

THIS WEEK:

- **Voir Dire; Untruthful Responses**
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Voir Dire; Untruthful Responses

Strickland v. State, S20A1476 (3/1/21)

Appellant was convicted of malice murder and armed robbery. After the hearing on his amended motion for new trial, appellant filed a supplement to that motion to which he attached 16 text messages that were exchanged after the trial between juror E. H. and appellant's girlfriend, Hubble. Appellant argued to the trial court that the text messages showed that E. H. had failed to acknowledge during voir dire that she knew appellant and that she knew about the case. Appellant did not provide affidavits from Hubble or E. H., nor was any testimony later obtained from them. In its response, the State did not contest the authenticity of the text messages but contended that they failed to support the grant of a new trial.

The record showed that during voir dire, the judge asked the potential jurors to raise their hands if any of them had formed an opinion about the guilt or innocence of the accused, if any of them were prejudiced or biased for or against the accused, and if any of them had read or heard about the case. E. H. did not raise her hand in response. The prosecutor then asked, among other questions, if any of the potential jurors "know [appellant], know who he is, know of him, know his family . . . from any source." E. H. did not respond to the question. Appellant argued that the trial court erred in denying his motion because during voir dire juror E. H. intentionally lied about her knowledge of the parties, facts, and witnesses to the case.

The Court stated that appellant is not entitled to a new trial solely because a juror gave an incorrect response during voir dire; rather, to secure a new trial, a defendant must show that the juror failed to answer the question truthfully and that a correct response would have been a valid basis for a challenge for cause. The determinative question, therefore, is whether there existed bias on the part of the juror which results in prejudice to the defendant.

And here, the Court found, even assuming that E. H. had been familiar with appellant, Hubble, and a key witness, or any of them, at the time of trial, appellant failed to show that if E. H. had responded truthfully during voir dire, such familiarity would have required her dismissal for cause. A juror's knowledge of, or non-familial relationship with, a witness, attorney, or party provides a basis for disqualification only if it is shown that it has resulted in the juror having a fixed opinion of the accused's guilt or innocence or a bias for or against the accused. As the trial court found, appellant did not show that E. H. had such a fixed opinion or bias for or against appellant. To the contrary, E. H.'s texts were consistent with her having voted to convict on the basis of the evidence presented at trial, despite any familiarity with appellant or the witnesses, and appellant presented no other evidence that E. H. was biased against him at the time of trial. Accordingly, the Court found no error.

Jury Charges; Evidence of Gang Membership

Jones v. State, S20A1245 (3/1/21)

Appellant was convicted of murder in connection with a shooting that killed Hill and wounded three others. The evidence, briefly stated, showed that appellant and his brother, Price, came to Georgia to attend a car show. After the show, a large crowd gathered at a gas station to continue the festivities. Price was standing in the middle of the crowd, smiling and holding a beer, while engaging in a low-key argument with someone. Appellant was standing near Price in a calm manner, not saying anything. As the argument with Price appeared to intensify, Hill suddenly came from the side and punched or shoved Price, who fell back toward appellant. Immediately, appellant pulled out a gun and started firing at Hill, killing him and wounding three bystanders. The events were caught on video which was shown at trial.

Appellant contended that the trial court erred when it denied his request to instruct the jury on the defense of justification. Specifically, he argued, the trial court erroneously failed to provide: that a person may be justified in using force to defend himself or a third person if he reasonably believes such force is necessary; that the State must disprove a justification defense beyond a reasonable doubt; and that a person who is not the aggressor is not required to retreat before using force in self-defense. However, the Court stated, it did not need to decide whether the trial court erred when it refused to provide these requested instructions, because any such error was harmless. The test for determining whether a nonconstitutional instructional error is harmless is whether it is highly probable that the error did not contribute to the verdict.

Here, the Court found, to the extent there was any evidence supporting a charge on defense of self or a third person, it was meager at best. Our law makes clear that the use of *deadly* force to defend oneself or another person is justified only if a person reasonably believes that such force is necessary to prevent death or great bodily injury or to prevent the commission of a forcible felony. The jury saw the video recording depicting appellant opening fire, amidst a crowd of people talking, dancing, and mingling, the moment after Price was shoved or punched. Nothing in the video suggested that either Price or appellant was in such danger that appellant "reasonably" believed it was necessary to immediately fire his gun at Hill, much less to fire it in such a manner as to injure multiple bystanders. And while appellant argued that there was an air of tension between the Florida men and the local residents and that there was some evidence of gang affiliations among members of the crowd, he offered no evidence that he himself observed or perceived any threat, gang-related or otherwise, that would have justified the use of deadly force. Accordingly, the Court concluded, it was highly probable that the jury's verdict was unaffected by any error in the trial court's refusal to give all of appellant's requested instructions.

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Appellant next argued that his counsel rendered ineffective assistance by failing to discover and present evidence that Hill and other individuals were gang members. The Court noted that at trial, in her opening and closing remarks, appellant's counsel argued that several people seen in the video standing at the periphery of the crowd and wearing red hoodies were members of the Bloods gang, which presented a threat to appellant and his group. But, aside from testimony that some people at the gathering were flashing gang signals, the defense presented no evidence that any of the attendees was a gang member. In addition, the State countered the defense's argument with evidence that the red clothing merely represented the colors of local high school.

At the motion for new trial hearing, appellant (through new counsel) presented the testimony of a private investigator who testified that she discovered a number of photographs on social media showing Hill posing with other people, wearing red clothes or red bandanas, and making certain hand signs. These photos (16 in total) were introduced into evidence at the hearing. Appellant also presented the testimony of a crime intelligence analyst, who was tendered without objection as an expert on gangs. This witness testified that the red clothing and bandanas and the hand signs seen in the photos showed an association with the Bloods gang; that, in gang culture, if anyone shows disrespect to even a single gang member, the entire gang will "respond in force"; and that a gang member's failure to respond to disrespect, especially in public, will be perceived as a weakness that warrants punishment. On cross-examination, the expert acknowledged that his opinion about Hill's gang affiliation was formed solely from the social media photos and that he had never talked to appellant nor seen the video or any other evidence in the case.

Appellant argued that the photographic evidence of Hill's gang membership was necessary to support his defense of justification — to give the jury a full picture of the threat appellant and his associates faced from the crowd and to counter the State's argument that the red clothing seen in the video merely represented the colors of the local high school. However, the Court stated, the mere fact that this evidence might have been marginally helpful in establishing facts that the defense elicited other evidence to establish was not sufficient to render trial counsel's performance in this regard deficient. Deficiency cannot be demonstrated by merely arguing that there is another, or even a better, way for counsel to have performed.

And here, the Court found, this was particularly true given that the evidence appellant contended counsel should have discovered would have offered only minimal additional support for his self-defense theory. No evidence was presented at trial or the motion for new trial hearing that appellant knew Hill or believed that he was a gang member, and there was no evidence showing that any of the people depicted in the photos with Hill were present at the scene of the shooting, that those people were the same individuals seen in the video wearing red clothing, or that the red clothing seen in the video was in fact associated with the Bloods gang. Thus, given the marginal probative value of the photos, trial counsel could not be deemed deficient for failing to discover them. For the same reasons, it was highly unlikely that the evidence in question, even if admitted, would have persuaded the jury that appellant was justified in shooting Hill, and thus, appellant failed to show prejudice as well.

Statements; *Miranda*

Gaddy v. State, S21A0334 (3/1/21)

Appellant was convicted of felony murder and related crimes in connection with the three-year-old victim that was in his care. The relevant facts showed that a detective arrived at the hospital and located appellant. He read appellant his *Miranda* rights. Appellant indicated that he understood his rights and agreed to speak with him. Appellant stated that he was 20 years old and had completed high school; he did not appear to be intoxicated or otherwise incapacitated. The detective denied offering any benefit or threatening appellant in any way. After speaking for about ten minutes, there was a ten to twenty minute break when a doctor came into the room to provide an update on the child's condition. When the interview resumed, the detective asked appellant if he remembered the *Miranda* rights, and appellant confirmed that he did. Because appellant's explanations did not match up with the victim's reported injuries, the detective requested that they go to the police station to continue speaking. Appellant then threatened to kill himself, so the detective placed him in handcuffs, and officers transported appellant to the station. Because it had been less than an hour since the initial interview, instead of rereading the *Miranda* warnings, the detective asked appellant if he remembered the *Miranda* rights that had been read to him at the hospital, and appellant confirmed that he did and agreed to continue speaking about the events that led to the victim's injuries. Appellant never asked for an attorney nor showed any reluctance to speaking with the detective. At the police station, appellant made incriminating statements.

Appellant contended that the trial court erred in denying his motion to suppress his custodial statements because he was not fully informed of his *Miranda* rights at the police station. The Court disagreed.

The Court noted that appellant did not dispute that the detective properly read him his *Miranda* rights before he was first questioned at the hospital. Nonetheless, appellant argued that, because he was not in custody at the time the detective initially read the *Miranda* warnings, the detective was required to repeat the warnings once appellant was in custody at the police station. But, the Court stated, neither federal nor Georgia law mandates that an accused be continually reminded of his rights once he has intelligently waived them. Thus, when conducting a follow-up interview or a continuation of a previous interview, a reminder of *Miranda* rights may be permitted in place of a complete restatement. Even where, as here, the interviews took place in two different locations, conducting interviews in multiple places does not require repeating *Miranda* warnings at each location. Accordingly, the Court concluded, the trial court did not err in admitting the statements at trial.

Sufficiency of the Evidence; Violations of the Street Gang Act

Butler v. State, S20A1297, S20A1298 (3/1/21)

Appellants Butler and Avery were tried jointly and convicted of murder, Violations of the Street Gang Act, and other offenses in relation to the killing of Jordan and the wounding of his brother, Chad. Briefly stated, the evidence showed that the brothers met Clarissa McGhee and Nashea Poole on a dating website and invited the women to the brothers' sister's residence. According to Chad, McGhee and Poole gave "unusual" responses when asked about where they lived, and they were noticeably inquisitive about the layout of the house, trying at one point to go upstairs. The women also went outside several times, expressing curiosity about the dog in the backyard, and were on their phones texting throughout the visit. After approximately an hour, Jordan decided to take the women to his house and prepared to leave. At this point,

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appellants came in through the back door and shot the two brothers. Chad made his way to the garage, where he found McGhee. Chad yelled at and began chasing McGhee, who pulled out a gun, pointed it at Chad, and then fled. Chad survived, but Jordan died of his wounds.

Appellants argued that the State failed to prove that the shootings were committed with an intent to further the interests of a gang, relying heavily on the fact that McGhee testified that there was no plan to commit the shootings and that the incident was unrelated to their gang. However, the Court stated, where there is other evidence supporting an inference that criminal conduct was committed with the intent to further the interests of a gang, a witness' disavowal of such an intent does not necessarily compel a finding that such intent was lacking. For example, evidence of a defendant's association with a gang and participation in its activities before and during the crimes charged may provide the required nexus between his criminal acts and the intent to further the gang's interests. And here, there was evidence that the gang used prostitution and robbery of "johns" to finance the gang and that the shootings resulted from that sort of activity. Likewise, discussions between fellow gang members after the charged crimes, which may include attempts to avoid getting caught, may offer further evidence of a nexus between the crimes and the gang's interests.

Here, the Court found, the evidence showed that appellants were high-ranking members of the Bloods criminal gang, which McGhee and Poole had joined as well; the Luciano Bloods, an organized subset of the Bloods that Butler had helped establish, had a history of violent criminal activity; and the Luciano Bloods employed prostitution as a primary means of funding its operations and had in the past used women to lure "johns" to rob them. Additionally, McGhee and Poole connected with the victims through a dating website they used to set up prostitution meetings; appellants were present with the women immediately before and after the shootings and were in communication with them throughout the period during which the shootings took place; and following the shootings, appellants discussed the crimes with the women and warned them not to talk to the police. Viewed as a whole, the Court concluded that this evidence was sufficient to establish a nexus between the charged crimes and an intent to further the gang's interests, and, accordingly, the evidence was sufficient to authorize a rational trier of fact to find that appellants violated the Street Gang Act.

Nevertheless, Butler contended, the trial court erred in admitting evidence of his gang participation and the other gang-related testimony. Specifically, he argued that he was charged with the Street Gang Act violation purely to justify the admission of inflammatory gang-related evidence and thereby enhance the chances that the jury would convict him of the other charged crimes. However, the Court held, as the grand jury returned an indictment charging a violation of the Street Gang Act, the State was merely executing its duty to "prosecute all indictable offenses." OCGA § 15-18-6 (4). And the Court noted, it concluded that the evidence was sufficient to support his conviction for this offense. Therefore, this enumeration of error had no merit.

Butler next argued that under Rule 403, the gang evidence should have been excluded because its highly prejudicial nature substantially outweighed its probative value. The Court disagreed. While gang evidence may be prejudicial, it is only when unfair prejudice substantially outweighs probative value that Rule 403 permits exclusion. And here, the Court found, the gang evidence was not just highly probative but indeed necessary to prove several of the essential elements of the Street Gang Act offense — the existence of the gang, Butler's participation therein, and the nexus between the crimes and the gang's interests. Moreover, the exclusion of evidence under Rule 403 is an extraordinary remedy, which should be used only sparingly, and the balance should be struck in favor of admissibility. Accordingly, the Court found no abuse of discretion in the trial court's decision to admit the gang evidence.

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Co-Conspirator Statements; Accomplice Testimony

Finney v. State, S20A1469 (3/1/21)

Appellant, a drug dealer, was convicted of felony murder and other offenses based on the fatal shooting of Cole, the mother of one of his rivals. The complicated facts, very briefly stated, showed that in the Fall of 2007, someone broke into appellant's home and stole about \$30,000 in cash, 300 pounds of marijuana, and two kilograms of cocaine. On November 9, 2007 a rifle, which appellant purchased a couple of days earlier, was used to shoot up the home of Recardo Jackson house on Sylvester Circle. On January 20, 2008, Barnes, who was carrying a rifle, went to a house on Lawton Avenue, looking for appellant. Appellant was there, shooting started, but no one was hurt.

During a Super Bowl party in February 2008, appellant accused Rose of robbing him and threatened Rose's mother. The following day, Marlon heard that someone shot up drug houses belonging to him and his brothers. Later, Rose went looking for appellant and found him at a house owned by Spradley. Appellant was with Marlon at the time. Rose did a drive-by shooting at the house. That night, Cole, Rose's mother, heard a knock on her door. She went to the door and the person asked for Rose. When she stated he was not there, appellant and Marlon opened fire on the house, killing her.

Appellant contended that the testimony of Marlon's former prison-mates, Wright and Williams, recounting what Marlon told them about Cole's murder was inadmissible hearsay. The trial court admitted this testimony over appellant's hearsay objection, ruling that Marlon's statements were admissible under OCGA § 24-8-801 (d) (2) (E), the hearsay exception for statements made by a co-conspirator to further the conspiracy during its concealment phase. The Court noted that at the time of Marlon's statements, he and appellant had not yet been charged with crimes related to Cole's murder, and it may have been that their alleged conspiracy to commit those crimes was still in its concealment phase. In any event, however, there was no indication that Marlon was sharing details of those completed crimes to advance the interests of that conspiracy when he spoke to two inmates who had no other apparent connection to Marlon, appellant, their criminal scheme, or even the state of Georgia. Instead, Marlon's statements worked against the concealment of the conspiracy: they merely "spilled the beans," disclosed the scheme, and informed the listeners of the declarant's activities. Thus, the Court found, trial court's finding that Marlon's statements furthered the conspiracy was unsupported by the record, and the court therefore abused its discretion by admitting Wright's and Williams's testimony under OCGA § 24-8-801 (d) (2) (E).

Next, appellant contended, because Marlon's statements were (improperly) admitted at trial and the evidence clearly supported a finding that Marlon was an accomplice in the charged crimes, the trial court should have given the jury an instruction about the requirement of accomplice corroboration. The Court agreed. The trial court not only failed to inform the jury of the accomplice-corroboration requirement, but also instructed the jury that "[t]he testify [sic] of a single witness if believed is sufficient," and "[g]enerally there is no legal requirement of corroboration of a witness." The trial court therefore erred in instructing the jury as to how it could consider Marlon's statements admitted through Wright's and Williams's testimony.

Finally, appellant argued, the trial court erred in admitting evidence of the Sylvester Circle shooting and the Lawton Avenue incident pursuant to OCGA § 24-4-404 (b) ("Rule 404 (b)"). The Court again agreed. At trial, the State tried to link the two prior incidents to the charged crimes by arguing that appellant acted in the prior incidents and in the charged shooting with the same motive — revenge for the break-in and robbery at his house. However, the Court found, the

evidence failed to connect either prior incident to the break-in. Instead, the Court found, the motive that the State really ascribed to appellant based on these incidents was the generic motive that he regularly engages in violent acts against others, and that is not a proper purpose under Rule 404 (b).

The Court then engaged in a cumulative effect of errors analysis. After reviewing the evidence in great detail, the Court stated that when it weighed the substantial prejudicial impact of the erroneously admitted evidence along with the clearly erroneous jury instructions against the less-than-overwhelming properly admitted evidence of appellant's guilt, the trial court's errors likely affected the outcome of appellant's trial and seriously affected the fairness, integrity, or public reputation of the judicial proceedings. Thus, under all of the circumstances of this case, the Court concluded that it did not have confidence that without the trial court errors, the outcome of appellant's trial would have been the same. Accordingly, appellant's convictions were reversed.

Statements; Jury Charges

Volkova v. State, S21A0006 (3/1/21)

Appellant was convicted of murdering her husband. The record showed that prior to trial, appellant filed a motion to suppress her statement, and a *Jackson-Denno* hearing was held. During this hearing, appellant's trial counsel conceded that appellant's interview was non-custodial, stating, "It's purely voluntariness to be [determined]. She was not in custody. So issues that deal with custodial interrogation are really not before the Court." After considering the evidence, the trial court ruled that appellant was not in custody at the time that the statement was given and that her statement was admissible.

Appellant contended that the trial court erred in denying her written request to charge the jury on the entirety of Georgia Suggested Pattern Jury Instructions, Vol. II: Criminal Cases § 1.32.21, an instruction regarding the manner in which a jury should consider statements made by a defendant. Specifically, she argued that the charge, as given by the trial court, omitted custody as an issue to be determined by the jury and failed to inform the jury that a knowing and voluntary waiver of her *Miranda* rights was a mandatory prerequisite to the jury's consideration of her statement to police, rather than a discretionary consideration. The Court disagreed.

The Court stated that determining the voluntariness and, consequently, the admissibility of a defendant's statement in a criminal case, is a two-step process. Initially, the trial court addresses the issue outside the presence of the jury and, if the statement is determined to be voluntary, it is admitted for the jury to make the ultimate determination as to its voluntariness and, thus, its probity as inculpatory evidence. But, if the trial court determines that the defendant was not in custody when the pre-arrest statement was made, it is not proper to instruct the jury that the protections of *Miranda* apply to that statement. This concept is reflected in Georgia Suggested Pattern Jury Instructions, Vol. II: Criminal Cases § 1.32.15, which states: "If the court determines the defendant is/was in custody, the court should give voluntariness and *Miranda* charges. If the court determines the defendant is/was *not* in custody, *the court should give the voluntariness charges only.*" (Emphasis supplied.)

And here, the Court found, the trial court, after conducting a proper *Jackson-Denno* hearing and review, made the necessary factual findings to determine that appellant was not in custody at the time she made her statement. In fact, appellant conceded that she was not in custody. Therefore, all facts and circumstances relating to the issue of custody had been

determined by the trial court and conceded by appellant prior to trial. Accordingly, the trial court appropriately gave voluntariness charges only. Furthermore, the Court stated, an instruction treating appellant's statement as custodial and requiring the jury to find a waiver of *Miranda* rights, as appellant requested, would have been *incorrect* under the law, so the trial court did not err by rejecting it.

Intrinsic Evidence; Voir Dire

McKelvey v. State, S20A1548 (3/1/21)

Appellant was convicted of the murder of Owens. The evidence, very briefly stated, showed that Owens had two brothers, Gregory and Mungin. In 2009, appellant was convicted of three counts of terroristic threats in which one of the victims was the mother of Gregory's children. On April 22, 2014 appellant met the brothers and told them that they "owed" him money or drugs for what happened in 2009, blaming Gregory, in particular, for appellant's arrest, incarceration, and inability to get a job. On April 24, appellant shot and killed Owens.

Appellant argued that the trial court abused its discretion by admitting into evidence his 2009 convictions for terroristic threats because they were not admissible as intrinsic evidence or to prove prior difficulties with the Owens brothers or motive under OCGA § 24-4-404 (b). The Court disagreed. The evidence relating to appellant's 2009 convictions pertained to the chain of events explaining the context, motive, and set-up of the crime and was reasonably necessary for the State to complete the story of the crime to the jury. This evidence helped to explain why the April 22 altercation between appellant and the Owens brothers occurred and how the altercation established a motive for appellant's shooting of Owens on April 24.

Nevertheless, appellant contended, the 2009 incident was not intrinsic to the charged crimes because it was too remote in time and did not specifically involve the brothers. The Court again disagreed. While it is true that whether evidence is linked in time and circumstances with the charged crime is pertinent to the intrinsic-evidence analysis, there is no bright-line rule regarding how close in time evidence must be to the charged offenses, or requiring evidence to pertain directly to the victims of the charged offenses, for that evidence to be admitted properly as intrinsic evidence. And here, the Court concluded, the 2009 convictions were sufficiently linked to Owens's shooting and thus, the trial court did not abuse its discretion in admitting this intrinsic evidence in this case.

Next, appellant contended that the trial court erred by granting the State's motion to strike Jurors 31 and 48 for cause over his objection. The record showed that during voir dire, when the prosecutor asked if any of the panel members knew appellant, Juror 31 stated that he was friends with appellant in middle school. When asked whether he would "be able to set that relationship aside and decide this case based on the evidence that's presented," Juror 31 answered, "No." Similarly, Juror 48 stated that she had gone to middle school with appellant. When asked if she would "be able to set that relationship aside," Juror 48 said, "I don't want to do it." When the prosecutor asked Juror 48 a second time whether she thought she would be able to set the relationship aside, Juror 48 replied, "No sir. Oh, no, sir." Neither the prosecutor nor defense counsel asked any further questions in an attempt to rehabilitate the jurors.

The Court found that the trial court did not abuse its discretion by striking Juror 31 based on his statement that he would not be able to set aside his relationship with appellant and decide the case based on the evidence presented. Likewise, the

trial court did not abuse its discretion by striking Juror 48 based on her statement indicating that she would not be able to set aside her relationship with appellant.

Motions for New Trial; Newly Discovered Evidence

Swinson v. State, S21A0396 (3/1/21)

Appellant was convicted of malice murder of Bennett and Smith. Very briefly stated, the evidence showed that appellant stored a vehicle containing \$100,000 in money and drugs at a friend's house. Someone broke into the vehicle and stole the money and drugs. Appellant threatened to kill whoever did it. A friend told appellant that Bennett and Smith were the thieves. Appellant asked for their address, which the friend provided. Bennett and Smith lived in a neighboring county. Cell-site data tracked appellant and his son, Jamahrey, to the home of Bennett and Smith on the day of the murders. Alva, a neighbor of the victims, saw two men at the victim's home and testified that one of them "definitely could be" appellant. At trial, appellant claimed that "Mexicans" killed the victims.

Jamahrey was indicted separately from appellant in connection with the murders. After appellant was convicted of the crimes, Jamahrey entered into a plea agreement in which he pleaded guilty to concealing the death of another and was sentenced to five years of probation. Jamahrey made an allocution in connection with that plea, and appellant called Jamahrey as a witness at the hearing on his motion for new trial. Jamahrey testified that during his plea allocution, he said that he was the man Alva saw on the day of the murders and that while he was interacting with her, he heard a gunshot. However, when questioned further, Jamahrey stated that he did not stand by the testimony he gave during his allocution; rather, he said his testimony at the plea hearing consisted of what his lawyer and the district attorney told him to say. Then, after the trial court advised Jamahrey that he could be subject to a felony charge of perjury if he changed the testimony he previously gave under oath, Jamahrey chose to assert his right against self-incrimination under the Fifth Amendment in response to any further questions about the circumstances surrounding the crimes.

Appellant contended that this newly discovered evidence from Jamahrey's plea hearing contradicted Alva's in-court identification of him. He argued that the trial court therefore erred in denying his motion for new trial because a substantial likelihood of a different verdict exists if the jury had heard and considered Jamahrey's evidence. The Court disagreed.

Citing *Timberlake v. State*, 246 Ga. 488, 491 (1) (1980), the Court stated that for a new trial based on newly discovered evidence, the defendant must show: (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that the evidence is so material that it would probably produce a different verdict; (4) that the evidence is not cumulative only; (5) that the affidavit of the witness himself was procured or its absence accounted for; and (6) that the only effect of the evidence will not be to impeach the credit of a witness. And here, the Court found, appellant made no effort to show how Jamahrey's testimony fits within these requirements. Specifically, at a minimum, appellant could not establish the third *Timberlake* factor, requiring that the evidence be so material that it would probably produce a different verdict. Even if the jury accepted as true Jamahrey's testimony that he was the man Alva saw that day and that he heard a gunshot while in her presence, that evidence does not undermine the State's theory of the case. In fact, this testimony would be consistent with the cell phone evidence showing that appellant and Jamahrey traveled together on the day of the murders and the neighbor's testimony that two men were present at the victims' home that day. Moreover, in light of this evidence, Jamahrey's testimony raised an

inference that appellant, not Jamahrey, shot the victims. Accordingly, the Court found no merit to appellant's argument on this ground.

Character of the Victim; Rule of Completeness

Gialenios v. State, S20A1196 (3/1/21)

Appellant was convicted of malice murder and possession of a firearm during the commission of a felony. Very briefly stated, the evidence showed that Bryan and Kerri Overseth had been married for 16 years and lived in Montana. Kerri met appellant online and the two established a long-distance romance while the Overseths were living in Montana. Kerri came to Georgia in October 2016 to visit her sick father. Appellant lived in a neighboring county. The two met and had sexual relations. Kerri told appellant that she was unhappy with her marriage and appellant told her that if she slept with her husband again, he would kill them both. Appellant was very unhappy when Kerri returned to her husband. In November 2016, Kerri told appellant she was pregnant and he became angry because it meant she had sex with Overseth despite his earlier threat to kill them both.

In December 2016, the Overseths came to Georgia for an extended visit. On Friday, January 20, 2017, Kerri told appellant that she was planning on returning to Montana with her husband and children. On Saturday, they texted frequently with appellant stating that Kerri was his “Queen” and that it was just him and her together. That night, when Overseth went out to walk the dog, he never returned. He was later found dead from a bullet to the head.

Appellant contended that the trial court abused its discretion in limiting the cross-examination of Kerri and her oldest son, Brendan, about whether Overseth had emotionally abused Kerri and tricked or forced her into intercourse, resulting in her pregnancy. The transcript showed that the State called Brendan, who testified that his mother married Overseth when he was three years old and that he treated Overseth as his father. Brendan testified that he moved out of the house when he was 18 as a result of conflicts with Overseth, and that his parents' marriage was “rough at times.” Asked by the prosecutor if he had told police investigators that “there were times in the past when [he] had wished that [Overseth] were dead,” he acknowledged that he had said that to members of his family but did not recall if he had said that to the police. His memory was refreshed with his transcribed statement to the police, and he acknowledged that he had made that statement.

On cross-examination, Brendan was asked if his mother ever confided in him, and he testified that Kerri told him that Overseth was “verbally abusive.” He agreed that he had stated in the past that he would like to beat Overseth or kill him. Asked if Kerri confided any details of her sex life to him, Brendan responded, “Not like in to[o] great detail.” He then was asked if Kerri told him “that she believed that [Overseth] raped her?” The State immediately objected, and a conference was held outside the presence of the jury. The defense contended that Brendan's testimony regarding his mother's marriage had opened the door to asking Brendan about whether his mother ever told him that the unborn child was a “rape baby” and argued that the “rule of completeness” in OCGA § 24-8-822 demanded that Brendan's entire police interview come into evidence. The trial court ruled that any such statement was hearsay not subject to an exception, that it was not relevant to any issue in the case, and, finally, that “the prejudicial effect . . . far outweighs any probative value of this,” and instructed the jury to disregard the question.

The Court stated that since the enactment of Georgia's current Evidence Code, admissibility of evidence of a victim's character is now governed by OCGA §§ 24-4-404 (a) (2) and 24-4-405 (a), which generally limit evidence of a victim's character to reputation or opinion and not specific bad acts. Moreover, even relevant evidence may be excluded if the trial court finds that "its probative value is substantially outweighed by the danger of unfair prejudice." OCGA § 24-4-403 ("Rule 403"). Even assuming without deciding that the testimony appellant sought to elicit from Brendan was in any way relevant and was not excludable as hearsay, the Court agreed with the trial court that the evidence was not probative and was overly prejudicial to Overseth by suggesting that he was deserving of death, whether at the hands of appellant or someone else. And, particularly after permitting Brendan to testify about Overseth's verbal abuse of Kerri and in light of its ruling permitting appellant to examine Kerri regarding the circumstances of her pregnancy, the trial court did not abuse its discretion in prohibiting reference to the terms "rape" or "rape baby."

Nevertheless, relying on the "rule of completeness" in OCGA § 24-8-822, appellant contended that once Brendan referred to his statement to the police to refresh his recollection, appellant should have been allowed to cross-examine Brendan with regard to his entire statement, including his alleged mention of Kerri's "rape baby" remark, and that appellant also should have been able to cross-examine Kerri with regard to whether she made such a statement. The trial court noted appellant' assertion of the rule of completeness but concluded that the remark's prejudicial effect outweighed its probative value, if any.

But, the Court stated, assuming without deciding that the matter sought to be introduced by appellant falls within the scope of OCGA § 24-8-822, the trial court did not abuse its discretion. The rule of completeness prevents parties from misleading the jury by presenting portions of statements out of context, but it does not make admissible parts of a statement that are irrelevant to the parts of the statement introduced into evidence by the opposing party. It permits introduction only of additional material that is relevant and is necessary to qualify, explain, or place into context the portion already introduced. Here, Brendan's statement to the police was not introduced into evidence or published to the jury; indeed, it did not even appear in the trial record. Brendan simply refreshed his recollection from the statement with regard to what he had told the police and then testified based on his recollection of the events in question. Similarly, while Kerri testified to telling appellant about her pregnancy, no evidence was introduced of any statement by her with regard to a "rape baby," and Kerri did not testify about making such a statement. The wording and context of this alleged remark was not part of the trial record, and thus, the Court held, it could not say that the trial court abused its discretion in ruling that the remark was not necessary to qualify, explain, or place into context any statement.