

THIS WEEK:

- **Video Recordings; OCGA § 16-11-62 (2) (B)**
- **Motions to Withdraw Guilty Pleas; Trial Court Jurisdiction**
- **Motions for Mistrial; Court Orders**
- **Closing Arguments; Judicial Intervention**
- **Jury Instructions; Gang Affiliation**
- **Motions for Mistrial; Rule 403**

Video Recordings; OCGA § 16-11-62 (2) (B)

Nuckles v. State, 20G0492 (12/21/20)

Appellant was charged with depriving Dempsey, an elder person, of essential services and concealing his death. The evidence showed that the 89-year-old Dempsey was a resident of a rehab facility. After he complained to his son that strange things were going on at night and that he was missing his hearing aids and other personal items, his son installed a video surveillance camera, concealed in a four- to five-inch-square alarm clock. The camera recorded “24/7” in five-minute increments onto a memory card.

Prior to trial, appellant filed a motion to suppress the video recording pursuant to OCGA § 16-11-67, which provides: “No evidence obtained in a manner which violates any of the provisions of this part shall be admissible in any court of this state except to prove violations of this part.” The State argued in response, however, that the video recording was admissible because it fell within the exception set forth in OCGA § 16-11-62 (2) (B) (the “Security Exception”), which provides that it is not unlawful “[f]or an owner or occupier of real property to use for security purposes, crime prevention, or crime detection any device to observe, photograph, or record the activities of persons who are on the property or an approach thereto in areas where there is no reasonable expectation of privacy[.]” After the trial court denied the motion following an evidentiary hearing, the Court of Appeals granted appellant’s motion for interlocutory review and affirmed the trial court’s ruling. The Court then granted appellant’s petition for writ of certiorari.

The Court stated that the text of the Security Exception sets out the following requirements for its application: (1) the video recording must be made by “an owner or occupier of real property;” (2) “to use for security purposes, crime prevention, or crime detection;” (3) with a device “to observe, photograph, or record the activities of persons who are on the property or an approach thereto;” (4) in an area “where there is no reasonable expectation of privacy.” OCGA § 16-11-62 (2) (B). Appellant first contended that the phrase “owner or occupier of real property,” regardless of its context, is a legal term of art referring only to a person who has ultimate control over the property and is responsible for its maintenance, protection, and guests. Because Dempsey had no such control of, or responsibility for, the rehab facility property, appellant argued that he was not an owner or occupier of real property and the Security Exception does not apply. The Court disagreed.

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Giving the phrase “occupier of real property” its natural, ordinary meaning in the context of the statute, the Court concluded that appellant’s proposed definition was too narrow, as it limits the phrase’s meaning to only someone with control and responsibility for the real property and excludes anyone who otherwise has the legal right to stay on, or lawful possessory rights in, the property. Instead, the Court interpreted the term “occupier of real property” as used in OCGA § 16-11-62 (2) (B) to be broad enough to encompass someone like Dempsey, who had the legal right to occupy, and indeed reside in, the area captured on the video recording. The evidence at the hearing showed that Dempsey’s son signed paperwork in connection with Dempsey’s admission to the rehab facility, and the facility received payment for the services and accommodations it provided to Dempsey, both from insurance and from his family. Dempsey moved into the facility on February 7, 2014, and stayed in the same room until his death on February 27. He stored his personal items in the room, including clothes, toiletries, a blanket, and photographs. Under these circumstances, Dempsey must be considered an occupier of real property within the meaning of the Security Exception, with the authority to conduct video surveillance for the purposes listed in the exception “in areas where there is no reasonable expectation of privacy.”

Nevertheless, appellant argued, Dempsey’s room *was* an area where there was a reasonable expectation of privacy, and thus the Security Exception does not apply to the video recording in this case. Specifically, appellant contended that “a reasonable expectation of privacy” should be determined by the “area” or place where the recording is made, not by the personal expectation of privacy of any individual in that location, and she asserted that a patient’s room is clearly a place where there is a reasonable expectation of privacy. The Court again disagreed.

Instead, the Court concluded, the reasonable expectation of privacy under the Security Exception must be considered in light of the *individual expectations* of the persons in the area where the video recording occurred and not, as appellant argued, solely based on a classification of that area. This determination must be made based on the timing and circumstances under which the individual was recorded. Therefore, courts must consider an individual’s status in relation to the location, as one person present in a particular area may have a reasonable expectation of privacy, while another person may not. Also, whether an individual has a reasonable expectation of privacy may depend on factors such as the conduct occurring, or other people present, at the time of the recording.

Therefore, the Court stated, regardless of whether Dempsey or others had an expectation of privacy in the area recorded, it must determine whether appellant had a reasonable expectation of privacy in that area at the time of the recording. And here, the Court found, Dempsey’s room was part of appellant’s workplace, and although courts have recognized that under the Fourth Amendment, within the workplace context, employees may have a reasonable expectation of privacy against intrusions by police, the recognition of such a reasonable expectation of privacy generally has been limited to areas over which an employee had exclusive authority, including areas where an employee kept his or her personal belongings. Thus, the question of whether, under the Fourth Amendment, an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis, considering the operational realities of the workplace.

The Court found that the evidence presented at the hearing demonstrated that appellant never exercised exclusive control over Dempsey’s room and never used it for personal reasons. She testified that she did not pay any rent for the use of the room; she never slept or changed clothing there; she never used Dempsey’s bathroom; and she never kept her personal items in his room. Instead, it appeared that appellant was engaged in her work duties at the time the recording was made, and there was nothing to suggest that she would not have been subject to supervision or observation by other rehab facility employees in the performance of her duties. In fact, appellant was charged along with two other co-defendants who

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apparently also were in Dempsey's room at the time of the video recording. Under these circumstances, the Court concluded that the State carried its burden of showing that appellant had no reasonable expectation of privacy in the area captured on the video recording at the time she was recorded, and thus, the trial court properly denied her motion to suppress.

Motions to Withdraw Guilty Pleas; Trial Court Jurisdiction

Flanders v. State, S20C0464, S20G0464 (12/21/20)

Appellant pled guilty to one count of aggravated assault and two counts of cruelty to children in the first degree. She was sentenced on December 19, 2017. On January 5, 2018, she filed a motion to withdraw her guilty plea alleging ineffective assistance of counsel. On February 20, 2018, and outside the term of court in which she entered her plea and filed her original motion, she amended her motion to allege that the State violated its obligations under *Brady* because the State failed to disclose the existence of a taped interview with the victim wherein the victim had denied that appellant injured her. After the trial court denied the motions, the Court of Appeals held that the trial court lacked jurisdiction to consider the *Brady* claim because the amended motion was filed outside the term of court in which appellant had entered her guilty plea, even though the original motion was timely filed within the term of court in which the plea was entered. See *Flanders v. State*, Case No. A19A0908, 352 Ga. App. XXIV (October 8, 2019) (unpublished). Appellant then filed a petition for writ of certiorari with the Court.

The Court noted that in finding that the trial court did not have jurisdiction to consider appellant's *Brady* claim, the Court of Appeals relied on *Matthews v. State*, 295 Ga. App. 752, 754 (1) (2009). But, relying on its recent decision in *Gray v. State*, ___ Ga. ___, 2020 Ga. LEXIS 746, *6, (Case No. S20G0192, decided Oct. 19, 2020), the Court stated that our courts have long applied the common-law rule that the trial court has the inherent authority to modify a judgment within the term of court and that a motion made during the term serves to extend the power to modify. With respect to a motion to withdraw a guilty plea, no statutory authority prohibits a defendant from amending outside the term of court a proper motion to withdraw a guilty plea that was filed within the term of court in which the conviction was entered. In fact, no statute sets forth the procedures by which a motion to withdraw a guilty plea may be entertained by the trial court after a sentence has been pronounced. Thus, the general common-law rule applies to a motion to withdraw a guilty plea.

The Court also found that the holding in *Matthews* is contrary to its holding in *Gray* and *McKiernan v. State*, 286 Ga. 756, 757 (2010). The Court also stated that the holding in *Matthews* conflicts with those cases in which the Court has urged defense counsel to preserve their clients' post-conviction remedies by filing "placeholder motions" that may be amended later by new counsel. See e.g. *Dos Santos v. State*, 307 Ga. 151, 159 (5) (2019). Therefore, the Court overruled *Matthews*.

Accordingly, the Court granted the petition for a writ of certiorari, vacated the Court of Appeals' opinion, and remanded the case to the Court of Appeals so that it may address appellant's claim that the trial court erred in declining to address the *Brady* claim raised in her amended motion to withdraw her guilty plea.

Motions for Mistrial; Court Orders

Lynn v. State, S20A1533 (12/21/20)

Appellant was convicted of malice murder and aggravated assault. He contended that the trial court erred in denying his motion for a mistrial when the State elicited testimony referencing a polygraph test in violation of a pretrial agreement between the parties. The Court disagreed.

The transcript showed that the prosecutor asked a detective about appellant's interview in 2011 after he was arrested. In response to a question about who initiated the interview, the detective replied, "I started it because he had asked to speak with me by myself. He actually had a polygraph scheduled for that day, as well." Appellant objected and moved for a mistrial. The trial court denied the motion and issued a curative instruction instead, telling the jury that a polygraph test was offered to appellant, he agreed to take it, the test was never administered, and the jury was to disregard any mention of the test and not consider it in its deliberations.

The Court stated that when prejudicial matter is improperly placed before the jury, a mistrial is appropriate if it is essential to the preservation of the defendant's right to a fair trial. But a trial court can negate the potentially harmful effect of improperly introduced evidence by prompt curative instructions rather than by granting a mistrial. Whether to grant a mistrial is within the trial court's discretion, which an appellate court will not disturb unless there is a showing that a mistrial is essential to the preservation of the right to a fair trial.

The Court found that even assuming that the detective's non-responsive and passing reference to a polygraph was prejudicial, any prejudice was low given that the trial court informed the jury that appellant had agreed to take a polygraph but there were no results, either positive or negative, to report. And the trial court's prompt curative instruction negated any prejudice by telling the jury to disregard the reference, an instruction that the Court presumed the jury followed. Accordingly, there was no abuse of discretion in denying Appellant's motion for a mistrial.

Appellant also contended that the trial court's order denying his motion for new trial should be vacated for lack of adequate findings and the case remanded for more detailed findings. Specifically, he argued that, in the absence of detailed findings, the Court could not conduct a meaningful review of the claims raised in his motion, especially his claims of ineffective assistance of counsel. But, the Court stated, it is well-settled that a trial court is not required to issue written findings of fact and conclusions of law when deciding a motion for new trial. And this principle applies no differently when a motion raises claims of ineffective assistance of counsel. Accordingly, the Court declined to vacate and remand for a more detailed order.

Closing Arguments; Judicial Intervention

Knighon v. State, S20A1195 (12/21/20)

Appellant was convicted of malice murder and possession of a knife during the commission of a felony in connection with the stabbing death of Harris. The evidence, very briefly stated, showed that appellant was 16 years old and Harris was 18 years old. They agreed to fight after appellant accused Harris of lying about where Harris lived. After the fight appeared to

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end, Harris apparently pulled out a pocket knife. The fight resumed as appellant tried to take the knife away from Harris. Harris was stabbed to death by appellant.

During closing arguments, the trial court interrupted appellant's counsel when counsel told the jury that the State had to prove that appellant brought the knife to the fight. The court told the jury this was not true and after a brief bench conference, gave a curative instruction. When defense counsel again made a similar argument, the trial court again interrupted and again gave a similar curative instruction.

Appellant argued that the trial court committed plain error by essentially instructing the jury to ignore evidence that Harris brought the knife to the fight and attacked appellant with it. He asserted that the court's first instruction told the jury to focus only on the moment of the stabbing and that the second instruction said that how appellant got the knife was irrelevant. The Court disagreed.

The Court found that the trial court's first instruction was prompted by defense counsel's argument that "the State has to prove that [appellant] brought the knife to the fight and it was his knife." But, as appellant conceded, that assertion was a misstatement of the law, because the State was not required to demonstrate that appellant owned the knife used in the killing or brought that knife to the fight in order to disprove beyond a reasonable doubt his claim of self-defense. Although at a trial the State must disprove a defendant's claim of self-defense beyond a reasonable doubt, there is no requirement that the State prove its case with any particular sort of evidence. In fact, the Court noted, in many cases, a defendant has been found guilty of murder and the conviction upheld on appeal even when there was some evidence that he disarmed the victim and then used the victim's weapon in self-defense.

And although the trial court could have dealt with counsel's misstatement in a number of ways, the court was authorized to interrupt his closing argument to prevent his continuing to misstate the law and to correct any confusion that he may have caused the jury. The trial court then explained that the jury would have to make a determination of whether appellant acted in self-defense "[a]t the moment of the stabbing," and that a finding that Harris brought the knife to the fight would not end that determination. Those were accurate statements of the law. Even if the jury found that Harris brought a knife to the fight, in order to determine that appellant acted in self-defense, the jury would have to find — among other things — that he reasonably believed that it was necessary to defend himself against Harris's "imminent use of unlawful force." OCGA § 16-3-21 (a) (emphasis added). Thus, the trial court correctly instructed the jury to determine whether appellant acted in self-defense at the time of the stabbing. And although appellant argued otherwise, nothing in this instruction told the jury to disregard evidence pertaining to the time before and after the stabbing. The court instead properly directed the jury not to confine its determination of self-defense to the issue of whether Harris brought the knife to the fight. Accordingly, the Court found no obvious error in the first instruction.

However, the Court stated, a closer question was presented by the trial court's second instruction, which was given in response to defense counsel's contentions that the State was required to show that appellant "had a knife," that the case "turn[ed] on" how appellant got the knife, and that the State knew that how appellant got the knife was "the most critical point in the whole case." Although the latter two statements were not improper when considered in isolation, the first statement essentially repeated the argument that the court had already correctly deemed inappropriate.

Unlike the first instruction, which the trial court gave after time for reflection during a bench conference with counsel, this time the court immediately said, “[I]t doesn't matter how [appellant] got the knife, it's when the stabbing occurred, was [he] justified in using self defense,” and “It's not how he got the knife ... is everybody clear on that?” The court's statement about the knife not “matter[ing]” incorrectly suggested that all of the evidence about how appellant got the knife was irrelevant, and the court's asking if the jury was “clear on that” emphasized that point. The Court found those parts of the instruction to be inartful, but viewed in light of the instruction that preceded them and the jury instructions as a whole, the Court concluded that they did not rise to the level of obvious or harmful error.

Moreover, during its final charge of the jury after the closing arguments, the trial court fully and accurately instructed on justification, self-defense, no duty to retreat, and excessive force. The jury was therefore fully informed that it was to consider all of the circumstances and evidence in the case. Thus, the trial court's statement about the knife not “matter[ing],” when evaluated in the context of the first instruction and the charge as a whole, did not create a clear and obvious error beyond reasonable dispute with respect to the jury's understanding that it was to consider all of the evidence presented at trial in determining whether appellant acted in self-defense when he fatally stabbed Harris. And, for the same reasons, appellant failed to show that, but for the trial court's isolated improper statement, there was a reasonable probability that the outcome of the trial would have been more favorable to him. Accordingly, appellant did not meet his high burden of establishing plain error.

Jury Instructions; Gang Affiliation

Armstrong v. State, S20A1364 (12/21/20)

Appellant was convicted of malice murder. At trial, the State was permitted under Rule 404 (b) to introduce other acts evidence of appellant's gang affiliation to prove motive. Appellant argued that the trial court committed plain error when it charged the jury without giving an instruction that the evidence of appellant's gang affiliation was admitted for the limited purpose of proving motive. The Court disagreed.

The Court stated that even assuming that the trial court's failure to give a limiting instruction was clear error, appellant could not establish that the error affected his substantial rights because he could not show that the error probably affected the outcome of his trial. Appellant made only conclusory arguments about harm. The Court noted that throughout his brief, he acknowledged that the gang evidence “featured prominently in” and “was naturally a major component of” the State's theory of the case. And the Court found, the record bore this out; the State's theory was that gang membership motivated appellant's actions. The State relied heavily on this theory in both opening and closing arguments. The challenge for appellant's argument was that the limiting instruction he contended should have been given would have told the jury that motive was a proper purpose for which the jury could consider the gang evidence.

But, the Court found, appellant's only response to this point was conclusory statements and bald assertions that the jury may have used the gang evidence to form negative conclusions about appellant's character and convicted him on that improper ground. But given how the State used the evidence regarding motive, and given that appellant did not contend that the State made any improper arguments regarding the evidence, the Court found any such possibility to be too speculative and remote. After factoring in the considerable damage to appellant from the properly admitted gang-affiliation

evidence, any additional prejudice that may have resulted from the trial court's failure to provide the limiting instruction was so minimal that it did not change the outcome of appellant's trial.

Motions for Mistrial; Rule 403

Thomas v. State, S20A1187 (12/21/20)

Appellant was convicted of malice murder and other crimes in connection with the shooting deaths of two victims at a nightclub. The evidence showed that appellant cut off his ankle monitor, went to the nightclub, shot the two victims and later fled to South Carolina where he was eventually arrested.

During trial, the State informed the trial court and defense counsel that deputies had reported that Toni Stagers, who had no connection to appellant but had apparently driven one of the defense witnesses to court and had been sitting behind the defense table in the courtroom, had been going in and out of the room where witnesses were sequestered. At a sidebar conference, the State asked to examine Stagers in front of the jury. The trial court allowed the State to question Stagers outside the jury's presence and then, over defense counsel's objection, in front of the jury. Her testimony was similar both times: she had been seated behind the defense table and had gone into the witness room after every witness finished testifying, but had not told any of the witnesses about the testimony. However, a corporal, who provided security for the courthouse, testified that he saw Stagers enter and exit the courtroom and that he saw Stagers in the witness room facing one of the witnesses and heard her say, "That's not what she said at that time."

After the corporal was cross-examined, the evidence was closed, the jury was excused for the day, and the State requested a jury charge on violation of the rule of sequestration. Appellant's counsel objected to any instruction, arguing that there was no evidence that appellant had anything to do with what Stagers said, and moved for a mistrial on the sole basis of Stagers's testimony. The trial court denied the motion and ultimately decided not to give the requested charge. Defense counsel later renewed his motion for mistrial, arguing generally that appellant had been prejudiced. The trial court denied the motion on the basis that Stagers's testimony was necessary for the jury to determine whether she influenced or collaborated with defense witnesses.

Appellant argued that the trial court erred in denying his motion for mistrial after a courtroom spectator was permitted to testify in front of the jury. But, the Court stated, a motion for mistrial must be promptly made as soon as the party is aware of the matter giving rise to the motion. If the defendant did not make a contemporaneous motion for a mistrial at the time the defendant became aware of the matter giving rise to the motion, then the defendant has waived review of this issue on appeal. And here, instead of moving for a mistrial when Stagers testified, appellant cross-examined Stagers and waited until another witness testified and the evidence was closed, the jury was excused for the day, and the State requested a charge on violation of the rule of sequestration before moving for a mistrial. Because appellant's motion for mistrial was not made contemporaneous with the testimony that he complained about, the issue of whether the court abused its discretion in denying his later motion for mistrial was not properly before the Court for review.

The record showed that while appellant was in jail, he shared a pod with Dasmine. Dasmine wrote three letters from the jail to the prosecutor's office regarding appellant's involvement in the shooting. Dasmine testified that he did not seek a deal to testify nor did the district attorney's office offer him a deal. He then testified that appellant admitted he shot "Little

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Kenny and Jabrial or something like that”; told Dasmine there was a video that showed appellant running away but did not show his face; and said, “No face, no case.” Dasmine also testified that appellant said he cut off his ankle monitor and went to North Carolina or South Carolina after the shooting.

Appellant objected to Dasmine's testimony on the ground that “its probative value is far outweighed by its inherent prejudice,” arguing that no party asked Dasmine to testify; rather, he asked to be allowed to testify. The State proffered that Dasmine had written letters to the district attorney with information about the case, that Dasmine was interviewed, and that he gave more details than the police had publicized. After noting that the State did not plant an inmate in appellant's cell in an attempt to procure a confession, the trial court ruled that the probative value of Dasmine's testimony was “not substantially outweighed by any unfair prejudice.” Appellant argued that Dasmine's testimony was unfairly prejudicial because it did not include certain information, such as what type of gun was used, whether appellant went to North Carolina or South Carolina after the shooting, and other facts that were not included in news stories; because of evidence that Dasmine had an altercation with two of appellant's friends; and because of the general unreliability and bias of jailhouse informants.

The Court noted that appellant's objection at trial was based on OCGA § 24-4-403 (“Rule 403”). Under Rule 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. There is no mechanical solution for this balancing test, and that in each case, a trial court must undertake a considered evaluation of the proffered justification for the admission of such evidence and make an independent determination of whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. In reviewing issues under Rule 403, the Court looks at the evidence in a light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact. Decisions regarding relevance are committed to the sound discretion of the trial court, and the exclusion of relevant evidence under Rule 403 is an extraordinary remedy that should be used only sparingly.

Here, the Court found, although appellant's appellate argument was couched in terms of unfair prejudice, he primarily focused on minimizing the probative value of Dasmine's testimony. But the circumstances on which appellant relied—including the absence of certain details and Dasmine's altercation with appellant's friends—did not undermine the probative value of his confession. Instead, they concern witness credibility—but Dasmine's credibility, which was a question exclusively for the jury, was indeed properly placed before the jury through his direct and cross-examination at trial. And appellant's general attack on the testimony of jailhouse informants as a class of evidence is not itself a reason to exclude Dasmine's testimony. Dasmine's testimony about appellant's confession—whether credible or not—was undoubtedly probative. And although this evidence was inherently prejudicial—as all confessions are—nothing suggested that it was unfairly prejudicial. Thus, the Court concluded, the trial court did not abuse its discretion in admitting the confession.