

THIS WEEK:

- Ineffective Assistance of Counsel; State's Closing Arguments
- Plain Error; Strategic Decisions
- Other Acts; Intrinsic Evidence
- Search & Seizure; Exigent Circumstances
- Continuances; *Brady* Material

Ineffective Assistance of Counsel; State's Closing Arguments

Crawford v. State, S21A0638 (9/21/21)

Appellant was convicted of felony murder and related offenses. The evidence, very briefly stated, showed that appellant, Flowers and others were waiting in a car while the driver was in a house making a drug deal. The victim was walking home from work. Appellant and Flowers, each with a gun, got out of the car and attempted to rob the victim. The victim was pistol-whipped and then Flowers shot him.

At appellant's request, involuntary manslaughter (based on affray, simple battery, and simple assault) was listed on the verdict form as a lesser included offense of the murder counts. During closing argument, the prosecutor discussed the involuntary manslaughter charge, arguing that the jury should find appellant not guilty of that unindicted offense because the evidence showed that he and co-defendant Flowers were intentionally attempting to rob the victim at gunpoint when the fatal shooting occurred. The prosecutor then said if the jury filled the verdict form out wrong, appellant "gets off, it's called a technicality." Appellant's trial counsel did not object at the time. However, the next day, after jury instructions were given, counsel argued that the prosecutor's statement that if appellant was convicted of involuntary manslaughter, he would "go free" was a mischaracterization of the law, and they asked the trial court to clarify that a guilty verdict on any of the crimes "is a conviction and there is no going free." The judge then brought the jury back into the courtroom and advised them, without objection: "One thing I wanted to tell you is that involuntary manslaughter, as well as all of the other charges on the indictment[,] are all felony charges. There was some dispute as to whether he would be getting off or something, but they're all felony charges and you need to be aware of that."

Appellant contended that his trial counsel provided ineffective assistance by failing to object to the prosecutor's assertion in closing argument that if the jury found him guilty of involuntary manslaughter, he would "get away." The Court found that the prosecutor's argument was obviously improper, and appellant's trial counsel should have objected immediately. But appellant did not show that this deficient performance likely affected the outcome of his trial. Although the prosecutor's comments were not immediately corrected, the trial court specifically advised the jury the next morning that involuntary manslaughter is a felony charge and appellant would not be "getting off," and the jury continued to deliberate for about four and a half hours after receiving that instruction. Also, before deliberations began, the jurors were instructed on how to consider the involuntary manslaughter charge and told that the court would instruct them on the law and that

they should not concern themselves with punishment. Moreover, there was little if any evidence of involuntary manslaughter, so the jury was unlikely to find Appellant guilty of that offense regardless of the prosecutor's misstatement. Accordingly, appellant's claim of ineffective assistance of counsel failed.

Plain Error; Strategic Decisions

Washington v. State, S21A0829 (9/21/21)

Appellant and his two co-defendants were convicted of malice murder, first degree burglary and related crimes. He contended that the trial court committed plain error by admitting surveillance videos from a Best Western. The Court disagreed.

Here, appellant specifically argued the State's use of a business record certification was not sufficient to authenticate the surveillance videos and that the trial court therefore committed plain error by admitting the evidence without further authentication. However, the Court found, appellant was unable to satisfy the first prong of the plain error test. In his opening statement at trial, appellant's counsel admitted that his client was at the Best Western hotel and explained that the State would probably introduce surveillance footage showing that appellant was there, but claimed that the State would not be able to show that appellant was at or near the scene of the crime. This opening statement was consistent with appellant's defense theory — that he went to the hotel in South Carolina but did not travel with his co-defendants to Atlanta — and with his co-defendant's testimony that appellant stayed behind at the hotel when he and the third co-defendant went to Atlanta because appellant was ill.

In evaluating the first prong of the plain error test, a strategic decision to refrain from objecting may constitute the equivalent of an affirmative waiver. And based on the circumstances of this case, the Court stated that it was clear that appellant strategically and intentionally refrained from objecting to the admission of the surveillance video and instead sought to incorporate it into his defense theory. Thus, appellant intentionally relinquished any claim that the trial court erred in admitting this evidence, and consequently, the trial court did not plainly err.

Other Acts; Intrinsic Evidence

Johnson v. State, S21A0807 (9/21/21)

Appellant was convicted of the malice murder of Burke, the felony murder of Cornelius, and other crimes in connection with a shooting incident at a "gambling house" on August 13, 2013, and the aggravated battery of Rayner in connection with another shooting at a restaurant a week later. Evidence was presented that appellant was a member of the Atlanta Blood Gang ("ABG"), an affiliate of the Bloods gang. The State also presented evidence that around 8:30 p.m. on August 12, about three-and-a-half hours before the gambling house shootings, another shooting incident occurred on Boulevard Place in Atlanta. A responding police officer testified that two men were shot. Neither of the victims could identify who had shot them, but a woman at the scene called out to the officer, "It was a silver Ford Taurus."

Appellant argued that the trial court abused its discretion by ruling that evidence related to the shootings on Boulevard Place was admissible as intrinsic evidence. The Court stated that evidence is admissible as "intrinsic" evidence when it is (1) an uncharged offense arising from the same transaction or series of transactions as the charged offense; (2) necessary to

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complete the story of the crime; or (3) inextricably intertwined with the evidence regarding the charged offense. In applying this test, evidence pertaining to the chain of events explaining the context, motive, and set-up of the crime is properly admitted if it is linked in time and circumstances with the charged crime. In addition, intrinsic evidence must satisfy OCGA § 24-4-403.

Here, the Court noted, appellant was charged with participating in criminal street gang activity, and the State's theory was that he was involved in the gambling house shootings (with a Bloods gang affiliate and several unidentified assailants) and the restaurant shooting (with several unidentified assailants) as part of his "work" for the Bloods-affiliated gang ABG. The evidence related to the Boulevard Place shootings added significant weight to that theory, because that evidence was linked in time and circumstances with the charged crimes and one victim was a member of a rival gang. Most significantly, the ballistics evidence from the Boulevard Place crime scene linked the gambling house and restaurant shootings to each other and to the ABG gang. A .40-caliber and .45-caliber handgun used during the gambling house shootings were also used in the Boulevard Place shootings, as was a .45-caliber handgun used during the restaurant shooting, which another ABG member was carrying when he and appellant were arrested together less than a week after the restaurant shooting. In addition, the Boulevard Place shootings occurred just a few hours before the gambling house shootings and about a week before the restaurant shooting. The Boulevard Place, gambling house, and restaurant incidents each involved multiple assailants working together to shoot the victims; the assailants used a silver Ford Taurus during both the Boulevard Place and gambling house shootings; and the gang expert's testimony indicated that the three incidents were related to ABG's gang activity.

Thus, the Court found, even though the State did not charge appellant in connection with the Boulevard Place shootings, evidence of that incident was relevant to disputed issues in the case. And because the Boulevard Place evidence pertained to the chain of events in this case by connecting the gambling house and restaurant incidents to each other and to appellant and by indicating that these incidents were related to the ABG gang, the evidence was reasonably necessary to complete the story of the crimes for the jury and therefore intrinsic to the crimes charged.

Turning to the analysis under Rule 403, the Court found that the evidence of the Boulevard Place incident had significant probative value. The State needed evidence to show the connection between appellant, his gang membership, and the charged crimes. Only one eyewitness identified appellant as a shooter at the gambling house, and appellant argued at trial that the identification was not credible; A gang affiliate with appellant at the gambling house recanted his police interview statement that appellant was at the gambling house that night; and another witness testified that he merely "believe[d]" that appellant was the tall man shown on the restaurant parking lot surveillance recordings. The evidence that appellant was involved in the restaurant shooting was entirely circumstantial. And the only evidence that the gambling house and restaurant incidents were committed to benefit the gang was the gang expert's rather conclusory testimony. Although the State presented evidence that appellant was a member of ABG, during his police interview, he denied being in a gang and denied any involvement in the gambling house shootings. Beyond linking the guns used in the gambling house and restaurant shootings, the evidence of the Boulevard Place shootings (which had a more obvious gang-related motive) tended to prove appellant's motive and helped the State explain why appellant committed crimes with groups of unidentified assailants against victims to whom he had no apparent connection.

The Court determined that the evidence of the Boulevard Place incident was also prejudicial, as is all inculpatory evidence, but in light of its significant probative value, it was not a matter of scant or cumulative probative force, dragged in by the

heels for the sake of its prejudicial effect. Moreover, the prejudicial effect of the Boulevard Place evidence was mitigated by the trial court's instruction limiting the jury's consideration of the evidence. Although the Boulevard Place evidence was intrinsic to all of the crimes charged, the trial court instructed the jury before the evidence was presented and again during the final charge that the evidence could be considered only to prove the count of participating in criminal street gang activity and not for any other purpose. Also, the Court found, any prejudicial effect was reduced by the prosecutor's acknowledgment during her opening statement that the State would not prove that appellant was present during the Boulevard Place incident. Accordingly, the Court found no abuse of discretion in the trial court's implicit conclusion that the probative value of the Boulevard Place evidence was not substantially outweighed by its prejudicial effect.

Search & Seizure; Exigent Circumstances

Tidwell v. State, S14A0739 (9/21/21)

Appellant was convicted of malice murder and aggravated battery. Appellant argued that the trial court erred by denying her motion to suppress evidence obtained at the crime scene after officers' initial warrantless entry into the mobile home, arguing that there were no exigent circumstances that would have excused officers from obtaining a search warrant. The Court disagreed.

The evidence showed that three officers responded to the initial 911 call. One of the officers testified that he got information from dispatch concerning an anonymous call "that there's possibly a body at an abandoned [mobile home] somewhere off of Pea Ridge Road." The caller did not give an address but did provide a description of the property. Based upon the officers' prior dealings with the area, they determined that the tipster was referring to the victim's mobile home. The mobile home was familiar to officers because they had responded to previous calls at that residence for "verbal disputes" including "a lot of yelling and arguing." Another officer testified that, "with the information we have, we are there to render aid if someone is in there and still alive. So our main priority is to render aid if we can."

When officers arrived, they knocked on the door and announced who they were but received no answer. At that time, officers noticed that the front door was unsecured and that there were pry marks around the door handle. They opened the front door and announced themselves again but received no response. Officers checked the residence and observed a large pile of blankets in the corner of the kitchen. When they moved one of the blankets, officers saw a human leg with obvious signs of lividity. At this point, the responding officers stopped what they were doing, exited the residence, and notified dispatch. Thereafter, officers obtained search warrants for all subsequent entries and searches of the home.

The Court noted that the crux of appellant's argument was that, because the initial 911 caller only notified officers of a "body" inside a mobile home, officers did not have enough information that the person inside was in need of immediate aid. However, the Court stated, officers do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception. The test is not what officers subjectively believed, but whether there was an objectively reasonable basis for believing that medical assistance was needed, or persons were in danger. Here, the record showed that officers received a tip about a possible dead body inside a mobile home; had responded to the residence on prior occasions for verbal disputes; and that, after knocking on the front door and receiving no response, officers noticed that the front door was unsecured and that there were pry marks near the door handle. Based on these circumstances, the Court agreed with the trial court that it was objectively reasonable for the officers to believe that a person inside the mobile home was seriously

injured or imminently threatened with such injury. Consequently, the trial court did not err in denying appellant's motion to suppress.

Continuances; Brady Material

Anglin v. State, S21A0845 (9/21/21)

Appellant was convicted of malice murder and other offenses. Briefly stated, the relevant evidence showed that on the morning of opening statements, appellant's trial counsel announced that the prior evening, the prosecutor had told him that the sheriff had received information that someone else had confessed to killing the victim. Trial counsel said that, given the late hour he received this information and his focus on preparing for trial, he did not have a chance to contact the sheriff. Trial counsel asked for a one-day continuance to do so. The trial court denied this motion, saying that trial counsel would still have opportunities to follow up with the sheriff.

Three days later, on the final day of trial, and outside the presence of the jury, counsel questioned the sheriff and James Hale, the lead investigator. Briefly, the sheriff stated that about two months before trial he received a call from Houseman, the ex-girlfriend of Daniel Hale (brother of James Hale) who told the sheriff he had "the wrong man in custody." Also, James Hale testified that the sheriff had told him that Houseman had called Daniel's ex-wife, Thomas, to let her know that Daniel had admitted to killing the victim, and then Thomas called the sheriff. Investigator Hale did not disclose this to the DA's Office until the first day of trial.

Appellant argued that the trial court erred in denying his request for a one-day continuance so that he could investigate the belatedly disclosed evidence before opening statements. But, the Court found, appellant failed to show harm. He asked only for a one-day continuance to interview the sheriff. Three days after being denied that request, he still had not done so, stating that he planned to call him to testify anyway. Appellant elicited evidence from the sheriff that he used in his defense, and because appellant never showed that he could present admissible evidence to support his defense, appellant failed to show how the lack of additional time harmed him.

As to appellant's *Brady* claim, the Court noted that the a defendant must show that (1) the State possessed evidence favorable to the defendant; (2) the defendant did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the trial would have been different.

In the case of an untimely disclosure, a defendant must show that an earlier disclosure would have benefited the defense and that the delayed disclosure deprived him of a fair trial. Whether a disclosure at trial is timely enough to satisfy *Brady* depends on the extent to which the delay in disclosing the exculpatory evidence deprived the defense of a meaningful opportunity to cross-examine the pertinent witness at trial, whether earlier disclosure would have benefited the defense, and whether the delay deprived the accused of a fair trial or materially prejudiced his defense.

Here the Court found, appellant failed to demonstrate how earlier disclosure would have benefited him. The Court noted that appellant conceded that the evidence contained multiple layers of hearsay — a statement from Daniel that was passed through one or two people before reaching the sheriff, and then to Investigator Hale and to the district attorney before

being communicated to his trial counsel. Such hearsay evidence can be material under *Brady* as long as appellant can show that it would have led to the discovery of admissible evidence. But he failed to do so.

Appellant argued that, had he been given the information sooner, he would have been able to “interview the pertinent witnesses ... and secure their presence at trial,” but he did not even secure Houseman's or Thomas's presence at the motion for new trial hearing. And the Court stated, even if either of them could have attended his trial, appellant did not demonstrate that their testimony regarding Daniel's confession would have been admissible. Appellant argued that their testimony could have been admitted as a statement against Daniel's interest, but for such statement to be admissible, Daniel would have had to be unavailable at trial. Given that Daniel testified at the motion for new trial hearing, and appellant pointed to nothing else regarding his unavailability at trial, he did not meet this threshold requirement.

Appellant also argued that the hearsay statements could have been admissible under the residual hearsay exception in OCGA § 24-8-807 because Daniel's confession was a statement against interest that had a sufficient guarantee of trustworthiness. But, the Court stated, although the text of Rule 807 does not explicitly require a declarant to be unavailable to admit the declarant's statement, the declarant's availability re-enters the analysis because the rule requires that the proponent use reasonable efforts to procure the most probative evidence on the points sought to be proved. To admit the hearsay statements of Houseman and Thomas, appellant would have had to establish that their statements were more probative on the point for which they were offered than any other evidence which he could have procured through reasonable efforts.

Appellant also failed to show that he needed Houseman's and Thomas's statements to prove the point he says he wanted to make. At trial and at the hearing on his motion for new trial, appellant argued that the evidence was needed to show that the investigation was “shoddy” and unreliable, and that he was not trying to prove the truth of the matter Houseman and Thomas asserted — that Daniel actually confessed to killing the victim. But, the Court found, despite his claims to the contrary, appellant was able to present evidence to establish this point without getting into the substance of Houseman's and Thomas's statements. In his examination of the sheriff and Investigator Hale, appellant elicited testimony that the sheriff's office had received some information about Daniel but that the sheriff's office did not document this or investigate the claimed admission. Based on this evidence, appellant's trial counsel highlighted to the jury in closing argument that the sheriff's office's investigation was inadequate, and questioned Investigator Hale's motive for not disclosing the information sooner.