

## THIS WEEK:

- Judicial Misconduct; Undue Influence
- Cross Examination; Impeachment Evidence
- **Witness Tampering; Ineffective Assistance of Counsel**
- **Motions for Severance; Offenses of Same or Similar Character**

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### Judicial Misconduct; Undue Influence

*Dugar v. State*, S22A0707 (8/9/22)

Following a bench trial, appellant was convicted of felony murder, aggravated assault, and a firearm-possession offense. Appellant shot the victim during a melee and then called 911 and waited for them to arrive. During the initial bond hearing, the trial court commented that calling 911 was “not the usual in the situation of an alleged murderer.” He then stated to the prosecutor that “[t]his is something that might be better viewed as manslaughter . . . based on the snippet that I've gotten involved and she made the call.” The trial court then continued the bond hearing. Years later, appellant waived her right to a jury trial. The trial court judge passed away before the bench trial and the succeeding trial judge convicted her.

Relying on *Ealey v. State*, 310 Ga. App. 893, 898 (2011), appellant contended that the original trial judge's remarks at the initial bond hearing regarding the facts of the case and the possible charges against her exerted “undue influence” on her decision to waive her right to a jury trial, therefore rendering her waiver involuntary. The Court disagreed and stated that the facts in *Ealey* bear no resemblance to this case.

The Court stated that even if appellant's undue-influence theory could support a claim that her waiver of a right to a jury trial was not voluntary, and that the circumstances in *Ealey* amounted to sufficient undue influence to render the waiver there involuntary, the circumstances here did not raise even remotely similar concerns. Here, the original trial judge's remarks at the pre-indictment bond hearing involved no threats or promises; did not mention a bench or jury trial, much less pressure appellant to choose one over the other or threaten appellant with a heavier sentence if she chose a jury trial and the jury found her guilty; and were directed to counsel rather than to appellant personally.

Moreover, the judge's remarks and appellant's decision to waive her right to a jury trial occurred over three years apart, separated by intervening hearings that resulted in decisions unfavorable to appellant: the original trial judge twice denied appellant's requests for bond and, denied her motion for immunity

after receiving extensive testimony from multiple witnesses. The original trial judge's statements here in a completely unrelated hearing three years earlier were not comparable with the statements made in *Ealey* at the time of the defendant's decision, which placed the defendant under pressure to decide immediately and signaled a preference for the defendant to waive his rights.

Thus, the Court concluded, whatever appellant may have believed or hoped regarding the original trial judge's remarks explaining the reasons for continuing the initial bond hearing, more than three years before she waived her right to a jury trial and nearly four years before her bench trial was conducted by a different judge, the successor trial judge did not clearly err in rejecting appellant's assertion that those remarks rendered involuntary her waiver of a jury trial.

Nevertheless, appellant argued, the original judge's remarks at the initial bond hearing were improper regardless of when they were made, arguing under OCGA § 17-8-57 that comments expressing a judge's opinion as to the merits of a case cannot be made "during any phase of any criminal case." But, the Court stated, that statute does not apply to comments made outside the presence of the jury. Therefore, the original trial court's comments explaining his reasons for continuing the initial bond hearing would not have violated OCGA § 17-8-57, even if it applied here.

### **Cross-Examination; Impeachment Evidence**

*Ellington v. State*, S22A0477 (8/9/22)

Appellant was convicted of malice murder and other offenses. Durden, appellant's girlfriend at the time of the crimes, testified against him. During a sidebar conference, the State raised concerns that appellant planned to impeach Durden by cross-examining her about the facts of her then-pending aggravated assault case. The State objected that such questioning would constitute improper character evidence. The trial court ruled that appellant was permitted to elicit on cross-examination what crimes Durden was charged with, when she was indicted, and whether the charges remained pending—but not the underlying facts or circumstances of the charged offenses, which were referenced in Durden's indictment. Further, the court did not permit questioning on the potential sentences for the charged crimes. Defense counsel did not object but responded: "Okay. Thank you, Judge."

Appellant argued that the trial court committed plain error when it prohibited him from cross-examining Durden more fully regarding the unrelated criminal charges that were pending against her at the time she testified at his trial. The Court disagreed.

Here, the Court found, appellant failed to demonstrate that the trial court erred—let alone clearly erred—in imposing the limitations it placed on his cross-examination of Durden. The record showed that the trial court allowed appellant to cross-examine Durden about her pending criminal charges because of their potential effect on her motive or bias in testifying, while also recognizing that a defendant who

seeks to impeach a witness by asking about the witness's prior crimes generally is not entitled to ask about the specific facts underlying those crimes, citing *Smith v. State*, 300 Ga. 538, 542 (2017). The Court also noted that the trial court's ruling also followed its precedent that where a witness has not obtained a concrete plea deal from the State in exchange for her testimony, the accused may not bring out the potential penalties faced by the witness. And to the extent that appellant's appellate argument was based on his contention that *Smith* should be overruled, plain error cannot be based on an extension of existing precedent, much less on the overruling of existing precedent. Thus, the Court held, under the circumstances of the case, appellant failed to establish that the trial court plainly erred when it allowed him to cross-examine Durden about what criminal charges she had pending against her and about her potential motive or bias in relation to them, but prohibited him from eliciting testimony about the specific facts underlying those charges or about the potential sentences they carried.

### **Witness Tampering; Ineffective Assistance of Counsel**

*Payne v. State*, S22A0469 (8/9/22)

Appellant was convicted of malice murder. The transcript showed that after several witnesses had testified for the State, outside of the presence of the jury, the trial court summoned to the bench Kelvin, the brother of the victim, because a deputy had reported that Kelvin had been “talking to witnesses outside.” A “Ms. Hernandez” (who was not otherwise identified in the transcript but appears to have been affiliated with the prosecution) reported that she had spoken with a witness who was “agitated because [Kelvin] here has been walking back and forth talking about the witnesses lying and also telling them that I'm going to get you one by one, one by one.” She added, “What I believe is going on is that he's listening to the testimony and then he's going out there and — .” The trial court interrupted her to agree, saying, “That's what it sounds like to me.” Kelvin denied talking to witnesses or making threats, but the trial court found that “there's something going on” and Kelvin was “communicating with potential witnesses out there.” The trial court ordered Kelvin to leave the courthouse and not communicate with any witnesses. Appellant did not object to this resolution of the matter.

Appellant argued that his trial contained a structural error because Kelvin threatened witnesses and shared testimony with them outside of the courtroom. The Court noted that a “structural error” generally is defined as a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. Structural errors are not subject to harmless error review; they are cause for automatic reversal. But, the Court stated, it did not need to decide whether the trial court's handling of matters related to the victim's brother constituted a structural error. Appellant preserved no such argument for the Court's review because he failed to request a mistrial or some other remedy.

Appellant nevertheless argued that his trial counsel was ineffective for failing to move for a mistrial or otherwise object to Kelvin's threatening witnesses. Specifically, he again contended that Kelvin's alleged

threats to witnesses created a “structural error.” He argued that this was akin to the unconstitutional closure of a courtroom, a structural error from which harm is presumed. He also attempted to draw an analogy to certain communications between a juror and a third party that may create a presumption of harm to the defendant.

However, the Court noted, appellant cited no authority that the sort of contact at issue here was grounds for a mistrial, and the Court found none. A lawyer is not deficient for failing to make an argument that would require an extension of the law. Moreover, appellant did not explain why it would have made sense to grant a mistrial solely because witnesses had been threatened because whereas a retrial involves the selection of new jurors, it does not necessarily involve the selection of new witnesses. And to the extent that appellant argued that counsel otherwise was deficient for failing to “object to the constitutional structural error” of Kelvin threatening witnesses, he did not specify what remedy short of a mistrial counsel should have requested. Although a witness's reference to a threat may raise the possibility of prejudice to be addressed by the trial court when the reference is made *in front of the jury*, the trial court's inquiry about Kelvin's alleged actions was conducted outside of the presence of the jury. Accordingly, the Court concluded, appellant failed to show that counsel performed deficiently by not requesting a mistrial based on alleged threats by Kelvin or otherwise “object” to the situation.

#### **Motions for Severance; Offenses of Same or Similar Character**

*Johnson v. State, A22A0299 (6/28/22)*

Following a jury trial, appellant was convicted on three counts of robbery by force, two counts of robbery, and one count of criminal attempt to commit robbery. The record showed that the indictment was based on a July 22, 2016 incident, a November 17, 2016 incident, and an August 20, 2017 incident. Appellant originally faced three separate indictments based upon the dates of the crimes. However, in August 2018, the State re-indicted appellant for each of the crimes and combined the charges in a single indictment. Appellant filed a motion to sever. After a hearing, the court denied the motion.

Appellant contended that the trial court erred in denying his motion to sever. The Court agreed. The Court stated that when two or more crimes of the same general nature are committed against different persons, at different times and places, and are charged in separate counts of an indictment, severance is mandatory upon the defendant's motion if the crimes are joined solely because they are of the same or similar character. But, if the offenses are not joined solely because they are of the same or similar character, and evidence of one charged offense would be admissible as a similar transaction during trial on another charged offense, the trial court is vested with discretion in deciding whether to grant a motion to sever. In making this decision, the court must consider the number of offenses charged, the complexity of the charges, and the complexity of the evidence and determine whether the jury will be able to fairly and intelligently parse the evidence and apply the law regarding each charge.

And here, the Court found, and the State conceded, the record did not support any conclusion other than that appellant's charges were joined solely because they are of the same or similar character. In so holding, the Court noted that the record did not contain a written response by the State to appellant's motion to sever or a transcript of any hearing on appellant's motion, either of which might have explained the State's theory for combining appellant's charges. Moreover, the trial court's order denying appellant's motion, which was prepared by the State, did not contain any legal analysis of appellant's motion or an explanation of its reasoning for denying the motion. In addition, neither opening statements nor closing arguments were transcribed, during which the State could have shown how the crimes were connected or part of a common plan or scheme. Nor did the State file a written response to appellant's motion for new trial as amended.

Finally, the Court found that appellant's convictions were not rescued by the trial court's order denying appellant's motion for new trial — again, prepared by the State — in which it stated that "severance is not warranted where the crimes charged stem from a course of continuing conduct," citing *Hubbard v. State*, 275 Ga. 610, 611-612 (2) (2002). The Court determined that the trial court's application of *Hubbard* was erroneous. In *Hubbard*, our Supreme Court affirmed the trial court's denial of a defendant's motion to sever. However, the Court observed that the defendant's crimes were committed "mere hours apart" on the same night. Here, even though appellant's crimes bore some similarities to each other, they lacked any connection to each other and spanned the course of thirteen months.

Thus, the Court concluded, at no point in the record did the State indicate that appellant's charges were joined for any reason other than that they were similar. Furthermore, the State conceded on appeal that it did not join the charges for any other reason, and the Court stated, it found nothing in the record to the contrary. As a result, in the absence of any such reason, coupled with the trial court's misapplication of *Hubbard*, the trial court erred because, under like circumstances, severance is mandatory upon the defendant's motion.