

## THIS WEEK:

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## Jury Deliberations; Removal of Juror

*Heinze v. State, S20A1353 (12/7/20)*

Appellant was convicted of the malice murder of his father and seven other people. During jury selection, Juror 152, a retired federal law enforcement officer, disclosed a relationship between his daughter and appellant's family. Juror 152 stated that his daughter attended the same school as appellant, that she was his friend, that she was sad to learn about the killings for which he had been charged, and that she did not "understand how something like that could happen." Juror 152 indicated that his daughter had been afraid when she learned of the killings, but she said that she had never known appellant to be a violent person. Despite these disclosures, neither party moved to strike Juror 152 for cause or exercised a peremptory strike to remove him. He was seated as a member of the jury.

Thereafter, the State raised a number of concerns about the conduct and impartiality of Juror 152 during the course of the trial and the first two days of the jury's deliberations and moved three times to have Juror 152 excused. The trial court denied the State's motion each time. Later, in the early afternoon of the second day of deliberations, the court was informed that the jury had reached a unanimous verdict as to some counts, but that it was divided 9 to 3 as to other counts. After an inquiry, the trial court determined that the jury was not hopelessly deadlocked and ordered the jurors to continue deliberating. Later that evening, the court was informed that two jurors had concerns about the impartiality of Juror 152 and that there had been a "heated" conflict between Juror 152 and the foreman in the jury room. After bringing the jurors into the courtroom and conferring with the foreman about their progress, the court dismissed the jury for the evening. The following morning, the parties informed the court that they had reached an agreement to remove Juror 152 and replace him with the first alternate in exchange for the State's withdrawal of its notice of intent to seek the death penalty.

Appellant contended that, by accepting the parties' agreement, the trial court violated OCGA § 15-12-172 because it did not have the authority under that Code section to remove Juror 152. Appellant also argued that the removal of Juror 152 deprived him of his right to a fair and impartial jury and deprived Juror 152 of his right to serve as a juror. He also contended that the trial court's questioning of appellant about the agreement was inadequate to determine whether he knowingly and intelligently waived his right to have Juror 152 on the jury.

However, the Court stated, as appellant conceded at oral argument, by agreeing to the removal of Juror 152 in exchange for the State's agreement to withdraw its notice of intent to seek the death penalty against him, he invited the trial court's actions and therefore affirmatively waived any claim of error regarding the removal of Juror 152. The Court found that the record clearly showed that appellant consulted with his attorneys before entering into this agreement. Moreover, the trial court questioned appellant as to his knowledge and understanding of the agreement and whether he had consulted with his attorneys about the agreement, and the trial court gave appellant an opportunity to ask questions about the agreement. Furthermore, the Court noted, appellant pointed to no authority suggesting that the trial court was even required to make these inquiries of appellant personally in order to remove Juror 152 pursuant to the mutual agreement of the attorneys for the parties. Moreover, appellant failed to assert or present any evidence as to anything relating to the agreement that he did not know about or understand at the time he entered into it. Accordingly, the Court affirmed his convictions.

## Opinion Testimony; Rule 701

*Carter v. State, S20A1367 (12/7/20)*

Appellant was convicted of malice murder and two firearm offenses in connection with the shooting death of a grocery store owner. The evidence, briefly stated, showed that as the victim was closing his grocery store, two of his employees were outside, locking the store's door, while the victim was picking up trash in the parking lot. Appellant came around the side of the grocery store, ran into the parking lot, yelling "Don't move, don't move," while wearing a white t-shirt wrapped around his face and holding a gun in his hand. As the victim ran from appellant, appellant fired two shots from his weapon, killing the victim. The two employees subdued appellant after appellant dropped his pistol.

Appellant contended that his trial counsel rendered ineffective assistance by failing to object to the lay opinion testimony of an investigating officer. The State asked the officer if he compared the shoeprints found on the path leading to the grocery store parking lot with the Nike athletic shoes that appellant was wearing when he was arrested in the parking lot after the shooting. The officer stated, "Yes, sir. Visually, looking at the two side by side, there are a number of characteristics similar in the pattern of the shoe and in the pattern of the shoe impressions."

Appellant contended that his trial counsel should have objected to this evidence as improper lay witness testimony under OCGA § 24-7-701 (a). Specifically, appellant did not dispute that officer's testimony met the requirement in subsection (a) (1), as the testimony was "rationally based on [the officer's] perception" of the bottom of appellant's shoes and the shoeprints found at the crime scene. Rather, he argued that the officer's testimony did not satisfy subsection (a) (2) because the jury could have made its own comparison of appellant's shoes and the shoeprints. But, the Court found, the officer was in a better position than the jury to compare the shoeprints found at the scene to appellant's shoe treads, particularly because the jury was not shown any pictures of appellant's shoe treads and none were entered into evidence.

Appellant also argued, based on § 24-7-701 (a) (3), that this sort of testimony could be given only by a qualified shoeprint-identification expert. The Court disagreed. The kind of basic visual shoeprint comparison done by the officer did not require specialized knowledge. Thus, the Court concluded, an objection to the officer's testimony as improper lay witness testimony would have been properly overruled, and appellant's trial counsel did not perform deficiently by failing to make a meritless objection.

## Statements of Co-conspirators; OCGA § 24-8-801 (d) (2) (E)

*Golden v. State, S20A1273 (12/7/20)*

Appellant was convicted of felony murder for the death of Hawkins during an attempted robbery. The evidence, briefly stated, showed that appellant, his girlfriend Tillery, Walters, and Tillery's female friend Parks, planned to rob Hawkins, a drug dealer who was staying at a low-budget motel. Tillery exchanged text messages with Hawkins in which she made plans to meet up with him. Because Parks was someone who Hawkins would not recognize, she was directed by Tillery to go to Hawkins's room to inquire about purchasing marijuana while the others were parked nearby. Parks asked Hawkins about purchasing marijuana, then told him she would have to return with the money for payment. Golden and Walters then went to Hawkins's room. After confronting Hawkins, either Golden or Walters shot Hawkins one time, killing him. The two then fled.

Appellant contended the trial court erred in admitting the testimony of Parks about the text communications between Tillery and Hawkins. The Court disagreed.

The Court noted that although Parks did not see the text messages that Tillery exchanged with Hawkins, her trial testimony described the texts as part of the robbery set-up to learn Hawkins's location and when he would return to the motel. Appellant's counsel objected to Parks's testimony about Tillery's texts as hearsay, but the trial court overruled the objection on the ground that Tillery's description of the texts to Parks was the statement of a co-conspirator. Moreover, the trial court found, many of the statements were "deceptive in nature" and not offered for the truth of the matter.

The Court found that the testimony in question consisted primarily of Parks's recitation of questions she understood Tillery was asking Hawkins, in particular where he was and whether he had firearms. Thus, the Court found, even if these were statements by Tillery offered for the truth of the matter, the trial court did not err in concluding that they fell under OCGA § 24-8-801 (d) (2) (E), which provides that "[a] statement by a coconspirator of a party during the course of and in furtherance of the conspiracy" shall not be excluded by the hearsay rule.

The Court also noted that appellant made no argument as to why this exception did not apply, stating simply that the exceptions for prior witness statements and admissions by party-opponents (the latter of which encompasses statements by a coconspirator of a party in furtherance of the conspiracy) do not apply and that the trial court should not have allowed Parks's testimony about the texts. But, the Court stated, the trial court certainly could infer from the evidence that Tillery and appellant entered into a conspiracy to rob Hawkins and that Tillery's remarks to Parks about her texting with Hawkins were intended to apprise Parks of Hawkins's location so she could proceed to his motel room as part of the robbery plan. Therefore, the Court held, the trial court did not clearly err in concluding that the elements of the hearsay exception were met.

Furthermore, Parks also testified that Tillery told her that Hawkins said he was on his way back to his motel room. But that was not offered for the truth of the matter that Hawkins actually said that he was on his way back in his motel room, or was in fact on his way back. Rather, it was offered to explain why Parks then proceeded to Hawkins's motel room. It therefore was not hearsay and the trial court did not err in admitting it.

## **Voir Dire; Excusals**

*Lanier v. State, S20A1192 (12/7/20)*

Appellant was convicted of malice murder and other offenses. He contended that the trial court erred in excusing six potential jurors during voir dire. The Court disagreed.

The trial court may excuse a potential juror where the juror shows "good cause," OCGA § 15-12-1.1 (a), and the Court stated, it is well-settled that a trial court may excuse a potential juror for "good cause" if jury service would impose an undue hardship. Whether to excuse a juror for hardship lies within the trial court's discretion. Here, the Court found, the record reflected that the trial court excused five potential jurors for hardship after an individualized inquiry. Three of those excused for hardship had medical reasons, one was too distressed about her husband's recent death to serve, and one was a full-time caretaker for her grandmother who was in hospice. Thus, the Court determined, the trial court did not abuse its discretion in excusing these five potential jurors for hardship.

As for the sixth potential juror, the trial court excused him because he had known appellant's family for about 40 years and said that his relationship would create bias and impact the verdict. Although the juror said that he wanted to believe he could remain impartial, he consistently indicated that his preexisting relationship would color his evaluation of the evidence and witness testimony.

The Court stated that a trial court has broad discretion to determine a potential juror's impartiality and to strike for cause jurors who may not be fair and impartial. A conclusion on an issue of juror bias is based on findings of demeanor and credibility which are peculiarly in the trial court's province, and those findings are to be given deference by the appellate courts. Here, the prospective juror expressed bias for appellant based on his relationship. Thus, the Court found no abuse of discretion in the trial court striking this prospective juror for cause.

## **Impeaching Jury Verdicts; Character of Victim**

*Beck v. State, S20A1152 (12/7/20)*

Appellant was convicted of felony murder in connection with the shooting death of Liverpool. He argued that he was entitled to a new trial because jurors considered extrajudicial information regarding punishment to reach their verdicts. The Court disagreed.

The Court stated that OCGA § 24-6-606 (b) ("Rule 606 (b)") imposes a nearly categorical bar on juror testimony. Although a juror may testify to any facts bearing upon the question of the existence of any extraneous influence, the court may not inquire into the subjective effect of such information on the particular jurors. Information is deemed extraneous if it derives from a source external to the jury.

The Court found that based on the record, the trial court was entitled to conclude that any testimony suggesting that the jury received information about sentencing from an outside source was not credible. Although appellant pointed to the testimony of Juror C.C. that information about possible sentences "was given to us," the Court noted that she also testified that "nobody . . . brought it to court" and that she could not remember specifically what had happened. And although

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appellant argued that Jurors M.H. and A.J. corroborated C.C., the Court found that they testified, at most, that the jury discussed possible sentences, not that the jury received information about sentencing from an outside source. Therefore, the Court concluded, the trial court did not abuse its discretion in deciding that Rule 606 (b) forbade the use of the jurors' testimony about their deliberations to impeach their verdict.

Appellant also argued that the trial court erred by denying his request to admit specific instances of violent conduct by Liverpool, evidence about Liverpool's reputation, and evidence that Liverpool had violence-themed tattoos. The record showed that prior to trial, appellant filed a notice of intent to present evidence of various past acts of Liverpool, that he had a reputation for carrying a firearm, and that his nickname was "Killer." Trial counsel also proffered that Liverpool had "tattoos of no mercy" and "a tattoo of a gun or some other type of symbol, brandishing sort of how he carried himself." Following jury selection, the trial court ruled that the defense could not introduce prior acts of violence of Liverpool (except any involving violence against appellant); instead, the defense could introduce only evidence as to Liverpool's general reputation for violence. The court also ruled that the defense could not introduce evidence about Liverpool's tattoos unless the tattoos were visible at the time that he was killed.

The Court noted that under OCGA § 24-4-404 (a) (2), a defendant is permitted to introduce evidence of a "pertinent trait of character" of the alleged victim. However, under OCGA § 24-4-405 ("Rule 405"), such character traits generally may be proved only with "testimony as to reputation or testimony in the form of an opinion," OCGA § 24-4-405 (a), 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).

A victim's violent character is pertinent to, but not an essential element of, a defendant's claim of self-defense, so it generally may be proven only by reputation and opinion testimony. And the Court stated, although it has not yet decided whether, under the current Evidence Code, a victim's specific acts of violence of which the defendant had personal knowledge may be admissible to show the defendant's state of mind with respect to a claim of self-defense, something that federal courts have allowed, this case did not call on it to decide that issue.

Here, appellant provided notice of his intent to introduce two prior convictions of Liverpool, a conviction for carrying a firearm without a license and some other unspecified conviction apparently related to selling drugs. Appellant's counsel proffered to the trial court that appellant communicated with Liverpool while Liverpool was incarcerated, suggesting that appellant was aware of those convictions. But appellant made no particular argument that either of these convictions show "specific acts of violence" within the meaning of the federal case law. And, even assuming that the firearm possession conviction could constitute evidence of an act of violence, that evidence, along with any other evidence about Liverpool's violent character that appellant was precluded from introducing, was cumulative of the evidence about Liverpool that was introduced. Thus, the jury heard evidence that Liverpool went by the name "Killer" and had a reputation for being dangerous and carrying a firearm, as well as evidence of a prior incident at a bus stop two days before the shooting in which Liverpool flashed a pistol at appellant and made a threatening gesture. Moreover, there was testimony that Liverpool had a tattoo that said "no mercy." And both appellant and his girlfriend (who instigated the confrontation with Liverpool) testified to their belief that Liverpool was looking to harm appellant based on an incident in which appellant was accused of stealing a truck. Thus, the Court concluded, any error by the trial court in limiting evidence about Liverpool's allegedly violent character was harmless, as it was highly probable that any such error did not contribute to the verdicts.

## Relevancy; Hearsay

*Thrift v. State, S20A1182 (12/7/20)*

Appellant was convicted of felony murder in connection with the death of Rouse. The evidence, very briefly stated, showed that appellant and Rouse were cousins and best friends. In 1991, they worked together pouring concrete for appellant's father's company. Rouse was having an affair with Rhonda, appellant's wife. On May 10 1991, Rouse and Rhonda met at the home of a friend. That night, appellant, Rhonda and appellant were altogether at a party. But, appellant and Rhonda left shortly after arriving and headed home. Their babysitter, who slept on their couch that night, reported hearing Rhonda and appellant arguing during the night; being awakened later by a loud noise, perhaps the sound of a horn or a loud muffler; and seeing Rouse there when she woke up between 5:00 and 6:00 a.m.

Rouse never showed up for work that day and around 2 p.m. on the 11<sup>th</sup>, Rouse's car was discovered outside one of the entrances to the Okefenokee Swamp. The car's windows were rolled down, the ignition switch was in the on position, the battery was dead, and the car was out of gas. Rouse's family never saw or heard from him again. In the 20 years following Rouse's disappearance, appellant told a number of people on numerous occasions that he had killed Rouse by beating him and/or shooting him because Rouse was having an affair with Rhonda. Appellant said he then disposed of Rouse's body in the swamp, sometimes describing Rouse as "gator bait." Appellant was indicted almost 21 years after Rouse's disappearance.

At trial, the State introduced the testimony of Rouse's brother, Shannon, that Rouse had close ties to his large extended family, who all lived in the same area as Rouse at the time of his disappearance. Although Rouse spoke with his family regularly and customarily attended family events, his family had not seen or heard from him since May 11, 1991. Appellant's attorney objected on the ground that Shannon's testimony was irrelevant, prejudicial, and intended "to substitute sympathy for evidence" after the prosecutor asked Shannon about his mother and other family members who passed away in the years since Rouse's disappearance and whether Rouse had visited them during their extended illnesses or attended their funerals. The trial court overruled appellant's objections but later granted appellant a continuing objection to this line of testimony.

Appellant argued that the trial court erred by denying his counsel's repeated and continuing objections to the State's introduction of irrelevant testimony regarding personal matters involving Rouse's family in an attempt to incite the passions of the jury. But, the Court found, the State had the burden of showing that Rouse is dead, that his death was caused by violence or the direct criminal agency of another human being, and that appellant caused the death in the manner charged. In the absence of a body, the State was forced to present other evidence to carry this burden. Thus, the Court concluded, Shannon's testimony regarding Rouse's 20-year absence; his lack of communication with his family, with whom he had previously shared close relations; and his failure to attend family events he usually attended in the past had the tendency to make the fact of Rouse's death (as opposed to his voluntary disappearance, as the defense contended) more probable, and thus it was relevant within the meaning of Rule 401 to a fact that was of consequence to the case. Additionally, although Shannon testified to a number of family events that occurred over the 20-year period for which Rouse was absent, his testimony merely recited the events and did not belabor them or address the emotional impact of Rouse's absence on the family. Accordingly, the Court found that under these circumstances, there was no abuse of discretion in the trial court's determination that the probative value of Shannon's testimony was not outweighed by the danger of unfair prejudice.

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Appellant also argued that the trial court erred by denying his motions under OCGA § 24-8-807 (“Rule 807”) to introduce evidence of out-of-court statements given to law enforcement by two witnesses he asserted were unavailable for trial. The Court disagreed.

The record showed that prior to trial, appellant filed a notice of intent under Rule 807 to introduce evidence of the first witness's unsworn, out-of-court statement given to law enforcement on May 15, 1991, that between 9:30 and 10:30 p.m. on May 11, 1991, when the witness was working at a convenience store in Florida, she spoke to a young, male customer. The young man said that he had worked nearby pouring concrete foundations for the apartments under construction down the road from the store. The witness told police that she later recognized the man as Rouse after seeing a missing person poster in the store window. The witness did not know Rouse, and thus she did not know he was a concrete worker. The trial court conducted a pretrial hearing on the admissibility of the witness's statement and later heard argument on the issue during trial before ruling that the evidence was not admissible.

The Court found that appellant failed to show the requisite guarantees of trustworthiness to support the statement's admission. The witness's statement was given to, and put in written form by, law enforcement. In that statement, the transcribing officer noted that law enforcement had investigated the witness's information—including by showing Rouse's picture to workers at the apartment construction site, where no one recognized Rouse—but had been unable to corroborate it. Although appellant pointed to other circumstances—the witness's apparent lack of interest in the matter, the temporal proximity of the statement to Rouse's disappearance, and the statement that the man said he had poured concrete despite the witness's apparent unfamiliarity with Rouse's work history—to argue that the statement was trustworthy, the Court concluded that, considering the totality of the circumstances, the trial court was authorized to find that these factors alone did not provide sufficient guarantees of trustworthiness to support the statement's admission.

Appellant also filed a notice of intent under Rule 807 to introduce the statement of a second witness, after introducing her obituary to show she was deceased. This witness made her statement in a 1997 interview with law enforcement, in which she said that on one occasion, when she and her then-husband were at her house drinking beer with a friend, the friend stated that he and another man killed Rouse “and fed him to the gators.” During the pretrial argument addressing this matter, appellant's counsel represented that he intended to call the friend who made this claim as a witness at trial not for the purpose of showing the truth of the statement but only to show that someone else made wild statements about Rouse. Appellant's counsel said that he only intended to introduce the witness's statement if the friend denied telling the witness that he killed Rouse. The trial court reserved ruling on the admissibility of the witness's statement until after the friend testified. After further discussion at trial regarding the admission of this evidence, the trial court ruled, without explanation, that the witness's statement was inadmissible.

The Court noted that appellant pointed to no facts or circumstances surrounding this witness's statement that he contended provide guarantees of its trustworthiness, and he failed to demonstrate at trial that the witness's statement was more probative than other evidence that he could produce at trial for the stated purpose of showing that someone other than appellant made a drunken boast about killing Rouse. Accordingly, the Court concluded that the trial court also did not abuse of discretion in excluding this witness's statement.