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### Cultural Norms; Opinion Testimony

*Martinez-Arias v. State, S21G1050 (2/15/22)*

Appellant was convicted of child molestation, aggravated child molestation, and aggravated sexual battery. Appellant's conviction was affirmed on appeal. See *Martinez-Arias v. State*, 356 Ga. App. 423 (2020). The Court of Appeals held that the trial court did not err when it allowed the State to present opinion testimony about certain purported aspects of Mexican or Latino culture from a school counselor who had worked with M.J., the child victim. The Supreme Court granted appellant's petition for certiorari.

The transcript showed that Escamilla, M. J.'s school counselor was allowed, over appellant's objection, to offer testimony about Mexican or Latino culture. Specifically, the evidence showed that the victim lived with her aunt and appellant, the aunt's boyfriend. The victim's family is originally from Mexico, and the victim's father lived there. Noting her own Latino heritage and professional experience working with at-risk Latino youth and Latino children who had been exposed to sexual abuse, Escamilla began describing what she termed the "machismo" and "collectivistic family" nature of the Latino culture. The prosecutor asked Escamilla to describe attitudes she had noticed "with the Latino culture and sexual abuse." In response, Escamilla testified about the "machismo culture," in which females "are supposed to be submissive to" the male head-of-household. Escamilla testified further about Latino cultural norms she had observed in cases of child sexual abuse, specifically, that Latino girls reporting such abuse experience guilt, shame, a lack of family support, and difficulty making disclosures. According to Escamilla, these victims feel that "it's the girl's fault for opening her legs and the boys are just supposed to be that way, they just have urges."

The Court began its analysis by identifying the "fact that is of consequence" under Rule 401. Both the trial court and the Court of Appeals concluded that Escamilla's testimony was intended to explain M.J.'s delayed outcry—that is, to show that her years-long delay in disclosing the abuse she suffered was not the result of fabrication, but rather was "related to the victim's fear." To that limited extent, the Court agreed with the trial court and the Court of Appeals that, if Escamilla's testimony were relevant at all, it would be for the limited purpose of providing context for the several-year delay in the victim's outcry.

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But, the Court stated, it reached a different conclusion about whether Escamilla's testimony about Mexican and Latino culture was relevant and concluded, it was not because it had no tendency to make the “fact of consequence”—the State's theory that M.J.'s delayed outcry was not the result of fabrication—any more probable or less probable than it would have been without the testimony. In other words, it indicated nothing at all about M.J.'s specific motivations about when and why she reported her abuse and provided no basis for the jury to make any reasonable inferences about M.J.'s behavior; the testimony bore no relationship to M.J. or her specific actions.

First, the Court found that Escamilla's testimony about the ethnic and cultural attitudes she had experienced was so broad and generalized that it could not say it would indicate to the jury whether those attitudes—even assuming for the sake of argument their accuracy—applied to the members of M.J.'s household. That was particularly true with respect to Escamilla's testimony about “collectivism” (“Latino culture is a collectivistic family”) and “machismo” (“a lot of factor [sic] is the machismo”) in Latino culture. Secondly, Escamilla's generalized comments such as “many times the mothers or the females are supposed to be submissive” and “another common trend or factor[ ] is the lack of sexual education” provided no basis for the jury to be able to determine the prevalence of those attitudes and whether the members of M.J.'s household shared them, again assuming only for the sake of argument that Escamilla's testimony was even accurate.

Furthermore, the Court found, neither M.J. nor any member of her household testified about their own ethnic or cultural identity, and it was not clear to the Court that, just because M.J. and at least some members of her household had lived in Mexico at some point or had family living in Mexico, the jury reasonably could infer that the generalized characterizations Escamilla offered about Mexican or Latino culture applied to M.J. or the members of her household living in Georgia. Given this lack of foundation, the Court stated that it could not see how a jury reasonably could infer from Escamilla's testimony that M.J.'s decision about the timing of her outcry—including that she allegedly suffered nearly three years of abuse before revealing it—was affected (let alone motivated) by the cultural attitudes Escamilla testified to having observed and studied.

Thus, the Court concluded, Escamilla's testimony about Mexican and Latino culture was not relevant to explain M.J.'s behavior because Escamilla's testimony shed no light on whether such generalized characterizations applied to M.J. or members of her household and did not make it more or less probable that M.J.'s delay in disclosing her abuse was a sign of fabrication. Accordingly, Escamilla's testimony did not meet the Rule 401 standard for relevance and was therefore inadmissible.

Finally, the Court cautioned that Georgia courts should assess the relevance of cultural or ethnic evidence based on the specific testimony in question and on the fact that such evidence is supposed to make more (or less) probable, viewing such evidence in the context of the record before the court in each particular case. Accordingly, the Court expressed no opinion as to whether testimony referencing culture or ethnicity—including testimony that potentially could invoke cultural or ethnic stereotypes (whether positive or negative)—ever could be relevant or admissible in other cases; it concluded only that Escamilla's testimony about Mexican or Latino culture, when considered in the context of the other evidence presented at appellant's trial, was not relevant and that the trial court abused its discretion by admitting it.

Nevertheless, in reviewing all the evidence presented against appellant, the Court found that the admission of the evidence was harmless, and no new trial was warranted. Consequently, although the trial court and the Court of Appeals erred when

they held that Escamilla's testimony was relevant, because the Court of Appeals's ultimate judgment affirming appellant's convictions was correct, the Court affirmed.

## **Child Hearsay; Excited Utterances**

*Grier v. State, S21A1249 (2/15/22)*

Appellant was convicted of malice murder and other crimes in connection with the shooting death of his girlfriend, Bailey. The evidence showed that appellant lived with Bailey, her five-year-old daughter, J.F., and the couple's three-year-old daughter, A.G. The couple's relationship was tumultuous. Bailey told her aunt that she planned to break up with appellant. Three days later, appellant called 911 to report that Bailey had been shot. When officers and paramedics arrived, appellant and the children were in the unit, and Bailey was unconscious on the floor of the kitchen with a gunshot wound through her eye. Bailey's earrings and clumps of her hair were scattered around the living room, and there was a suitcase packed with men's clothing in the kitchen. In a recorded interview with Berhalter, the lead detective, appellant admitted that he sold drugs from the apartment and blamed the shooting death of Bailey on someone who came to the apartment to buy marijuana.

At trial, the State did not call A.G. as a witness. J.F., who was six at the time of the trial, testified by closed-circuit television from elsewhere in the courthouse. J.F. was asked if she "said that [her] daddy killed [her mom]," and J.F. nodded her head up and down. J.F. was asked if she was there when that happened, and she again nodded her head up and down. When J.F. was asked if she saw it happen, she shook her head from side to side. J.F.'s answers to many of the State's questions were nonverbal gestures or verbal responses that were not audible in the courtroom. On cross-examination, J.F. answered only two questions audibly before providing only non-verbal responses to questions from appellant's trial counsel. Appellant's counsel then said that he was not going to ask her any more questions about her "mommy and daddy." Appellant's counsel proceeded to ask J.F. several questions about her favorite dessert, school, and watching television, which she answered by nodding or shaking her head.

Additionally, Paa, the director of forensic services who interviewed the two girls, testified to their statements incriminating appellant. Delmar, Bailey's cousin, testified that "probably the night" of the shooting, J.F. said that "she saw them arguing and stuff and saw her daddy ... pull out a gun and shoot mommy and put them in a room, stuff like that." Brettnacher, the property manager of the apartment complex, testified that assistant property manager Jackson called her from Bailey's apartment immediately after the shooting while the paramedics were still working on Bailey. According to Brettnacher, Jackson said, in an excited state, that Bailey had been shot, that appellant was sitting in a police car, and that "the little girl [J.F.] just came up to me and said daddy shot mommy." Detective Berhalter did not testify to any out-of-court statements by J.F. or A.G. However, the jury saw the recording of his interview of appellant, in which Berhalter said, "from what I am being told, okay, is that your five-year-old and two-year-old [sic] are saying that you and [Bailey] were fighting, okay, and during that fight you shot her." The detective also questioned appellant as to why the girls were "saying that Daddy is responsible for this?"

Appellant contended that the trial court committed plain error in admitting Paa's testimony. The Court found that A.G.'s statement to Paa was testimonial, as Paa worked for the District Attorney's Office and the statement was made in an interview of A.G. conducted by Paa a week before trial for the purpose of gathering evidence for use at trial. A.G. did not

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testify at trial, and appellant had no prior opportunity to cross-examine A.G. about her statement. Thus, Paa's testimony about A.G.'s statement clearly should have been excluded under the Confrontation Clause. Nevertheless, the Court concluded, this did not affect appellant's substantial rights and no new trial was warranted.

However, the Court found, Paa's testimony about statements made by J. F. was admissible. Appellant contended that the Child Hearsay Statute did not apply because a shooting does not constitute "physical abuse" within the meaning of the statute, But, the Court stated, this was not obvious error and appellant failed to point to any precedent where the Court held that a shooting that causes injury does not constitute "physical abuse" under the statute, and it is not unequivocally clear from the words of the Child Hearsay Statute that such a shooting does not qualify as physical abuse.

Appellant then argued that the State failed to provide sufficient notice of Paa's testimony about J.F.'s statement. The Court agreed that the State did not provide any notice of its intent to present child hearsay from Paa. However, absent a showing of prejudice to the defendant and bad faith by the State, the ordinary remedy for failure to comply with a requirement that a witness must be identified prior to trial is simply a continuance to allow for an interview of the witness, and the Court assumed, the trial court would have followed the law if an objection to notice had been made. Thus, because the exclusion of Paa's testimony about J.F.'s statement would not have been required had appellant's counsel objected to the lack of proper notice, appellant did not show clear error.

Appellant argued that J.F. did not actually "testify" at trial as required by the Child Hearsay Statute, because most of her responses were non-verbal, so Paa's testimony about J.F.'s statement was inadmissible. But, the Court found, J.F. did testify at trial, was cross-examined, and provided responses to many of the questions asked to her. That defense counsel willingly abandoned his case-related questioning of J.F. after she provided non-verbal responses to some of the State's questions did not mean she did not "testify" as required by the Child Hearsay Statute.

Appellant contended that the trial court clearly erred in admitting Delmar's testimony. Specifically, he argued that Delmar's testimony about J.F.'s statement should have been excluded because there was no evidence that J.F. made the statement directly to Delmar. But, the Court found, Delmar testified that the statement was made to her alongside other family members, and nothing in the Child Hearsay Statute precludes the admission of a statement simply because it was made to multiple people simultaneously. The evidence showed that Delmar was an original recipient of J.F.'s statement, so this argument failed.

Next, appellant argued that the trial court erred in admitting Brettnacher's testimony. However, the Court stated, the trial court did not err, much less commit plain error, in admitting Brettnacher's testimony that J.F. told Jackson that "daddy shot mommy," because both Jackson's statement to Brettnacher and J.F.'s statement to Jackson were admissible as excited utterances. Here, Brettnacher testified that Jackson was in an "excited" state when she called from appellant and Bailey's apartment shortly after the shooting and told Brettnacher that J.F. said that "daddy shot mommy." And while there was no direct testimony that J.F. was under the stress of excitement caused by the shooting when she told Jackson that "daddy shot mommy," the trial court could have reasonably concluded from the circumstances that J.F. was in such a state when she made the statement to Jackson. J.F.'s testimony indicated that she was in the apartment when the shooting occurred and, according to Brettnacher, the paramedics were still trying to resuscitate J.F.'s mother when Jackson called Brettnacher from the apartment and relayed what J.F. said to Jackson. Thus, the circumstances indicated that this statement was made

close in time to the shooting. Accordingly, the Court concluded, J.F.'s statement to Jackson, which Jackson relayed to Brettnacher, was admissible.

Finally, appellant contended that the trial court erred in admitting Detective Berhalter's interview with him. The Court again disagreed. The Court found that it was not clear legal error to admit the part of the recording of Detective Berhalter's interview with appellant where Detective Berhalter referenced statements by J.F. and A.G. that appellant shot Bailey during a fight and that he was responsible for the shooting, as the statements were not hearsay. The detective's statements were clearly not meant to establish as true that the others had implicated appellant, but were simply a part of an interrogation technique. In other words, what Detective Berhalter asked of or said to appellant during interrogation was not offered for its truth, but rather to establish what questions or statements appellant was responding to and the effect the former had on appellant as the listener. Therefore, the Court held, because Detective Berhalter's recorded statements were not hearsay, the trial court did not clearly err in admitting them.

## **Special Demurrers; Supersedeas Effect of Notice of Appeal**

*Sanders v. State, S21A0983 (2/15/22)*

Appellant was granted an interlocutory appeal from the denial of her special demurrer. Very briefly stated, the record showed that in 2018, appellant was indicted and filed a special demurrer. No hearing on this special demurrer was had. In 2020, appellant was re-indicted for two counts of felony murder predicated on conspiracy to commit aggravated assault and conspiracy to commit armed robbery (Counts 1 and 2, respectively); conspiracy to commit aggravated assault (Count 3); conspiracy to commit armed robbery (Count 4); criminal solicitation (Count 5); and trafficking methamphetamine or amphetamine (Count 6) (the "Second Indictment"). On January 12, 2021, Sanders filed a special demurrer to the Second Indictment, which the trial court summarily denied on January 22, 2021. However, the trial court gave appellant a certificate of immediate review, appellant timely petitioned the Supreme Court for review and the Court granted the petition on March 11, 2021. Appellant then timely filed his notice of appeal. On May 26, 2021, the State re-indicted appellant and moved to nolle prosequi the first two indictments, which the trial court granted.

The State contended that the appeal was now moot. The State argued that OCGA § 5-6-45 (a) governs the notice of appeal here, and because appellant has not been sentenced to death or admitted to bail, that there is no supersedeas in effect. But, the Court stated, appellant' appeal is from the timely grant of a certificate of immediate review and the grant of an appeal by the Court pursuant to OCGA § 5-6-34 (b). Thus, OCGA § 5-6-45 (a) does not govern the application of supersedeas here, but rather, OCGA § 5-6-34 (b) does. Moreover, under the general principle that the trial court is divested of jurisdiction to alter the judgment or order appealed from, the trial court was without jurisdiction to nolle pros the Second Indictment. Thus, the Court found, because appellant's notice of appeal deprived the trial court of the authority to enter an order of nolle prosequi as to the Second Indictment while this appeal was pending, the order of nolle prosequi was a nullity.

Count 1 charged that "on the 22nd day of January, 2018, while in the commission of the offense of Conspiracy to Commit Aggravated Assault, a felony, [appellant] did cause the death of Eugene Singletary, a human being, by gunshot, contrary to the laws of said State, the good order, peace and dignity thereof." Appellant argued that Count 1 was insufficient because it failed to allege proximate cause in sufficient detail and that she should have been given more information about the

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causal link between the alleged conspiracy and Singletary's death. The Court disagreed. Count 1 alleges that appellant caused Singletary's death by gunshot while in the commission of conspiracy to commit aggravated assault. The indictment therefore contains the requisite causal element, gives appellant notice of the charge against her, and enables her to intelligently prepare a defense and safeguard against double jeopardy. While appellant may desire greater detail about how the conspiracy resulted in Singletary's death, it is not required that the indictment give every detail of the crime. Instead, the additional detail desired by appellant may be supplemented by the pretrial discovery she receives and any investigation her counsel conducts. Thus, the Court concluded, the language of the indictment is not too vague to inform appellant of the charges against her, and the trial court did not err in denying the special demurrer on these grounds.

Appellant also contended that Count 1 is flawed because it fails to sufficiently allege a conspiracy. Specifically, she argued that Count 1 fails to identify a co-conspirator or an overt act in furtherance of the conspiracy. But, the Court stated, although each count must be wholly complete within itself and contain every allegation essential to constitute the crime, this rule applies only to the offense rather than the form and the indictment is read as a whole. Appellant's claim that Count 1 must be vacated because it did not allege the essential elements of the underlying offense of conspiracy to commit aggravated assault is a challenge to the form of the indictment. Accordingly, because the indictment must be read as a whole, the Court stated it must consider whether Count 3, which charges appellant with conspiracy to commit aggravated assault, provides the information appellant complains is missing from Count 1. And here, Count 3 charges appellant with conspiracy to commit aggravated assault, and it alleges that appellant "did unlawfully conspire with Eugene Singletary" to commit an aggravated assault against Conley. Thus, assuming without deciding that appellant is correct in arguing that a co-conspirator had to be identified for the indictment to be constitutionally sufficient, Count 3 provides this information. Also, the Court found, Count 3 further alleges "the overt acts of planning to assault said Chaz Conley and texting him to lure him to a certain location under false pretenses[.]" Appellant argued that "planning to assault" Conley does not qualify as an overt act. Assuming, arguendo, that appellant is correct in this assertion, the allegation that appellant texted Conley "to lure him to a certain location under false pretenses" sufficiently sets forth an overt act, and the Court stated, it found no authority requiring the indictment to set forth the particulars of the overt act in greater detail than what is alleged here. Accordingly, the Court concluded, the conspiracy elements alleged in Count 3 can be considered with Count 1 for this analysis and Count 1 is not subject to a special demurrer on the ground that it does not sufficiently allege a conspiracy.

Appellant next contended that Count 1 is subject to a special demurrer because it fails to allege facts about the aggravated assault she allegedly conspired to commit. Specifically, she argued that she cannot tell from the indictment whom she allegedly planned to assault or how she planned to do so. The Court stated that an indictment does not have to contain every detail of the crime to withstand a special demurrer, but rather must allege the underlying facts with enough detail to sufficiently apprise the defendant of what she must be prepared to meet. Here, Count 3 alleges that appellant conspired to assault an identified victim, Conley. Because the indictment is considered as a whole, the victim's identification provided in Count 3 may be used to provide the information that appellant complains is missing from Count 1. And, the Court found, the indictment is detailed enough for appellant to prepare her defense to the charge of felony murder predicated on conspiracy to commit aggravated assault without additional information regarding precisely how she planned to commit the aggravated assault. Because appellant had notice that the charge of felony murder predicated on conspiracy to commit aggravated assault involved the use of a firearm, appellant was sufficiently informed that she would need to defend against all the possible ways in which she could have planned to commit an aggravated assault using a firearm. Accordingly, the Court held, appellant's arguments that a special demurrer was warranted as to Count 1 on these grounds failed.

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Appellant further argued that Count 1 is subject to a special demurrer because it fails to sufficiently allege an inherently dangerous or life-threatening underlying felony. Specifically, she argued that the count must allege the element that aggravates the crime above a simple assault. The Court agreed that this is true where a defendant is charged with aggravated assault. But Count 1 charges appellant with felony murder based on the “offense of Conspiracy to Commit Aggravated Assault, a felony,” and further alleges that appellant caused the death of Singletary by gunshot. Thus, regardless of whether the State was required to name an inherently dangerous felony in this count, the indictment implicitly alleged the use of a deadly weapon (a gun) in the actions leading to the death of Singletary, which sufficiently supports the aggravated nature of the assault. Therefore, appellant's argument that Count 1 should have been dismissed failed.

Appellant contended that her special demurrer as to Count 4 should have been granted because it is a duplicative charge. The Court noted that Count 4 is captioned “conspiracy to commit armed robbery,” but the substance of this Count is the same as Count 3, which alleges a conspiracy to commit aggravated assault. The substance, not the caption, of the indictment controls. Because Count 4 is “entirely duplicative” of another count and provides no additional facts by which it could be distinguished from that count, the trial court erred in denying appellant's special demurrer as to Count 4.

Next, appellant argued that her special demurrer as to Count 5 should have been granted because it fails to allege any facts supporting the charged offense. Count 5 states “[O]n the 22nd day of January, 2018, with intent that another person engage in conduct constituting a felony, [appellant] did request Chaz David Conley to commit the felony offense of Violation of the Georgia Controlled Substances Act: Possession of a Controlled Substance, contrary to the laws of said State, the good order, peace and dignity thereof.” The Court stated that while an indictment does not have to contain every detail of the crime to withstand a special demurrer, it must state the essential elements of the offense charged and must allege the underlying facts with enough detail to sufficiently apprise the defendant of what she must be prepared to meet. Here, the Court determined, Count 5 of the Second Indictment failed to allege any underlying facts, such as what drug appellant requested that Conley possess or in what quantity, that constitute a felony violation of the Georgia Controlled Substances Act. As written, Count 5 does not give appellant enough information about the criminal solicitation charge to prepare her defense intelligently, as appellant could have violated the statute in a number of possible ways. And although the indictment is read as a whole, it was not clear from the allegations in the Second Indictment that the drug referenced in Count 6, which alleges that appellant committed felony trafficking of methamphetamine, is the same drug that appellant is alleged to have requested Conley to possess in violation of the Georgia Controlled Substances Act in Count 5. Accordingly, the Court held, the special demurrer should have been granted as to Count 5, and the trial court erred in denying it.

Finally, appellant argued that the trial court should have granted her special demurrer as to Count 6 because the title of the count is confusing, the count does not specify whether she is being charged with a felony or misdemeanor, the count alleges an incorrect date, and the count contains a grammatical error. The Court disagreed that the alleged errors warrant special demurrer as to this count. The Court found that while the title of this count could cause confusion, the substance of the indictment controls, not the caption. And the substance of Count 6 clearly identifies methamphetamine as the controlled substance in question. Also, it is clear from the amount of methamphetamine specified in the indictment — i.e., over 28 grams — that appellant is being charged with felony trafficking in violation of OCGA § 16-13-31 (e). And as to the allegation that Count 6 alleges an incorrect date and contains a grammatical error, the Court stated that when a

special demurrer points out an immaterial defect, the trial court need not dismiss the defective charge, but may strike out or correct the erroneous portion of the indictment. Thus, the trial court did not err in denying appellant's special demurrer as to Count 6, and its judgment on that count was affirmed.

## **Motions for Mistrial; Right of Confrontation**

*Williams v. State, S22A0210 (2/15/22)*

Appellant was convicted of malice murder and other offenses in connection with a drive-by shooting. Relying on *Soto v. State*, 285 Ga. 367, 369 (2) (2009), he contended that he was denied his right to a fair trial when a witness, co-indictee Jackson, refused to answer certain questions during his testimony. Specifically, appellant argued, the trial court should have granted his motion for mistrial, because the refusal left the jury with the impression that Jackson was afraid to testify because appellant, the only remaining defendant, had threatened him.

The record showed that Jackson refused to answer several questions on direct examination, but he continued to testify and respond to the State's questions after appellant's motion for mistrial was made and denied. On cross-examination, Jackson again refused to answer certain questions, but acknowledged that he had made statements to the police and that those statements were true. Appellant's trial counsel asked Jackson whether he had declined to answer certain questions because he had been threatened by appellant, and Jackson denied that he had been threatened by appellant or by anyone else. Appellant's trial counsel also elicited admissions from Jackson that Jackson had entered into a plea agreement to serve 25 years in prison and that he had lied to the police during their investigation, and directly challenged Jackson regarding his honesty and truthfulness.

Here, the Court found, unlike the witness in *Soto*, Jackson did not decline to testify altogether. The main and essential purpose of the right of confrontation is to secure for the opponent the opportunity of cross-examination. And here, appellant was able to conduct a thorough cross-examination, and Jackson's testimony in many respects actually inured to appellant's benefit. Therefore, the Court concluded, the trial court did not abuse its broad discretion in denying a motion for mistrial under these circumstances.

## **Motions to Sever; Combined Jury and Bench Trials**

*Maddox v. State, S21A0967 (2/15/22)*

Appellant was indicted for malice murder. His jury trial was conducted simultaneously with the bench trial of his co-defendant, Evans. The evidence, briefly stated, showed that the victim was walking in an apartment complex parking lot when Evans grabbed the victim by the hand as appellant walked toward them. Witnesses saw appellant punch, kick and choke the victim after the victim failed to pay the money appellant claimed the victim owed him. Crews, another trial witness, was nearby while the attack was happening. The jury convicted appellant and the trial court acquitted Evans.

Appellant first contended that the trial court erred by holding a jury trial for him and a bench trial for Evans at the same time. The Court noted that the propriety of conducting joint bench and jury trials at the same time, and whether any special considerations for conducting such trials in this manner are necessary, appear to present questions of first

impression. However, the Court stated, it did not need to reach these questions because by failing to object to this arrangement when it was announced by the trial court, appellant waived any claim of error on appeal.

Next, appellant argued that the trial court abused its discretion by denying his motion to sever, which he filed on the day after the trial court announced that it would conduct simultaneous jury and bench trials. The Court disagreed.

The Court found that appellant failed to make the required showing of prejudice to show that his motion to sever should have been granted. As the trial court determined, the joint trial did not present a significant likelihood of confusion of the evidence and law, or the possibility that evidence introduced against Evans might be improperly considered against appellant. There were only two defendants, both were charged jointly with the same crimes, and the law applicable to each was substantially the same. The fact that Evans pointed to appellant as the one solely responsible for strangling the victim did not in itself indicate that the jurors were confused by the presentation of evidence, even with appellant's different argument that it was in fact Crews or someone else who committed the crime. Further, appellant did not show, or even argue, that there was any evidence presented solely against Evans or that any such evidence was clearly stronger than the evidence against appellant.

Nevertheless, appellant contended, he was prejudiced by Evans's counsel using his cross-examination of the State's witnesses to elicit testimony that showed that appellant was guilty of the crimes and that Evans was not. Appellant pointed specifically to Evans's counsel's cross-examinations of Brown and Sheffield, during which counsel asked several questions that attempted to clarify that the witnesses saw appellant attacking Smith while Evans stood by. However, the Court found, such questioning did not elicit additional evidence regarding appellant's involvement in the crimes beyond what the State elicited on direct examination. The cross-examinations simply drew out further details suggesting that Evans never punched or choked the victim. The cross-examination of these witnesses by Evans's counsel did not prejudice appellant, as the specific testimony that was elicited was admissible against appellant and did not add any new facts tending to incriminate appellant.

Furthermore, the Court noted, although the cross-examinations arguably damaged appellant's case by undermining his arguments to the jury that it could have been Crews who killed Smith and that Crews, Sheffield, and Brown had conspired to blame the victim's killing on appellant, the State's direct examination also damaged these arguments. Appellant thus failed to show any specific prejudice resulting from antagonistic defenses that would have required the trial court to grant his motion to sever.

Moreover, the Court found, the procedural safeguards implemented by the trial court and parties further prevented confusion of the evidence. Among the measures taken to avoid confusion, the parties agreed that the jury would not hear opening statements and closing arguments by Evans's counsel, and the trial court made clear to the jurors that they should not consider Evans's guilt or innocence in their deliberations. Therefore, the Court stated, to the extent a joint bench and jury trial affects a decision on severance, the steps taken here were sufficient to support the trial court's decision not to sever.

## **Intrinsic Evidence; Limiting Instructions**

*Anderson v. State, S21A0981 (2/15/22)*

Appellant was convicted of malice murder and other offenses. The evidence showed that sometime just before noon, at an apartment complex on Glenwood Avenue, a man wearing a black hat, dark pants, and a gray and white striped shirt and carrying a backpack walked through a parking deck and broke into one of the apartment buildings. Around the same time, someone reported to the police that an unknown man attempted to enter an apartment in that complex. A woman inside the apartment screamed, and the man ran away. Approximately an hour later, and less than a mile away, a man wearing a surgical mask, a backward hat, a gray striped shirt, and black pants broke into an apartment. While he was inside the apartment, the victim came home and surprised the burglar. The burglar shot him and fled. Eventually, the investigation centered on appellant who was arrested for the crimes.

Appellant argued that the trial court erred by admitting evidence from the burglary at the Glenwood Avenue apartments as intrinsic evidence. The Court disagreed. The Court agreed with the trial court's determination that the evidence of the Glenwood Avenue burglary was part of the same series of transactions as the charged offenses, that it was necessary to complete the story of the crime and inextricably intertwined with the evidence regarding the charged offense, and that, along with the testimony of other witnesses, the evidence helped to explain that the intruder was unlikely to be a resident of the apartment complex because he had just attempted another break-in an hour earlier.

Furthermore, the Court found, the evidence also met the balancing test of Rule 403. Here, although the evidence implicated appellant in another criminal act, the probative value of the evidence concerning the burglary at the second apartment complex was not substantially outweighed by the danger of unfair prejudice.

Next, appellant argued that his trial counsel performed deficiently by failing to request a limiting instruction when evidence of the Glenwood Avenue burglary was admitted at trial. He also contended that counsel performed deficiently by later failing to object when a limiting instruction regarding the evidence, which counsel requested in the charge conference, was omitted in the trial court's final charge to the jury. The Court again disagreed.

The Court stated that to prevail on this claim, appellant had to show that the request would have been granted or that the objection to the final charge would have been sustained had they been made. But, the Court found, he could not do so here because the trial court did not abuse its discretion by admitting the evidence in question as intrinsic evidence. And, the Court stated, because a limiting instruction generally is not warranted for intrinsic evidence, appellant could not show that his trial counsel performed deficiently by failing to request such an instruction when the evidence was presented at trial or by failing to object to the final charge to the jury as given by the trial court.