

THIS WEEK:

- Rule 403; Motions to Sever
- Jury Deliberations; Removal for Cause
- Jury Charges; Voluntary Manslaughter
- Search & Seizure; Sufficiency of Warrant Affidavits
- Juror Misconduct; Extrajudicial Information

Rule 403; Motions to Sever

Harris v. State, S22A0092 (6/22/22)

On June 18, 2014, appellant left his 22-month-old son Cooper in his SUV and went into work. Appellant found his son in the vehicle after he got off from work much later that day. Evidence showed that appellant had been communicating online with numerous women, some of whom were minors. One of those minors was C. D. The messages were mostly of a sexual nature in which appellant desired some type of sexual relationship with these women. Appellant was indicted and convicted of five alleged crimes against Cooper (malice murder, two counts of felony murder, and cruelty to children in the first degree and second degree) and three alleged crimes against C.D. (attempt to commit sexual exploitation of a child and two counts of dissemination of harmful material to a minor). In a 130+ page opinion, a divided Court reversed the convictions relating to the death of Cooper.

Appellant contended that the trial court erred in allowing the State to admit evidence of appellant's sexual activities in the months leading up to Cooper's death including the day of his death. Initially, the Court found that the trial court erred in concluding that all the sexual-activities evidence was intrinsic and, alternatively, that all the same evidence was admissible under Rule 404 (b) because the evidence could not be both. Next, the Court found that the trial court abused its discretion in admitting the evidence to show intent because the intent required for the alleged crimes against Cooper was different than appellant's intent when he sent sexual messages and engaged in sexual conduct. For the same reason, absence of mistake or accident, which in this case was essentially another way of addressing appellant's intent (that is, whether Cooper's death was the result of intentional acts or a mistake or accident), was not a proper purpose. And appellant's sexual activities gave no indication that he had any knowledge related to how to kill a child by leaving the child in a hot vehicle.

Thus, the Court stated, this left only motive as a reason for admitting this evidence. The Court found that evidence regarding the sexual — and the non-sexual — messages that appellant sent and received beginning at 12:14 a.m. on June 18, 2014 and continuing throughout the day was necessary to complete the story of the charged offenses related to Cooper. The messages were closely linked in time to Cooper's death and helped to show appellant's activities and state of mind both shortly before he left Cooper in the SUV and while Cooper was dying or already dead in the vehicle. Evidence of appellant's online activities that day was thus an integral and natural part of the account of that day and was relevant as intrinsic to the charged crimes related to Cooper.

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However, the Court found, appellant's sexual messages and conduct in the weeks, months, and even years before Cooper's death were not closely linked in time to the charged offenses relating to that event. The Court noted that the State's motive theory relied on a particular chain of reasoning: (1) appellant wanted to have sexual relationships with many women; (2) appellant's marriage impeded that goal; and (3) Cooper prevented appellant from ending his marriage. But, the Court stated, the first two links in this chain had no direct relevance to appellant's alleged motive for killing Cooper. Contrary to the State's theory, a man does not normally enhance his ability to have sexual relationships with women by killing his young child. Also contrary to the State's theory, the impediments that marriage places on sexual relationships with multiple partners are normally overcome by cheating, divorce, or, in criminal situations, murdering one's spouse, not one's child.

Specifically, the Court found that the first link in the State's motive theory — that appellant wanted to have sexual relationships with many women — was readily proved and not disputed, and it was furthest from and the least probative of a motive for murdering Cooper. Indeed, standing alone, the evidence that appellant had a sex-crazed “double life” would not have been relevant to show his motive for murdering Cooper. Without evidence that appellant viewed Cooper as an obstacle to his sexual conquests, appellant's obsession with having sexual liaisons with many women lacked a “logical and necessary link” to the alleged crimes against Cooper. Nevertheless, the State was allowed to establish this relatively inconsequential fact with the testimony of 12 witnesses (nine women who exchanged messages with appellant, a police detective, a prostitute, and the police officer who interviewed the prostitute) and hundreds of online messages (whereas the final, most crucial, and most disputed link in the motive chain relied on four messages appellant sent to three anonymous Whisper (an online app) users months before Cooper's death). The messages that appellant exchanged on the day of Cooper's death, which were admissible as intrinsic evidence, established that appellant had sexual relationships with at least five women other than his wife. The Court acknowledged that some amount of evidence on this issue beyond those messages may have been probative to show that engaging in this kind of extramarital sexual activity was an important part of appellant's life, rather than a one-day affair (with five women), but there was a point at which yet another sexual message (or another 100 sexual messages) did not contribute to this issue in any meaningful way. Merely piling on more evidence to show the supposedly limitless extent of appellant's sexual “depravity” (as the dissent put it) did nothing to strengthen the link between his sexual obsession and the key question at trial — did this obsession motivate appellant to kill Cooper?

Moreover, the Court found, there were three categories of needlessly cumulative evidence that was highly prejudicial under Rule 403: evidence that appellant exchanged lewd and sometimes illegal sexual messages and pictures with four minors; nine color pictures of appellant's erect penis that the State extracted from messages and blew up to full-page size as separate exhibits; and evidence that appellant hired a prostitute three times. Through this extensive evidence about appellant's extramarital sexual relationships, the Court found that the State convincingly demonstrated that appellant was a philanderer, a pervert, and even a sexual predator. This evidence did little if anything to answer the key question of appellant's intent when he walked away from Cooper, but it was likely to lead the jurors to conclude that appellant was the kind of man who would engage in other morally repulsive conduct (like leaving his child to die painfully in a hot car) and who deserved punishment, even if the jurors were not convinced beyond a reasonable doubt that he purposefully killed Cooper.

Next, the Court addressed appellant's contention that the trial court erred in denying his motion to sever the counts related to C. D. The Court noted that the trial court first correctly held that the alleged offenses against Cooper and against C.D. were not joined solely because of their same or similar character. But the court then ruled that because the evidence related

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to C.D. would be admissible in a trial for the alleged crimes against Cooper, severance was not required, and the court declined to exercise its discretion to sever the counts, concluding that “considering the number and complexity of the offenses charged and . . . the nature of the evidence . . . , the trier of fact will be able to parse the evidence and apply the law with regard to each charge.”

The Court noted that where joinder is based upon the same conduct or on a series of acts connected or constituting parts of a single scheme or plan, severance lies within the sound discretion of the trial judge. When exercising that discretion, the trial court must determine if severance of the charges would promote a fair determination of the defendant’s guilt or innocence of each charge. Counts should be severed to prevent a defendant from being forced to proceed at an unfair disadvantage, due to confusion of law and evidence by the trier of the fact and the “smear” effect such confusion can produce. Generally, where evidence of one charge would be admissible in the trial of another, a trial court does not abuse its discretion by denying a motion for severance.

Here the Court found, the first count related to C.D. alleged that appellant attempted to commit sexual exploitation of C.D., a minor, by asking her to provide a photograph “involving the lewd exhibition of her genital and pubic area.” The State proved this count primarily with C.D.’s testimony and the record of appellant’s messages with her, which included at least seven messages beginning at least seven months before Cooper’s death in which appellant attempted to convince C.D. to send him a photograph of her vagina. But, the Court found, only one of these messages — the one appellant sent to C.D. on the afternoon of Cooper’s death — was admissible as intrinsic to the alleged crimes against Cooper. All the other messages were not properly admissible with respect to those offenses nor was evidence of C.D.’s age.

The other two counts related to C.D. alleged that between March 1 and June 15, 2014, appellant sent C.D. messages with graphic descriptions of sex and pictures of his erect penis. All of appellant’s messages describing sex were sent to C.D. by June 11, and all the penis pictures were sent by June 15. Thus, the Court determined, these alleged crimes related to C.D. were completed three days before the alleged crimes against Cooper. This evidence did not help complete the story of Cooper’s death, and it was not properly admissible to prove appellant’s alleged motive to kill Cooper. The Court further determined that the State supplemented this proof with evidence of appellant’s earlier sexual messages with C.D. as well as his lewd messages with M.B. and two other anonymous minors, including his exchange of sexual pictures with a Whisper user who told him that she was 17 years old. The Court found that this evidence may have been admissible with respect to the alleged crimes involving C.D. under Rule 404 (b) or OCGA § 24-4-414 (a), but it was not properly admissible with respect to the charges involving Cooper.

Finally, the Court addressed the harm to appellant. The Court stated that it could not say that it was “highly probable” that the trial court’s erroneous admission of evidence of appellant’s sexual activities and the court’s denial of his motion to sever did not contribute to the guilty verdicts as to the crimes against Cooper. Consequently, the Court reversed appellant’s convictions for those crimes (Counts 1 to 5). In so holding, the Court noted that appellant did not challenge his convictions related to C. D. and those were affirmed.

Jury Deliberations; Removal for Cause

Jones v. State, S22A0069. S22A0380 (6/22/22)

Appellants were tried jointly and convicted of murder and related offenses. They contended that the trial court abused its discretion when it removed L. M., the jury foreperson, after deliberations had started. Very briefly stated, the evidence showed that L. M. sent out numerous notes, as did other jurors, concerning the deliberations. There was evidence that the jury was deadlocked, that L. M. was in a small minority or the lone holdout on some charges, and that L. M. berated and was rude to other jurors. And at one point, L. M. requested to be removed from the jury because her views differed from the other jurors. After questioning the jurors, and over the objections of appellants, the trial court removed L. M. and replaced her with an alternate. The jury then reached a unanimous verdict sometime thereafter.

The Court stated that OCGA § 15-12-172 provides the general rule on removing jurors for cause. The question of whether to remove a juror is a matter committed to the trial court's discretion, even after jury deliberations have begun. However, there must be some sound basis upon which the trial court exercises its discretion to remove the juror. A sound basis may be one which serves the legally relevant purpose of preserving public respect for the integrity of the judicial process. Both the need for investigation and the possibility of harmful error are heightened when a jury has begun deliberations or when a jury is deadlocked. And because removing a dissenting juror when the jury is deadlocked risks violating a defendant's right to a unanimous verdict, a trial judge must exercise the utmost care in determining that good cause exists before removing the juror.

The Court noted that our appellate decisions reviewing the removal of jurors during deliberations reveal a general rule for the removal of holdout jurors during deliberations: such a juror may be removed after sufficient investigation supports findings establishing proper reasons unrelated to the juror's view of the trial evidence, but a juror may not be removed for reasons related to the juror's view of the trial evidence, even if the juror's insistence on that view has negative effects on other jurors and the jury's deliberations. Many cases have affirmed removal during deliberations for reasons unrelated to the juror's view of the trial evidence. On the other hand, several Georgia appellate decisions have concluded that the trial court abused its discretion in removing a juror during deliberations when the removal was for a reason related to a juror's view of the evidence, or when the trial court's investigation was insufficient to conclude with confidence that the reason for removal was unrelated to the juror's view of the evidence. In other words, a juror's view of the evidence is not the sort of "legally relevant purpose" our case law requires before removing that juror, even when the juror's view of the evidence has a negative effect on deliberations.

And here, the Court found, this case could have fit in either of these two lines of cases: while the evidence the trial court developed during its investigation could have supported findings that would place this case in the line allowing removal, the findings the trial court made instead placed it squarely in the line prohibiting removal. There was sufficient testimony from which the trial court could have found that L.M. insulted, threatened, unduly pressured, and intimidated other members of the jury, the sort of behavior unrelated to a juror's view of the evidence that could justify removal. But the trial court made no such finding. Instead, the trial court expressly found that L.M. "did not threaten the other jurors, nor did she unduly pressure or intimidate them into changing their opinions," and made no finding at all about insults. Although some jurors reported that L.M. had threatened, insulted, or pressured them in some way, credibility of witnesses and the weight to be given their testimony is a decision-making power that lies solely with the trier of fact. Specifically, the

trial court based its removal of L.M. on four related findings: (1) she ceased deliberating after making up her mind as early as two hours into deliberations, (2) she refused to communicate her reasons for her conclusion, (3) she sought to physically distance herself from the other members of the jury, and (4) she asked to be removed from the jury.

Even assuming these findings are supported by the record, The Court found that they were insufficient to support removal. Each of these findings was part and parcel of the notion that L.M. reached a firm conclusion as to the counts before the jury and declined to deliberate further. And although the trial court's finding that L.M. was "impeding the jury's progress as a whole in deliberating," the court made no finding that L.M. prevented other jurors from deliberating, and the context of that finding strongly suggested that the court meant that L.M. was impeding deliberations in the sense that the jury was unable to reach a unanimous verdict given her unwillingness to participate in further discussions.

Expanding on the time for reaching a conclusion about the evidence, the Court noted that it is unaware of any its prior decisions holding that a juror's having arrived at a firm conclusion based on the trial evidence — or arriving at that conclusion too quickly after deliberations begin — constitutes good cause for removal. A trial court may find good cause to remove a selected juror who has reached a "fixed and definite" opinion of guilt or innocence if it can be established that the juror reached such conclusion after jury selection and before the start of deliberations. Indeed, a juror or prospective juror who holds a fixed opinion about guilt or innocence before the evidence is complete and the judge has charged the jury has necessarily arrived at that opinion improperly, because that opinion is necessarily based on something other than all the evidence and the judge's charge. But, the Court stated, it makes no sense to extend that same proposition to a juror who has reached a fixed opinion after listening to all the evidence and the judge's charge and engaging in deliberations. Such a juror may have done precisely what it is expected of jurors to do — consider the law and evidence, and thereby reach a conclusion with a high level of personal confidence. And, once a juror has heard the evidence, the arguments of counsel, and the court's instructions on the law, there is no requirement that the juror spend any set length of time deliberating before forming an opinion as to the defendant's guilt or innocence. In so holding, the Court disapproved of *Bethea v. State*, 337 Ga. App. 217 (2016) to the extent that it could be read to conclude that a juror may be removed for deliberating for what the trial court deems an insufficient amount of time before arriving at a conclusion.

Finally, although the trial court also found that L.M. "asked to be removed from the jury," a point that has supported removal in several Georgia cases, the Court found the request did not support removal here because it was made in a note sent to the court, and the relevant text of the note made clear that the request was a result of L.M.'s firm conclusion that the evidence was insufficient to convict. A juror cannot be removed from a jury based on his or her request to be removed when that request is based on a "firm" conclusion that the evidence is insufficient to convict. Accordingly, because the trial court abused its discretion in removing L.M. from the jury, the Court conclude that appellants' convictions must be reversed.

Jury Charges; Voluntary Manslaughter

Mobley v. State, S22A0550 (6/22/22)

Appellant was convicted of malice murder and other related offenses. The evidence, very briefly stated, showed that appellant broke into the home of Katelyn, his estranged wife, in violation of a condition of pretrial bond, and shot and killed her in the presence of the couple's children. Appellant contended that the trial court erred by refusing his request

for a jury instruction on voluntary manslaughter as a lesser offense of murder. Specifically, he pointed to the physical evidence showing that Katelyn shot at him six times, "and one of [the shots] hit [him] in the thigh — a very sensitive area of the body," and to evidence that this "volley of fire" was "preceded by arguments and [Katelyn's] refusal to let him in the home." Appellant argued that "[b]eing shot under these circumstances is sufficient provocation for a reasonable person to react with a sudden, violent, and irresistible passion." The Court disagreed.

First, the Court noted, appellant did not identify any evidence supporting an inference that Katelyn's allegedly provocative conduct, shooting him through the bedroom door, actually engendered in him a sudden, violent, and irresistible passion. Although there was evidence, including appellant's testimony and some of the physical evidence, that supported an inference that Katelyn shot him through the bedroom door, that evidence, without more, did not support any particular inference about appellant's state of mind after being shot. Furthermore, neither of appellant's children stated during their forensic interviews that they observed appellant's reaction to being shot. And appellant did not testify that he was provoked, angry, or inflamed by being shot by Katelyn — only that he could not remember what happened after she shot him.

Second, the Court stated, even if a jury could infer from the evidence that appellant was actually provoked into a sudden, violent, and irresistible passion by being shot by Katelyn after they argued and she refused to let him into her home to see their children, Katelyn's conduct would not be sufficient to excite such a passion in a reasonable person. Even accepting as true appellant's testimony that he did not break into Katelyn's home, he knew that he had entered her home without permission and in violation of a no-contact court order, and he ignored her demand that he leave. Under such circumstances a reasonable person would not be provoked by the victim's use of force in defense of self and habitation.

Therefore, the Court concluded, absent any evidence of a specific provocation at or close to the time of the homicide that would generate in a reasonable person a sudden and irresistible passion to kill, the trial court did not err in declining appellant's request for a voluntary manslaughter instruction.

Search & Seizure; Sufficiency of Warrant Affidavits

Copeland v. State, S22A0591 (6/22/22)

Appellant was convicted of malice murder and other crimes in connection with the shooting deaths of Rodgers and Johnson. The evidence showed that Riley was appellant's girlfriend and Rodgers's ex-girlfriend. Riley and Rodgers kept in touch. One evening, Rodgers asked Riley to bring him his mail and medication (which came in the mail) to the motel at which he was staying. Appellant accompanied her. Riley knocked on the door and when Johnson opened it, appellant pushed Riley out of the way and then shot and killed Johnson and Rodgers. Riley and appellant then left the scene.

Appellant contended that the trial court erred in denying his motion to suppress evidence obtained from a search of his cell phone records, including "cell-site location information" and "geolocation information." Specifically, he argued, the affidavit supporting the application for the warrant that authorized the search lacked a sufficient factual basis to constitute probable cause. The Court disagreed.

The Court noted that in the affidavit, the attesting detective stated as follows: cell phones belonging to both victims were recovered at the scene of the shooting. The detective called the last outgoing number from Rodgers's phone and reached

Riley, whom Rodgers's family identified as Rodgers's ex-girlfriend. After Riley agreed to an interview with the detective but failed to show up or answer her phone again, and after the detective received a tip that Riley's boyfriend committed the homicides, another detective analyzed Riley's phone records. That detective determined, through social media and a records check, that the most-called number (370 times in one month) belonged to appellant, and that Riley had called appellant before and after the shootings. An investigation of appellant revealed that he was on probation and had an active warrant for his arrest. A location check of Riley's phone showed that it "pinged" during and after the homicides at the same location as the homicides, and it later became stationary in the same area as appellant's address. When the detective would attempt to call Riley following the scheduled interview that she missed, the call would go straight to voicemail, and he was unable to locate her "in the two known locations where she live[d]." Believing that Riley was "on the run" and had discontinued use of her cell phone, the detective requested appellant's phone records because he believed that Riley, in the likely circumstance that she had obtained a new phone, would still be in contact with appellant based on their frequent cellular communications and the detective would be able to identify Riley's new number from appellant's phone records.

Appellant argued that the affidavit supporting the application for a search warrant showed nothing more than a call to Riley from Rodgers within an hour before his death, an anonymous tip that an unknown boyfriend of Riley's was involved in the murders, and a high volume of calls between Riley and appellant. However, the Court found, based on the totality of the circumstances set forth in the affidavit, the magistrate was authorized to conclude that the facts stated in the affidavit linked Riley to one of the murder victims both before and around the time of the shootings, showed that she likely was evading the detective investigating the murders, closely linked appellant's cell phone to Riley's cell phone through frequent contacts that included calls before and after the murders, and placed Riley and appellant in the same area as appellant's house after the murders. The magistrate could infer from all these circumstances a fair probability that appellant's cell phone records contained updated contact information for Riley, as well as additional information about appellant's contacts with her around the time of the crimes, which would lead to evidence relevant to the murders. Therefore, the Court concluded, the magistrate had a substantial basis for concluding that probable cause existed to issue the search warrant for appellant's cell phone records.

Juror Misconduct; Extrajudicial Information

Harris v. State, S22G0018 (6/22/22)

Appellant was convicted of homicide by vehicle in the first degree. After she was convicted, it came to light that some of the jurors used the internet to determine the difference between "first and second degree." The trial court denied appellant's motion for new trial, finding that there was no reasonable probability that the jury's verdict was influenced by this improper extrajudicial information because it concerned only sentencing. The Court of Appeals affirmed. See *Harris v. State*, 360 Ga. App. 695, 698-699 (1) (2021). The Court then granted appellant's petition for writ of certiorari.

The Court stated that to set aside a jury verdict solely because of irregular jury conduct, a court must conclude that the conduct was so prejudicial that the verdict is inherently lacking in due process. In assessing whether juror misconduct meets this standard for prejudice, a court must presume that the misconduct prejudiced the verdict. And, when irregular juror conduct is shown, the prosecution carries the burden of establishing beyond a reasonable doubt that no harm occurred.

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The Court found that the trial court failed to apply these principles. First, the court erred in concluding that OCGA § 24-6-606 (b) ("Rule 606 (b)") displaced the presumption of prejudice arising from a showing of juror misconduct. Rule 606 (b) governs what is or is not admissible to sustain or impeach a verdict, creating a nearly categorical bar on juror testimony, with only three specific exceptions." Citing *Beck v. State*, 305 Ga. 383, 385-386 (2) (2019), the Court stated that Rule 606 (b)'s specific exceptions permit jurors to testify about whether (A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form. Thus, the trial court erred in failing to accord a presumption of prejudice to appellant upon its finding that jurors engaged in improper extrajudicial research with the potential to deprive her of due process.

Second, although the trial court correctly recognized that it was the State's burden to show that juror misconduct was nonprejudicial, it applied the wrong standard of proof in assessing prejudice. Specifically, the court determined that there was "no reasonable probability of harm," invoking the standard typically applicable to nonconstitutional errors, rather than applying the "beyond a reasonable doubt" standard that applies to most constitutional errors, including errors arising from juror misconduct.

Next, the Court found that the Court of Appeals properly recognized both that a presumption of prejudice attaches upon a finding of juror misconduct and that the State needed to prove beyond a reasonable doubt that the misconduct was nonprejudicial. However, the Court determined, that court erred when it concluded as a matter of law that, while extrajudicial information obtained by a juror about "the underlying substantive law or evidence" could prejudice a defendant, extrajudicial information about "the difference in the severity of the crimes" had no potential to cause prejudice. In fact, the Court stated, "[t]he Court of Appeals' conclusion that jurors' possessing extrajudicial sentencing information can never prejudice a defendant is ... inconsistent with half a century of Georgia legislation, case law, and practice prohibiting jurors from considering punishment in reaching a verdict."

Instead, the Court stated, the concern with injecting sentencing considerations into the guilt-innocence phase of a trial is that, if the jury can discern what sentence(s) the defendant on trial is facing, it might use that knowledge to fashion a verdict that will result in the sentence the jury wishes to see imposed upon the defendant being tried, rather than deciding the defendant's guilt or innocence based on the evidence and underlying substantive law provided by the court. Consequently, the Court noted, although it is not holding that a juror's obtaining extrajudicial sentencing information is *always* prejudicial, the Court of Appeals erred in concluding that such information could *never* be so inherently prejudicial as to require a new trial. Accordingly, the Court vacated the opinion of the Court of Appeals and directed the court to remand the case to the trial court to determine in the first instance whether appellant's motion for a new trial based on juror misconduct should be granted.