

THIS WEEK:

- Merger; Deliberate Intervals
- Harmless Error; Plain Error
- Sentencing; Merger
- Merger; Sex Offenses

Merger; Deliberate Intervals

Price v. State, S22A0079 (4/19/22)

After a bench trial, appellant was convicted of malice murder, aggravated assault, aggravated battery and other offenses in connection with the shooting death of Cantrell, Sr. ("Cantrell"), and the non-fatal shooting of his adult son, Cantrell, Jr. ("Junior"). The relevant evidence, briefly stated, showed that Cantrell and Junior returned home after dinner and surprised appellant and a codefendant, who were inside their home. After the victims confronted the codefendant in the hallway and fired weapons at each other, appellant exited a bathroom at the end of the hallway. Appellant pointed a shotgun at the victims and fired. The shotgun pellets struck Junior in the hand, blowing off a finger, and hit Cantrell in the side, causing him to fall and later die. After the initial shot, Junior turned around, picked up his father, propped him up against the wall, and told him that they were getting out of the house. When Junior turned around to walk down the hall, appellant ran down the hallway and shot Junior in the chest, causing extensive bleeding, before returning to the bathroom from which he had appeared.

The record showed that the aggravated assault conviction was based on shooting Junior with a gun, and the aggravated battery conviction was based on depriving Junior of his finger when he was shot. Appellant argued the trial court erred in failing to merge his convictions for aggravated battery and aggravated assault. Specifically, he contended that the shot that deprived Junior of his finger occurred "mere minutes" before the second shot to Junior's chest and was part of the same shootout. The Court disagreed.

The Court noted that for the aggravated assault and aggravated battery counts to be treated as distinct criminal acts, there must be a "deliberate interval" between the completion of one offense and the start of the other. If there was no deliberate interval, then the two offenses were part of a continuous act and merge for sentencing purposes.

The Court agreed with the trial court that the aggravated battery and aggravated assault counts, although involving appellant's use of a deadly weapon, did not clearly charge the same conduct, and Junior's testimony provided evidence that there was a deliberate interval between the critical shots. According to Junior, appellant fired a shot that blew off his finger and then struck Cantrell, causing Cantrell to fall. It was only after Junior began attending to his father that appellant shot Junior in the chest, resulting in additional injury. And although Junior did not describe the amount of time that lapsed between the first and second shot, his testimony revealed that he bent down to pick up his father, propped him against the

wall, and turned around to begin walking when appellant ran down the hall and fired the second shot. Therefore, the Court held, because the evidence showed a pause sufficient to constitute a deliberate interval, the trial court was permitted to conclude that the aggravated battery was completed before the aggravated assault took place.

Harmless Error; Plain Error

Smith v. State, S22A0086 (4/19/22)

Appellant was convicted of malice murder and theft by taking in connection with the stabbing death of Roach. The medical examiner who performed Roach's autopsy, was qualified as an expert in forensic pathology at trial. She testified that Roach's cause of death was multiple stab wounds, and she identified 38 stab wounds across Roach's body that were characteristic of wounds made by a knife. She also identified blunt-force trauma injuries on Roach's head and face.

When asked by the prosecutor, the medical examiner provided testimony about the crime scene; the defense did not object. Specifically, she testified that a photograph depicting a blood-smear pattern that investigators found next to Roach's bedroom door would be consistent with "testimony that the victim was trying to keep the door closed and that someone forced their way in," and that another photograph depicting different blood-spatter patterns on another part of the bedroom wall was consistent with the victim being "forcefully slung in that direction" with "compression and drag." She further testified that another blood-spatter pattern on a wall depicted in a different photograph was "very suggestive of finger marks" or of the victim "plac[ing] a bloody hand on something and dr[agging] it across."

The prosecutor then asked the medical examiner if the blood evidence at the crime scene would be consistent with testimony that the victim was first attacked in a different room, "ran to his bedroom and tried to close the door, that someone forced their way into the room and then an attack ensued ... and then [the victim] was stabbed to death in that area." Defense counsel objected on the ground that the medical examiner was "not an expert as to blood," and the trial court overruled the objection. She then testified that the prosecutor's hypothetical was a "likely" or "possible" scenario based on the pattern of wounds on Roach's body, but that to determine whether Roach had died under such circumstances, she would need to evaluate other factors. With respect to Roach's cause of death, she testified that the stab wounds to the left side of Roach's chest were fatal because they severely damaged major vessels and the resulting blood loss would have been fatal within four to five minutes, and that the fatal injuries most likely were inflicted after the other stab wounds. She then testified that defensive injuries on Roach's arm and hand were consistent with "fending something off" and that the crime scene and Roach's injuries "could be" consistent with more than one attack.

Appellant argued that the State did not lay the requisite foundation to qualify the medical examiner as an expert in blood-spatter evidence, and that the admission of her blood-spatter testimony was not harmless. The State, in turn, conceded that it did not lay a foundation to qualify the medical examiner as an expert in blood-spatter evidence at trial because she was never questioned about her training and experience in evaluating that type of evidence. It nonetheless contended that any error in admitting her testimony about the blood-spatter evidence was harmless. The Court stated that it would assume, without deciding, that the trial court erred by admitting the portions of the medical examiner's testimony related to blood spatter.

The Court noted that in evaluating the potential harm resulting from the medical examiner's blood-spatter testimony, it was faced with two standards of review. First, it must review the evidentiary claims that appellant preserved for ordinary appellate review—i.e., the aspects of the medical examiner's testimony to which appellant objected at trial—for harmless error. A nonconstitutional error is harmless if the State shows that it is highly probable that the error did not contribute to the verdict, an inquiry that involves consideration of the other evidence heard by the jury. But, as to the portions of the medical examiner's blood-spatter testimony to which appellant did not object at trial, review must be only for plain error. To succeed on a plain-error claim, appellant must demonstrate an error that was not affirmatively waived, that was clear and not open to reasonable dispute, that probably affected the outcome of his trial, and that seriously affected the fairness, integrity, or public reputation of judicial proceedings. The failure to meet one element of this test dooms a plain error claim. The test for nonconstitutional harmless error is like the determination of prejudice under plain error review, with the principal difference being the party that bears the burden of proof. In both circumstances, the Court stated, it reviews whether the error prejudiced the outcome of the trial. In determining whether trial court error was harmless, it reviews the record de novo, and weighs the evidence as it would expect reasonable jurors to have done so as opposed to viewing it all in the light most favorable to the jury's verdict.

Nevertheless, the Court stated, it did not need to parse through each of the medical examiner's blood-spatter references to apply the relevant standard of appellate review to each one before assessing the aggregate harm of the testimony that it assumed to be inadmissible, because appellant's claim failed under the harmless-error standard of review that is more favorable to him. After reviewing the evidence, the Court concluded that it was highly probable that any error in admitting the medical examiner's blood-spatter testimony did not contribute to the verdicts. Accordingly, appellant's claim failed.

Sentencing; Merger

Davenport v. Ward, S22A0179 (4/19/22)

Appellant was indicted for armed robbery (Count 1), aggravated assault with intent to rob (Count 2), and aggravated assault with a deadly weapon (Count 3). He entered a non-negotiated guilty plea as to all counts, and he was sentenced on April 19, 2016. In 2018, appellant filed a pro se petition for a writ of habeas corpus alleging among other claims, that Count 3 should have merged with Count 1. The habeas court denied relief on each of his claims for relief on February 22, 2021. The Court then granted appellant's application for a certificate of probable cause as to the merger claim.

The State conceded the merger error alleged by appellant, and the Court agreed that both the trial court and the habeas court erred in their determinations that Count 3 should not have merged with Count 1. Count 1 charged appellant with armed robbery by taking property "from the person and immediate presence of [the victim], by the use of an offensive weapon, to wit: a handgun and firearm." Count 3 charged appellant with aggravated assault by making "an assault upon the person of [the victim], with a handgun and firearm, a deadly weapon." As the State's recitation of the evidence at appellant's sentencing hearing made clear, both of those charges arose from the same conduct — threatening the victim at gunpoint and demanding his wallet and cell phone. Accordingly, Count 3 merged into appellant's conviction for armed robbery. The trial court failed to recognize that merger and erroneously entered a conviction and sentence for the aggravated assault, which must be set aside. Accordingly, the judgment of the habeas court as to this claim.

Merger; Sex Offenses

Carr v. State, A21A1391 (3/7/22)

Appellant was convicted of aggravated battery, four counts of child molestation, four counts of sexual battery, and two counts of first-degree cruelty to children. The victims were sisters Ta. C. and Ti. C. Appellant argued that the trial court erred in failing to merge several of his child-molestation and sexual-battery convictions for sentencing purposes. Relying on *Scott v. State*, 306 Ga. 507 (2019) (*Scott I*) and *Scott v. State*, 356 Ga. App. 152 (2020) (*Scott II*), the Court agreed and disagreed.

Appellant first argued that counts two and three of the indictment should have merged for sentencing purposes because they both alleged that he committed the offense of child molestation by touching Ti. C.'s vaginal area and her breasts, respectively, during the same two-month period. But, the Court found, although the trial court did not merge count two with count three for sentencing purposes, it did merge count two with count one, such that appellant's conviction for count two was expunged and he was not sentenced for that child-molestation offense. Consequently, appellant could not show the trial court committed a reversible error in merging count two with count one, rather than merging count two with count three.

Next, appellant argued that the trial court erred by failing to merge counts five and six of his indictment for sentencing purposes because they both alleged that he committed the offense of child molestation against Ta. C. by touching her vaginal area and breasts, respectively, during the same time frame. The Court noted that count five charged appellant with committing child molestation by touching Ta. C.'s vaginal area between January 1, 2013, and September 1, 2015. And count six of the indictment charged him with committing child molestation during the same period by touching her breasts. The evidence showed that appellant committed these discrete acts over a relatively long period of time. Specifically, Ta. C. testified that appellant would get into her bed and touch her "vagina area" during the day while she was in sixth grade (before she left on the bus to go to school), but did so in the early mornings—while it was still dark outside—after she graduated sixth grade. And Ta. C. also testified that he touched her "chest area" mostly on top of her clothes, but sometimes under her clothes. Significantly, Ta. C. testified that the sexual abuse lasted from when she was in sixth grade until she was a sophomore in high school. As a result, the Court concluded, a reasonable jury could have found that the sexual abuse alleged in counts five and six of the indictment were discrete, separate offenses occurring over a period of years, rather than during a single course of conduct taking place over a relatively short period of time. Under these circumstances, the trial court did not err in failing to merge counts five and six for sentencing purposes.

Appellant further contended that his four sexual-battery convictions should have merged for sentencing purposes because the offenses occurred close in time and constituted an "uninterrupted course of conduct." The Court noted that unlike the statute criminalizing child molestation, our appellate courts have not yet determined the unit of prosecution provided for in OCGA § 16-6-22.1 (b)—the statute criminalizing sexual battery. Interpreting the statute in light of *Scott I* and *II*, the Court held that the statute provides for a single unit of prosecution, such that appellant may not be convicted or sentenced for multiple sexual-battery offenses committed during an uninterrupted course of conduct.

The Court noted that counts seven and eight charged appellant with committing sexual battery against Ta. C. by making physical contact with her breasts and vagina, respectively, without her consent. Both counts alleged the sexual abuse

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occurred on or about December 31, 2015. Although Ta. C. testified that appellant sexually abused her over a period of years, she did not provide any specifics regarding the abuse that occurred on that particular day. Also, the State failed to present any evidence as to how much time elapsed between the criminal acts, and it was unclear whether they occurred during the same interaction with Ta. C. As a result, the Court concluded, the trial court erred in failing to merge counts seven and eight for sentencing purposes. Thus, the Court vacated appellant's convictions and sentences for counts seven and eight and remanded the case for the trial court to convict and resentence him on only one of those counts.

Next, the Court noted that counts nine and ten charged appellant with committing sexual battery on Ta. C. in the same manner alleged in counts seven and eight, respectively, except they alleged the sexual abuse occurred the next day, on January 1, 2016. As with counts seven and eight, these separate allegations of sexual battery allegedly occurred on the same day, Ta. C. did not testify regarding the length of time that elapsed between appellant touching her breasts and him touching her vagina, and it was unclear whether those criminal acts occurred during a single interaction. Thus, the Court also remanded the case for the trial court to vacate one of these convictions and merge them for sentencing purposes.

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