

THIS WEEK:

- *Allen* Charges; Coercive Verdicts
- Inevitable Discovery; Hearsay Exceptions
- Motions to Withdraw Guilty Plea; Ineffective Assistance of Counsel
- Rule 404 (b); Reimbursement of Attorneys' Fees
- Expert Testimony; Bolstering

Allen Charges; Coercive Verdicts

Marshall v. State, A21A0948 (10/7/21)

Appellant was convicted of numerous child-sex offenses and making false statements. He argued that the trial court gave coercive jury instructions—including an *Allen* charge—after being informed several times that the jury could not reach a verdict because one juror disagreed with the others. Specifically, he contended that—in considering the totality of the circumstances—there were six factors weighing in favor of finding the *Allen* charge coercive in this case. First, he conceded that *Allen* charges are legal when they are properly given, but nevertheless argued that three phrases included in the charge given by the trial court were coercive. But, the Court stated, any argument that the language of the *Allen* charge, standing alone, is coercive is meritless, especially considering that the trial court cautioned the jury that no verdict should be based on a mere acquiescence of jurors in order to reach an agreement. Furthermore, the Court found, the language of the *Allen* charge given was identical to Georgia's pattern instruction regarding a deadlocked jury. Thus, to the extent appellant contended that certain phrases in the *Allen* charge given in this case were coercive, the Court found his argument to be meritless.

Second, appellant argued that because the *Allen* charge given is not included in the American Bar Association's pattern jury charge on hung juries, this weighed in favor of finding it coercive. But, the Court stated, it is bound by the decisions of the Supreme Court of Georgia, not by any contrary policy pronouncements or guidelines made by a voluntary association of lawyers—even the ABA.

Next, appellant contended that because jury deliberations after the *Allen* charge were far shorter than those before the charge, this fact weighed in favor of finding the *Allen* charge coercive. The Court noted that the jury only deliberated for 30 minutes following the *Allen* charge before reaching a verdict; but the length of deliberations alone cannot render a non-coercive charge coercive. In fact, it is not necessary for the jury to deliberate for any particular length of time after the *Allen* charge is given in order for the charge not to be considered coercive; other factors should be considered. Thus, under the totality of the circumstances, the Court could not say that the length of time the jury deliberated after being given an *Allen* charge was sufficient to render it coercive.

Fourth, appellant argued that the jury convicting him of all counts, instead of only on some counts, weighed in favor of finding the charge coercive. But the Court stated, appellant failed to demonstrate how being found guilty of all charged offenses is sufficient to render an otherwise proper *Allen* charge coercive under the circumstances of this case. Indeed, the make-up of the jury's ultimate verdict is only one of several factors to consider in determining whether an *Allen* charge is coercive, and the trial court has considerable discretion in weighing factors for and against finding a charge coercive. Thus, the Court found, given all the circumstances present in this case, the fact that appellant was not acquitted of any of his charged offenses was not enough to establish that the trial court abused its discretion in giving the *Allen* charge.

Fifth, while appellant acknowledged that polling the jury weighs against an *Allen* charge being coercive, he argued coerciveness because one of the jurors had to be asked twice as to whether her verdict was voluntary before answering. But the Court noted, appellant provided no legal authority suggesting that a juror's hesitancy or reluctance to answer a question has any bearing on whether polling the jury weighs against a finding of coercion. And the juror appellant referenced ultimately, *under oath*, agreed that the submitted verdict was her verdict, it was freely and voluntarily agreed to by her, and it was still her verdict. And, although this juror later told the media that she felt as though she lied when asked to confirm her guilty verdict, and she also testified at the motion for new trial hearing that she felt pressured to change her verdict, aside from certain inapplicable exceptions, longstanding common law principles and OCGA § 24-6-606 (b) prohibit using juror statements or testimony to impeach their own verdict.

Finally, appellant argued that another factor weighing in favor of finding the *Allen* charge coercive was the lack of direct or physical evidence supporting his convictions. But, the Court noted again, he failed to provide any legal authority indicating that the strength of the evidence has any bearing on the question of whether an *Allen* charge is coercive, and Court found none to support his claim. And importantly, the strength (or lack thereof) of the evidence is not listed by our Supreme Court as being among the factors to be considered in determining whether an *Allen* charge is coercive.

Consequently, in light of the broad discretion a trial court has in deciding whether to give an *Allen* charge, and, considering that there were several factors supporting the court's decision, the Court found that it could not say the trial court abused its considerable discretion in giving the *Allen* charge under the circumstances in which it did so.

Inevitable Discovery; Hearsay Exceptions

McClure v. State, A21A0942 (10/13/21)

Appellant was convicted of three counts of child molestation, two counts each of incest and aggravated child molestation, and one count of aggravated sexual battery. The evidence, briefly stated, showed that appellant began molesting his middle daughter when she was thirteen years old. He also began molesting his youngest daughter when she was eleven. The youngest daughter told the middle daughter of the molestation and then the two spoke to A. M., their older sister, about the molestation, who then relayed the information to their mother.

Appellant contended that his trial counsel rendered ineffective assistance by failing to file a motion to suppress evidence recovered from his cell phone during a search conducted pursuant to a search warrant he claimed was defective. The Court stated that while the search was conducted pursuant to a warrant, on the facts of this case, appellant's claim that the warrant was defective was analogous to a claim that no warrant issued, and therefore the Court addressed the contention under the

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rubric of a warrantless search. A warrantless search is per se unreasonable, subject only to a few specifically established and well-delineated exceptions. One such exception — the inevitable discovery doctrine — allows the admission of evidence discovered as a result of police error or misconduct if the State can prove by a preponderance of the evidence that such information would have ultimately or inevitably been discovered by lawful means, without any connection to the error or misconduct. It applies where exclusion of the evidence puts the police in a worse position than they would have been absent any error or misconduct because the evidence would have been discovered as a matter of course if independent investigations were allowed to proceed. For evidence to be admitted under this exception, the State must establish: (i) a reasonable probability that the evidence in question would have been discovered by lawful means; and (ii) that the lawful means rendering discovery inevitable were being actively pursued before the illegal conduct occurred. The Court also noted that in the context of this appeal, it was appellant's burden of establishing a reasonable probability that, had his trial counsel moved to suppress the contents of his cell phone, the motion would have been granted and changed the outcome of his trial.

The Court found that it was undisputed that the State was in possession of appellant's cell phone, had actively pursued discovering its contents, and had obtained a search warrant to that effect. Consequently, even assuming a pre-trial motion to suppress the contents of the cell phone would have been granted on the ground that the search warrant was defective, there was a reasonable probability that the State would have (a) obtained a new warrant in which the deficiencies alleged by appellant were cured and (b) as a result, inevitably discovered the phone's contents. Furthermore, appellant provided no argument that a new, properly limited warrant would not have been obtained had a motion to suppress been filed. As a result, the Court concluded, appellant failed to satisfy the prejudice prong of his ineffective-assistance claim.

Next, appellant contended that his counsel rendered ineffective assistance regarding State's Exhibit 8 — a series of text-message exchanges between appellant's cell phone and A. M.'s cell phone, which was published to the jury. Specifically, he argued that his trial counsel rendered ineffective assistance by failing to ask the trial court to instruct the jury that A. M.'s text messages, which he argued were hearsay, were not evidence. The Court disagreed.

The Court noted that the messages originating from A. M.'s cell phone in Exhibit 8 largely fell into three broad categories: (i) expressions of love toward the recipient; (ii) expressions of sadness, heartbreak, disbelief, and confusion regarding occurrences that are not explicitly identified in the text messages, but reasonably may be read to refer to the events underlying this prosecution and their aftermath; and (iii) expressions of judgment as to the recipient's unidentified actions, which the sender refers to as “unforgivable” and “horribly inappropriate and devastating.” The Court found that when viewed in context with all of the evidence in this case — including A. M.'s own trial testimony to the effect that, after appellant became aware of the allegations against him, he never denied them — it was clear that the incoming text messages (originating from A. M.'s phone) were admitted primarily for the purpose of showing that the author of the outgoing messages (originating from appellant's phone) did not deny the allegations of misconduct in the incoming messages (and thereby implicitly admitted them), and not for the purpose of establishing the truth of the incoming messages.

Moreover, the Court noted, appellant did not identify which of the incoming messages in State's Exhibit 8 he claimed were offered to prove the truth of the matters asserted and thus constituted inadmissible hearsay. Thus, the Court concluded that the exhibit was not wholly inadmissible as hearsay and therefore, also rejected appellant's contention that a limiting instruction was warranted to the effect that all the incoming messages in State's Exhibit 8 “were not evidence.” As a result, appellant did not meet his burden of showing either that his trial counsel performed deficiently by failing to

request such an instruction or that, but for such failure, the result of his trial would have been different, particularly when viewed in the context of two younger daughters' trial testimony detailing the abuse and A. M.'s testimony that appellant never denied the allegations.

Motions to Withdraw Guilty Plea; Ineffective Assistance of Counsel

Walton v. State, A21A1050 (10/20/21)

Appellant entered a negotiated plea to numerous felony counts of VGCSA. Appellant entered his plea and was sentenced at the same hearing. Appellant then timely filed a motion to withdraw his plea. After a hearing, the trial court denied his motion.

Relying on *Nelson v. Wilkey*, 309 Ga. 203, 209 (2) (2020), appellant contended that he received ineffective assistance because his plea counsel did not inform him that he had an absolute right to withdraw his plea prior to sentencing. The Court noted that at the hearing on appellant's motion to withdraw his guilty plea, plea counsel testified that she did not explain to appellant that he had an absolute right to withdraw his plea before sentencing. According to appellant's plea counsel, "[Appellant] never really wanted to go to trial" and "wanted to work out some kind of plea." The trial court found that appellant's plea counsel was deficient for failing to inform appellant of his absolute right to withdraw his plea prior to sentencing. However, the trial court found that appellant had not shown prejudice — according to the court: "There is simply no evidence that he would have withdrawn his plea before sentencing as there has been no showing that [appellant] ever considered taking his case to trial because there was no realistic possibility of a better outcome[.]"

The Court found that at the hearing on the motion to withdraw, appellant testified that he asked to withdraw his plea "immediately," which he explained meant "as soon as [he] got back to the jail [after the plea hearing] or a day or so after." The trial court found that appellant was "not credible as to what he did and when he took action to withdraw his plea[.]" But, the Court stated, even if the trial court had found appellant's testimony credible, that testimony pertained only to actions he allegedly took *after* he was sentenced — appellant never testified that he would have withdrawn his guilty plea before sentencing if his counsel had informed him of his right to do so. Consequently, the Court concluded, appellant failed to demonstrate prejudice, and thus, the Court did not need to address whether appellant's plea counsel was deficient.

Rule 404 (b); Reimbursement of Attorneys' Fees

Martin v. State, A21A0900 (10/20/21)

Appellant was convicted of one count each of aggravated assault (family violence) and false imprisonment. Appellant contended that the trial court committed plain error in admitting a 16-year-old prior conviction for family violence battery to show intent when intent was not an issue at trial. Specifically, appellant argued that he admitted hitting the victim and that the issue at trial was self-defense. The Court disagreed.

First, the Court found, appellant did not take any affirmative steps at trial to remove intent as an issue by specifically adopting a strategy of self-defense. At the outset, appellant gave conflicting statements to law enforcement officers, first claiming that nothing had transpired between himself and the victim and later asserting that he struck the victim to parry

her drunken attack. Thus, the Court found, appellant essentially argued that *if* he struck the victim, the victim was the aggressor who pulled a knife, which made intent a central issue.

Second, appellant's defense at trial centered upon discrediting the victim through cross-examination and sowing resultant reasonable doubt. As a result, the probative value of the other acts was great because the State had a strong need for the evidence to combat appellant's attacks on the victim's credibility. Consequently, the Court concluded, under these circumstances, appellant did not demonstrate that, by admitting the other acts evidence, the trial court erred or deviated from a legal rule to support a finding of plain error.

Appellant also contended that he should be resentenced because the \$5,000 attorney fee reimbursement award was made without a hearing to evaluate his financial hardship. The record showed that one of the general conditions of appellant's sentence of probation was to reimburse the county \$5,000 for his legal expenses.

The Court noted that at the conclusion of appellant's sentencing hearing, the trial court stated that "[t]here will be a reimbursement to the county for appointed fees. . . . I'm just going to say not to exceed [\$]5,000." But, although the trial court may well have had enough information to serve as an adequate basis for ordering reimbursement, the record did not include the trial court's conclusion concerning appellant's ability to pay a reimbursement award, any information in support of the conclusion, or any consideration of the factors outlined in OCGA § 17-14-10 (a). Rather, there was only the rote imposition of an attorney fee reimbursement without any inquiry.

The Court stated that while neither OCGA § 17-12-51 (d), OCGA § 17-14-10 (a), nor our cases require a hearing to evaluate an indigent defendant's ability to pay an attorney fee reimbursement award, such a hearing during sentencing is a preferred practice. Nevertheless, at a minimum, the trial court should note — on the record — whether an attorney fee reimbursement award would "impose a financial hardship upon the defendant or the defendant's dependent or dependents," OCGA § 17-12-51 (d); any information to serve as an adequate basis for ordering reimbursement; and a consideration of the factors codified at OCGA § 17-14-10 (a). In view of the absence of these findings in this case, the Court vacated the trial court's attorney fees reimbursement condition of probation and remanded the case to the trial court for further proceedings.

Expert Testimony; Bolstering

Santoro v. State, A21A1094 (10/21/21)

Appellant was convicted of one count each of family violence aggravated assault, family violence battery, and terroristic threats. He argued that the trial court erred in admitting allegedly improper bolstering testimony by a family violence expert "to explain the behavior of a domestic violence victim who does not report abuse or leave the abuser. . . ." The record showed that before calling the director of the local victim/witness assistance program as an expert witness, the State proffered that she would testify as to the "cycle of violence" in domestic abuse cases, including "why victims do not report abuse or leave an abuser or even love abusers[.]" Appellant objected, arguing that the testimony would be bolstering and that the witness could not be qualified as an expert.

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The Court noted that appellant did not challenge the director's qualifications or any specific component of her testimony. Instead, he contended that the director's testimony bolstered the victim's credibility "by eliciting sympathy for her as a victim" and that, as a result, she should not have been allowed to testify at all.

The Court stated that the credibility of a witness is to be determined by the jury, and the credibility of a victim may not be bolstered by the testimony of another witness. Improper bolstering occurs when a witness gives an opinion as to whether another witness is telling the truth. And here, the Court found, the director's testimony offered no commentary or opinion on the victim's veracity. Rather, the testimony simply described the cycle of domestic violence because the reasons that a victim would not immediately leave after a violent event or report the abuse are beyond the ken of the average layperson. As a result, the Court found no abuse of discretion in the trial court's decision to admit expert testimony on the cycle of domestic violence to explain "why victims do not report abuse or leave an abuser or even love abusers[.]"