

THIS WEEK:

- Statements; Jail Videos
- Jury Charges; Accomplice Corroboration
- Prosecutorial Misconduct; OCGA § 17-8-75
- Identification; *Brady*
- BAC Testing Admissibility; Jury Charges

Statements; Jail Videos

Early v. State, S22A0265 (5/3/22)

Appellant was convicted of felony murder and aggravated assault. At trial, the State presented a jail deputy sheriff's body-camera recording, which showed appellant in jail about six months after his arrest for the charged crimes. At one point during the video, appellant said, "I'm a murderer." Appellant did not testify. His counsel argued that appellant shot the victim in self-defense, or the shooting amounted only to voluntary manslaughter.

Appellant contended that the trial court erred in admitting the video. Specifically, he argued that the trial court abused its discretion by admitting the jail video because its probative value was substantially outweighed by undue prejudice under Rule 403 and because it violated his constitutional right to a fair trial and the presumption of innocence. Appellant contended that the video was highly prejudicial because it showed him in handcuffs and wearing jail attire while being "disciplined by jail guards" and because the time stamp on the video established that he was in jail for the charged crimes while he was awaiting trial. The Court disagreed.

The Court found that appellant's statement, "I'm a murderer," during the jail video was highly probative because he was charged with murder and the statement indicated that after the shooting, he asserted to a law enforcement officer that he had murdered someone, although at trial he maintained that he shot the victim in self-defense. Moreover, the video allowed the jurors to assess appellant's credibility directly, as they could see and hear him make the statement.

Furthermore, the Court agreed with the trial court's conclusion that the two-minute video, presented with almost no narrative testimony, was not overly prejudicial. Contrary to appellant's primary contention, the video did not clearly depict him being disciplined by the deputy sheriffs. And while appellant correctly noted that the video showed that he was in jail several months after being arrested, under the circumstances of this case, the jury would not have been unfairly influenced by the fact that a defendant charged with murder was being detained while awaiting trial. Thus, the trial court did not abuse its discretion by concluding that the video was admissible under Rule 403.

Nevertheless, appellant argued, the admission of the jail video violated his constitutional right to a fair trial and the presumption of innocence. The Court noted that because appellant did not object on this ground during the pretrial

hearing on his motion to exclude the video or during trial, its review of this claim was only for plain error. The Court noted that appellant based his arguments on cases holding that a criminal defendant's constitutional rights may be violated when he is shackled or compelled to wear prison clothing *during his trial*. However, the Court stated, those cases are distinguishable, and appellant did not contend (and the record did not indicate) that he was shackled or forced to wear jail garb at any time during his trial.

Furthermore, the Court noted, appellant neither cited nor had the Court found any controlling authority from it, or the Supreme Court of the United States, holding that the admission of a video at trial showing a defendant in jail wearing jail attire and handcuffs violated his constitutional rights. In fact, the Court noted, many other courts have reached the opposite conclusion. Therefore, the Court concluded, because there was no controlling authority supporting appellant's argument, he failed to show clear error. Accordingly, the admission of the brief jail video was not plain error.

Jury Charges; Accomplice Corroboration

Palencia v. State, S21C0949, S21G0949 (5/3/22)

Appellant was convicted of several offenses arising from a home invasion and sexual assault upon V. M. Appellant appealed his convictions to the Court of Appeals, which affirmed his convictions and found no reversible error. See *Palencia v. State*, 359 Ga. App. 307 (2021). He filed a petition for a writ of certiorari arguing that the Court of Appeals erred by determining that the trial court did not plainly err by failing to charge the jury on the requirement under OCGA § 24-14-8 that accomplice testimony be corroborated. The Court granted the petition.

The relevant evidence showed that appellant and Ramirez-Aguilar were hired by Jose Carranza-Castro to physically beat and disfigure V. M., who was a former love interest of Carranza-Castro with whom Carranza-Castro shared a child. According to Ramirez-Aguilar, he and appellant broke into V. M.'s apartment, burglarized it, and waited inside until she returned home. Ana Lopez-Huinil and Angela Garcia were waiting outside during this time. Lopez-Huinil was appellant's girlfriend, and Garcia was Ramirez-Aguilar's girlfriend. When V. M. entered her apartment with her two young children, appellant and Ramirez-Aguilar attacked her. Ramirez-Aguilar testified that he threw boiling water on V. M. and that appellant raped her. Following the attack, appellant and Ramirez-Aguilar left the apartment.

Both Lopez-Huinil and Garcia testified that appellant was present during the burglary and attack. Specifically, Lopez-Huinil and Garcia testified that the two of them went with Ramirez-Aguilar and appellant to V. M.'s apartment earlier that night and that all four of them went inside to steal items when no one was home. They also testified that the four of them went back to V. M.'s apartment again later that night, but that Lopez-Huinil and Garcia waited outside and did not go inside that time. Lopez-Huinil testified that appellant told her that, during the second trip to the apartment, Ramirez-Aguilar "had sex" with V. M., and Garcia testified that Ramirez-Aguilar told her that appellant "raped" V. M.

Appellant argued that under *Stanbury v. State*, 299 Ga. 125 (2016), the Court of Appeals erred in its determination that the trial court's failure to give an accomplice-corroboration charge was not a clear and obvious error in light of the evidence presented in this case. The Court agreed. The Court noted that in *Stanbury*, it held that the failure to give an accomplice-corroboration charge was a clear and obvious error where the trial included purported accomplice testimony but the jury was instructed that facts could be established based on the testimony of a single witness. In essence, the jury received an

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instruction that it could believe the facts as described by the alleged accomplice without corroboration — in direct contradiction to OCGA § 24-14-8. Thus, the trial court's failure to provide a jury charge regarding accomplice corroboration was clear error not subject to reasonable dispute.

And here, the Court found, from the evidence presented at trial, the jury could find that Ramirez-Aguilar, Lopez-Huinil, and Garcia - all of whom were indicted with appellant and pled guilty to offenses with which he was also charged - were appellant's accomplices, who all testified that appellant burglarized V. M.'s apartment with them. Ramirez-Aguilar identified appellant as the person who raped V. M., and Lopez-Huinil and Garcia testified that appellant was inside the apartment when the attack and rape occurred. But in order to credit an accomplice's testimony under Georgia statutory law, the jury had to find at least slight evidence that was independent of the accomplice testimony and that directly connected the defendant with the crime or led to the inference that he is guilty. Furthermore, the Court noted, even if there was such evidence in the record, the trial court's failure to also charge the jury on the necessity of accomplice corroboration when charging it that the testimony of a single witness is sufficient to establish a fact was clear and obvious error in light of *Stanbury*.

Nevertheless, the State argued, there was overwhelming corroboration and thus, an accomplice-corroboration charge was not required in this case. The Court disagreed. Whether there is sufficient (or even overwhelming) corroborating evidence (such as multiple witnesses corroborating an accomplice's testimony) does not affect whether it is error for a trial court to fail to give the instruction when the single witness charge is given. The presence of corroborating evidence could mean that the error in not giving an accomplice-corroboration instruction did not affect the outcome of the trial, but it would not make the instruction unnecessary.

Finally, the Court noted, the Court of Appeals held that *Stanbury* did not apply to this case because V. M. survived the attack and testified at trial that a man matching appellant's description raped her. Thus, the Court of Appeals found, because the victim was a competent witness as to her own rape, Ramirez-Aguilar was not the only witness to it, and no corroboration of the victim's testimony was necessary.

However, the Court found, this analysis by the Court of Appeals was flawed. It is true that corroboration of a rape victim's testimony is not required by OCGA § 16-6-1. But that does not resolve the question with respect to accomplice-liability corroboration. Instead, because the jury could find that Ramirez-Aguilar, Lopez-Huinil, and Garcia were appellant's accomplices, their identifications of appellant as a perpetrator of the crimes, to the extent any one of them was credited by the jury to be an accomplice, required corroboration in order to form the basis of a conviction.

Therefore, the Court concluded, this case was clearly governed by *Stanbury* and similar cases. Because the Court of Appeals erred in its conclusion that the holding in *Stanbury* did not govern this case, the Court reversed the portion of the Court of Appeals opinion that held otherwise. On remand, the Court of Appeals was directed to consider whether appellant satisfied the remaining prongs of the plain-error test, a question on which the Court expressed no opinion.

Prosecutorial Misconduct; OCGA § 17-8-75

Caldwell v. State, S22A0229 (5/3/22)

Appellant was convicted of felony murder arising out of the shooting death of McPherson. Very briefly stated, the evidence showed that McPherson, a drug dealer, opened his apartment door when a woman knocked on it, requesting to buy marijuana. He was then shot and killed by appellant. At trial, the State's case rested almost entirely on Williams's testimony. The record showed that after police officers interviewed Williams in 2009, she was charged with the murder of McPherson. Her murder warrant was issued on November 1, 2009, but she was never indicted, and the warrant was eventually dismissed on May 27, 2016. On the morning of Williams's testimony at trial in July 2018, she entered into an immunity agreement with the District Attorney whereby she was granted immunity from prosecution in exchange for her agreement to testify. She was repeatedly impeached by defense counsel during her trial testimony. When appellant's defense attorney asked Williams if she had "lost track of how many fibs [she had] already told," Williams answered, "Yes, ma'am." Neither appellant nor his co-defendants testified at trial, and there was no evidence admitted of any statements that they may have previously given.

Appellant contended that the trial court erred by failing to give a curative instruction to the jury in response to comments made by the District Attorney during closing arguments that were prejudicial and referred to matters not in evidence. The Court agreed. The Court found that the record showed the District Attorney referred to a number of matters not in evidence concerning his role and authority in choosing whom to indict, his sworn duty not to indict those who have not committed a crime, and his sole authority to determine whom to indict. Thus, the Court found, the trial court violated OCGA § 17-8-75 and erred in refusing to give a curative instruction as requested.

Nevertheless, the Court stated, a trial court's error in not fulfilling its duty under OCGA § 17-8-75 is subject to harmless error analysis. And here, the Court found, the evidence that Williams was an accomplice was strong. She admitted that she participated in the plan to go to McPherson's apartment to obtain marijuana and that she knocked on his door because the group had decided that McPherson would more likely open the door for a woman. Although Williams did not go into the apartment, she heard a gunshot as she was turning away. She then left with the group and smoked the marijuana obtained from McPherson's apartment, which she noted was more in quantity than the money that the group had for the purchase. Moreover, a warrant was obtained for her arrest for the murder, but on the day of her testimony at trial, Williams entered into an immunity agreement in exchange for her testimony.

During the arguments regarding appellant's motion for a directed verdict, the District Attorney conceded to the trial court that the State had offered no evidence, other than Williams's testimony, that would place appellant or his co-defendants at the crime scene. Knowing that no evidence would corroborate Williams's testimony if she were found to be an accomplice, and that the trial court had in fact concluded that there was no corroborating evidence before denying appellant's motion for a directed verdict, the District Attorney argued in closing that regardless of the evidence in the record, the District Attorney was the sole arbiter of whether Williams could be indicted and that she was not indicted because he made that determination, implying based on the jury instruction that she could not be an accomplice. The Court found that the prejudicial nature of these statements was compounded by the District Attorney's assertion of authority over that of the trial court. Even though the trial court subsequently instructed the jury that it was to determine whether Williams was an accomplice, the trial court also told the jury that whether a witness is an accomplice is based on

whether she could be indicted for the same crimes. The District Attorney's arguments suggested to the jury that because of the District Attorney's authority, the decision about whether to indict (and consequently whether Williams was an accomplice) had already been made, so the jury did not have to make that determination, and the trial court's subsequent charge to the jury can be reasonably construed as reinforcing that argument.

Thus, the Court concluded, the State failed to carry its burden of showing that it is highly probable that the District Attorney's uncorrected argument did not contribute to the verdict. The only way for the jury to properly find appellant guilty, given the lack of corroborating evidence, was to find that Williams was not an accomplice, and the Court could not say that it was highly probable that the District Attorney's argument did not contribute to that finding. Consequently, the Court held that the failure to provide a curative instruction was harmful error, and reversed appellant's convictions.

In so doing, the Court acknowledged that it has often concluded that an improper argument or comment by a prosecutor was not harmful error, particularly where the evidence of guilt was strong. But, the Court stated, it could not reach the same conclusion here. The evidence that Williams was an accomplice was strong, and her credibility was significantly impeached by her prior inconsistent statements and immunity deal; there was no corroborating evidence of appellant's guilt at all; the District Attorney's arguments were clearly improper; and the trial court overruled requests to cure the inappropriate arguments. Under these circumstances, the error in this case was harmful.

Identification; *Brady*

Harris v. State, S22A0251 (5/3/22)

Appellant was convicted of felony murder and other offenses. The evidence, very briefly stated, showed that appellant, in the course of robbing a garden center before it opened one morning, shot and killed the owner of the business. Fletcher, one of the employees who arrived during the course of the robbery, identified appellant in pretrial proceedings and at trial.

Appellant contended that the trial court erred in admitting Fletcher's pretrial and in-court identifications of him. Specifically, he argued that this violated his due process rights because the pretrial identification procedure was impermissibly suggestive, and Fletcher's in-court identification was tainted by it. The Court disagreed.

Appellant argued that the lineup procedure was impermissibly suggestive because the officer who conducted the lineup knew that appellant was the suspect. Citing a psychology journal article, appellant contended that this was particularly problematic because the officer did not "take precautions" to ensure that he did not provide "conscious or unconscious cues" that appellant was the suspect. But, the Court stated, appellant did not specify what the officer should have done differently, except to the extent that he argued that a photo lineup must be presented by someone who does not know the suspect's identity. However, the Court stated, there is no authority supporting such an argument. To the contrary, statutory law contemplates photo lineups being administered by police officers who know the identity of a suspect. And here, the Court found, the evidence supported the trial court's implicit conclusion that the lineup was not impermissibly suggestive.

Appellant also argued that Fletcher's pretrial identification of him should have been excluded because there was a substantial likelihood of misidentification for other reasons, such as the stressful nature of Fletcher's interaction with the gunman and her inconsistent descriptions of him. But, the Court stated, where the identification procedure is not unduly

suggestive, it is not necessary to consider whether there was a substantial likelihood of irreparable misidentification. And here, the Court found no abuse of discretion in the trial court's admission of Fletcher's pretrial identification of appellant. Also, because appellant's argument that Fletcher's in-court identification was improper depended on his claim that her pretrial identification was fatally flawed, it failed as well.

Appellant next argued that that he was denied due process under *Brady* because the State thwarted his access to a plea allocution by co-defendant Carter. The Court again disagreed.

The record showed that at a pretrial hearing, Carter's attorney testified that she recalled that Carter had pleaded guilty to charges related to the victim's death in November 2012. There also was some indication — in the form of a news media article attached as an exhibit to a defense motion — that a prosecutor referenced a guilty plea by Carter in a news media interview in January 2013. But apparently, no transcript of any November 2012 guilty plea by Carter could be located by the parties or the court. In June 2014, appellant filed a motion to exclude Carter's testimony, arguing that the State's failure to notify appellant of the terms of Carter's negotiations and to preserve transcripts and other court documents relating to Carter's 2012 plea and allocution amounted to a *Brady* violation. The trial court denied the motion, deeming it "unlikely" that the plea hearing had taken place, given the lack of documentation of such a hearing. The court also concluded that any failure to ensure that documents were properly maintained and preserved was not the prosecutor's fault, but that of the judge, court staff, or the court reporter.

The Court stated that under *Brady* and *Giglio v. United States*, 405 U.S. 150 (92 SCt 763, 31 LE2d 104) (1972), the State violates due process when it suppresses evidence that materially undermines witness credibility. To prevail on such a claim, a defendant must show that (1) the State possessed evidence favorable to his defense; (2) he 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. The burden of proof on these elements lies with the defendant.

Here, the Court found, appellant failed to show that the State possessed evidence favorable to the defense, let alone that the State suppressed such evidence. The trial court deemed it unlikely that Carter made a plea allocution in November 2012 and the Court stated, it could not conclude on this record that this finding was clearly erroneous. The State could not possess, let alone suppress, records that do not exist. Furthermore, the trial court at least implicitly found that in the unlikely event that the plea hearing did take place, the records were lost by court staff and *Brady* requires information to be revealed only when it is possessed by the prosecutor or anyone over whom the prosecutor has authority. Therefore, the Court concluded, appellant failed to show a *Brady* violation with respect to any records of a November 2012 allocution by Carter.

BAC Testing Admissibility; Jury Charges

Butler v. State, A22A0146 (4/11/22)

Appellant was convicted of first-degree vehicular homicide, DUI (per se) and DUI (less safe). Briefly stated, the evidence showed that appellant's vehicle struck the victim as he walked across the road approximately 283 feet outside of the nearest crosswalk. Skid marks indicated that, after she engaged her brakes, she traveled across multiple lanes of the five- or six-lane

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road before hitting the victim. At the time, the weather was clear, the roads were dry, the area was well-lit by streetlights and area businesses. A detective testified that a pedestrian at the location of the collision would have been "illuminated and detectable." He further testified that appellant's car was traveling at approximately 31-35 miles per hour (in a 45-mile-per-hour zone) before she braked and that "speed was not a contributing factor" to the accident.

Toxicology reports indicated that appellant had a blood-alcohol concentration ("BAC") of 0.084 (plus or minus 0.04) grams per milliliter; the victim's BAC was 0.373 (plus or minus 0.019) grams per milliliter, and he also had cocaine in his system. It was undisputed that appellant's blood was drawn no later than 2:15 a.m., between three hours and three hours and fifteen minutes after she hit the victim. A forensic toxicologist testified that, at that time, appellant's BAC was either at its highest concentration or had started to decline since she last consumed alcohol. And neither the first officer to respond (who spoke with appellant) nor the officer who arrested appellant gave any indication that she had any opportunity to consume alcohol at any point after the collision or that alcohol was found in her car or on her person.

Appellant contended that the evidence was insufficient to support her DUI per se conviction because her blood was not tested within three hours of the accident. The Court noted that under the applicable statute, and as charged in her indictment, the State was required to prove that appellant drove while her BAC level was 0.08 grams or more "within three hours after such driving . . . from alcohol consumed before such driving . . . ended." OCGA § 40-6-391 (a) (5). But importantly, the statute does not require that the person be tested within three hours. Rather, the State need only show that the accused's BAC level was greater than the statutory limit during the three-hour period after she ceased driving.

Thus, the Court found, the evidence was sufficient for the jury to infer that appellant last consumed alcohol before the collision and that her BAC level was 0.084 or higher at the time of the collision. And even if the evidence on these points arguably may be deemed entirely circumstantial, when viewed in its entirety, it was sufficient for the jury to reject any reasonable theory other than appellant's violation of the DUI per se statute.

Nevertheless, citing OCGA § 40-5-55 (a), appellant argued that the results of her BAC test were inadmissible because the test was not administered within three hours of the accident. The Court disagreed. While OCGA § 40-5-55 (a) provides that BAC tests must be "administered as soon as possible" to anyone operating a motor vehicle who is involved in an accident resulting in serious injuries, that statute is not, on its face, a rule of evidence. Furthermore, the Court noted, appellant cited no authority interpreting that statute as a rule of admissibility. Consequently, she failed to meet her burden of showing that the trial court erred.

Citing *State v. Ogilvie*, 292 Ga. 6 (2012), and *Miller v. State*, 236 Ga. App. 825 (1999), appellant also contended that the trial court erred when it rejected her request to provide a jury instruction regarding OCGA § 40-6-95, which provides, in relevant part: "A person who is under the influence of intoxicating liquor or any drug to a degree which renders him a hazard shall not walk or be upon any roadway or the shoulder of any roadway." The Court noted that after an extended discussion during the charge conference, the trial court declined to give the instruction but also stated that, in conjunction with that decision, it would not give an instruction requested by the State to the effect that "[e]very pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway *unless he has already, and under safe conditions, entered the roadway.*" (Emphasis supplied.) When the trial court initially stated its decision in that regard, defense counsel responded, "I don't

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disagree with any of that analysis, Judge. We're amenable to that." After the trial court provided additional explanation for its decision, however, defense counsel responded, "Understood, Judge. We just note our exception."

Assuming appellant preserved the argument for review, the Court found that in *Ogilvie*, the Supreme Court held that: (i) "a jury charge on the defense of accident to a strict liability traffic offense is available only where there is evidence . . . that the defendant did not voluntarily commit the prohibited act"; and (ii) a jury charge on the defense of lack of proximate cause is warranted where a defendant claims that she could not avoid a collision due to an unforeseen, intervening cause. 292 Ga. at 9 (2) (b), 11-12 (2) (d)-(e). But, the Court stated, contrary to appellant's claim, the *Ogilvie* Court did not hold that a trial court must also charge the proper rules of the road statutes involving pedestrian duty. And the *Miller* Court held, in relevant part, that both "negligence by the defendant in operating his vehicle and the behavior of the victim remain relevant" in determining whether the State has met its burden of establishing that a defendant's conduct was the proximate cause of a victim's death in a vehicular-homicide case. 236 Ga. App. at 828 (2). However, *Miller* did not hold that a trial court must charge the jury on pedestrian rules of the road in cases in which a pedestrian victim is alleged to have been violating any such rule at the time he was struck by a car. *Miller* therefore also did not support appellant's claim of error. Accordingly, the Court concluded, appellant failed to meet her burden of showing that the trial court was required to charge the jury on pedestrian rules of the road, regardless of whether she sufficiently preserved this issue for appellate review.