not part of a pretrial motion excluding evidence under OCGA § 5-7-1 (a) (5). Moreover, to the extent the arguments require the Court to anticipate or predict how witnesses might testify at the second trial, how the defense might respond to such testimony, and what comments the trial court may make, the arguments are premature. Finally, because its review is limited

to the trial court's ruling on the State's motion, and the State did not raise any of these arguments below — instead arguing only that the photographs were relevant because the guns depicted in them matched witness descriptions of the murder weapon — the Court stated it would not consider them for the first time on appeal.

## **Alternate Jurors; Participation in Jury Deliberations**

*Lester v. State, S20A0827 (10/5/20)*

Appellant was convicted of malice murder and other offenses. The record showed that after the verdicts were published but before the jury was discharged, the District Attorney advised the trial court and defense counsel of his suspicion that an alternate juror had been present in the jury room during deliberations. The trial court sent the jury back to the jury room. During an ensuing colloquy, defense counsel expressed concern and requested that the court individually ask each juror if the alternate juror was present during deliberations. The court agreed and brought each juror back into the courtroom one by one, swore each juror in, and questioned each juror (other than the alternate) about whether the alternate was present during deliberations, whether the alternate participated in deliberations or voted on a verdict, and whether he influenced any juror's verdict. At defense counsel's request, the court then sequestered each juror from the jurors who had not yet been questioned.

All of the jurors affirmed that the alternate juror had been present in the jury room during deliberations. One juror recalled that the alternate did not participate in or say anything during deliberations; six jurors did not recall one way or the other whether the alternate participated in or said anything during deliberations; and five jurors recalled that the alternate did make comments or ask a question during deliberations, but none could recall anything specific that the alternate said. The foreperson and another juror told the trial court that the foreperson informed the alternate that he could not vote, and the 10 jurors who were asked affirmed that the alternate did not vote. All 12 jurors affirmed that the alternate juror's presence during deliberations did not influence their verdicts.

Appellant contended that the trial court erred in denying his “motion for mistrial.” The State argued that the issue was waived because appellant did not move for a mistrial at the first practicable moment, i.e., when defense counsel first discovered that the alternate juror had been present for deliberations. But, the Court stated, under these circumstances, a defendant cannot waive a complaint about this type of error by not moving for a mistrial because the alternate-juror issue only became known to the parties, and to the trial court, *after* a verdict was returned in the case, and a motion for mistrial after a verdict is rendered is improper. Instead, the proper vehicle for appellant's alternate-juror claim was a motion for new trial and here, appellant's counsel did file a motion for new trial within 30 days after the judgment, and later filed an amended motion for new trial that expressly raised the alternate-juror issue. Appellant therefore submitted a filing on the relevant issue within the time period that would have been required to file a valid motion for new trial. And the trial court ruled on the issue by denying the motion for new trial. Thus, the Court concluded, under these circumstances, appellant's alternate-juror claim was preserved for review.

Appellant argued that the presence of the alternate juror during deliberations violated OCGA § 15-12-171, resulting in a presumption of harm that the State cannot overcome because it was undisputed that the alternate remained with the jury throughout deliberations and that some jurors affirmed that the alternate participated in the deliberations by making comments or asking questions. The Court noted that under OCGA § 15-12-171, “[u]pon final submission of the case to

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the jury, the alternate jurors shall not retire with the jury of 12 for deliberation but may be discharged.” If the trial court deems it advisable to keep one or more of the alternate jurors available, however, “it may direct that one or more of the alternate jurors be kept in the custody of the sheriff or one or more court officers, separate and apart from the regular jurors, until the jury has agreed upon a verdict.” Id. Also, there is a rebuttable presumption of harm to the defendant if an alternate juror sits in on the jury's deliberations over the defendant's objections.

Citing *Johnson v. State*, 235 Ga. 486, 494-495 (1975), appellant further argued that, to overcome the presumption of harm, the State was required to prove that the alternate juror did not participate in deliberations, even if the evidence shows that the jury's verdict was not influenced as a result. Appellant contended that under *Johnson*, the State falls short of meeting its burden if it fails to present affirmative evidence that the alternate juror did not participate in deliberations and that the jury was not influenced by the alternate juror's presence. But, the Court stated, it does not read *Johnson* as effectively establishing a mandatory presumption of harm whenever the alternate juror merely “participates” in deliberations. Citing *State v. Newsome*, 259 Ga. 187 (1989), and *Eller v. State*, 303 Ga. 373, 379-380 (2018), the Court stated that the ultimate question is whether a verdict was influenced by the presence of an alternate juror.

The Court found that “[t]his makes good sense: where an alternate juror does not participate in deliberations and does not influence the verdict in any other way, then a defendant cannot suffer prejudice from the alternate's presence during jury deliberations; the ultimate question of influence on the verdict has been answered, and the presumption of harm has been rebutted.” But, the Court clarified, this same ultimate question of influence on the verdict may be answered if a trial court finds that the State met its burden of showing that no juror was influenced by an alternate juror's presence and the record supports that the finding is not clearly erroneous. Although an alternate's participation in deliberations is one type of evidence—and potentially a significant type of evidence—that is relevant to the question of influence, it is not the only or ultimate evidence that a trial court should consider in evaluating whether a violation of OCGA § 15-12-171 was harmless.

Therefore, the Court concluded, the State met its burden of proving that the presence of the alternate juror during deliberations was harmless error. Here, immediately after deliberations concluded and the verdict was returned, the trial court individually questioned the 12 regular jurors; it was undisputed that the alternate juror was informed he could not vote and that he in fact did not vote; and even among the five jurors who said that the alternate juror did make comments or ask questions during deliberations, none could recall anything that the alternate said. Moreover, all 12 of the jurors affirmed that the presence of the alternate did not influence their verdicts. Given this record, and in light of the legal standard it has clarified, the trial court did not err in refusing to order a new trial based on the presence of the alternate juror during deliberations.

In so holding, the Court disapproved any reading of *Johnson*, *Eller*, or any Court of Appeals opinion, including *Chandler v. State*, 309 Ga. App. 611, 614 (2011), and *London v. State*, 260 Ga. App. 780, 781 (2003), as holding that there is a per se requirement to prove that an alternate juror did not participate in deliberations in addition to not influencing the verdict.

## **Body Cameras; OCGA § 16-11-62 (2)**

*Solis-Machias v. State, A20A1502 (9/4/20)*

Appellant was convicted of one count of sexual battery and five counts of child molestation. The evidence showed that when he arrived at the family's apartment to investigate the victim's disclosure, the officer was wearing a body-camera, which recorded his encounter with appellant and his wife. And when asked at trial if he sought appellant or his wife's consent to record this interaction, the officer responded that he did not. Appellant then objected to the recording's admission, but the trial court overruled his objection, and the State then played the recording for the jury.

Appellant argued that the officer's body-camera recording of his investigation and the admission of that recording into evidence was prohibited by OCGA § 16-11-62 (2), which provides that “[i]t shall be unlawful for ... [a]ny person, through the use of any device, without the consent of all persons observed, to observe, photograph, or record the activities of another which occur in any private place and out of public view . . .” But, the Court noted, subsection (D) of this same statute provides “that it shall not be unlawful ... [f]or a law enforcement officer or his or her agent to use a device in the lawful performance of his or her official duties to observe, photograph, videotape, or record the activities of persons that occur in the presence of such officer or his or her agent . . .” Thus, to the extent that OCGA § 16-11-62 (2) could have been construed to apply to the actions of police officers making video recordings of others without their consent after being invited into someone's home, the legislature made clear that police do not have to obtain the consent of all parties being video recorded in a private place and outside of the public view when they record such persons in connection with their duties as police officers.

And here, the Court found, it was undisputed that the officer was recording his interaction with appellant and his wife as part of his official duties. Therefore, the recording was not prohibited by OCGA § 16-11-62 (2). Accordingly, the Court concluded, the trial court did not abuse its discretion in admitting the recording into evidence.

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

*Clarke v. State, A20A1013 (9/8/20)*

Appellant was convicted of two counts each of theft by receiving stolen property, OCGA § 16-8-7, and possession of a motor vehicle with identification removed, OCGA § 40-4-22. The evidence, very briefly stated, showed that in 2013, in response to a report from the Nat'l Ins. Crime Bureau, Barrow County law enforcement received and confirmed that a 2003 Infiniti G35 had a “cloned” vehicle identification number (VIN). The vehicle was reported stolen out of Gwinnett County and appellant was listed as the insured. Gwinnett police also identified two additional vehicles — a 2008 Lexus LX570 and a 2008 BMW 550i — were insured in his name. A Gwinnett County investigator checked the VINs on the Lexus and BMW 550i, and both “check digit[s] came back incorrect.” Both vehicles were also reported as stolen. Both vehicles had Pennsylvania tags and investigators subsequently discovered that both vehicles were registered in Pennsylvania, and that appellant had submitted paperwork to the PDOT for verification of the VINs on both vehicles. The paperwork submitted to the PDOT for each vehicle had a purchase date that preceded the date of theft.

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**CaseLaw** UPDATE

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Appellant first argued that the trial court abused its discretion in admitting, pursuant to Rule 404 (b), evidence of appellant's 2004 nolo contendere plea in Florida to second degree grand theft, criminal use of personal identification information, and possession of fictitious driver's license or identification card. The Court disagreed.

First, appellant pleaded not guilty and sought to refute the State's evidence of intent by claiming that the evidence showed that he had properly purchased, registered, insured, and titled the Lexus and BMW 550i, and legitimately financed the Lexus. By doing so, appellant put his intent at issue in this case. Second, contrary to appellant's contention that the prior crimes and the instant crimes were not sufficiently similar, all involved appellant acquiring or attempting to acquire high-end vehicles through the use of fraud or deceit. Finally, the crime was not too temporally remote in time to not be relevant.

Appellant also argued that the State's evidence of three other "stolen" vehicles also were improperly admitted pursuant to Rule 404 (b). As to the first vehicle – 2003 Infiniti G35 owned by appellant and found initially in a body shop in Barrow County – the Court found that Rule 404 (b) was not applicable. Specifically, evidence concerning the Infiniti was intrinsic because it explained how and why Gwinnett County officers were led to appellant, and what prompted them to suspect that appellant was in possession of two high-end stolen vehicles with altered VINs. Without such evidence, the jury would have been left to form their own story as to why Gwinnett County officers randomly appeared at appellant's home inquiring about his vehicles. Furthermore, although the evidence may have incidentally placed appellant's character at issue, its probative value was not substantially outweighed by the danger of unfair prejudice. Accordingly, the Court concluded, the trial court did not abuse its discretion in admitting the evidence.

As to the two other "stolen" vehicles, at trial the State advised the trial court that it planned to tender as evidence additional VIN correction forms submitted to the PDOT referencing a Toyota Camry and a BMW M5, which also showed appellant's knowledge and intent. The State argued that the documents were not Rule 404 (b) evidence, but simply part of the Gwinnett County investigation, and that the documents had been provided as part of discovery. The Gwinnett County investigator then testified that he received documents from the PDOT concerning two other vehicles owned by appellant, a Toyota Camry and a BMW M5.

The Court found that by arguing that he was simply an unwitting victim, appellant implicitly challenged his own knowledge that he retained the Lexus and BMW 550i despite knowing that they were stolen. Evidence that appellant submitted to the PDOT VIN verification/correction forms on two additional vehicles was relevant to the knowledge issue raised by appellant's defense, and established that appellant had submitted such forms in the past and in a state that did not require law enforcement verification of a VIN. Thus, the Court found no abuse of discretion in the trial court's determination that evidence of the other two instances appellant submitted VIN verification/correction forms to PDOT was relevant and admissible under Rule 404 (b).