

## THIS WEEK:

- **Motions to Withdraw as Counsel; Conflicts of Interest**
- **Expert Witnesses; Insanity Defense**
- **Prior Inconsistent Statements; Video Recordings**
- **Pleas in Bar; Prosecutorial Misconduct**
- **Jury Charges; Accomplices**

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### **Motions to Withdraw as Counsel; Conflicts of Interest**

*White v. State, A22A0738 (8/22/22)*

Appellant was convicted of child molestation and statutory rape. Briefly stated, the record showed that Wyatt was appointed to represent appellant in early June 2019. Less than a month later, Wyatt filed a motion to withdraw as defense counsel based upon an alleged conflict of interest. At a hearing the next day, Wyatt's assistant testified that her husband was a first cousin of the victim's father; the victim stayed at her home overnight as a young child; she was Facebook friends with the victim; she had not actually spoken to the victim in years; and she had not learned anything about the case from the victim. Wyatt stated that he did not particularly have a problem with this relationship, but he was having other problems with his client. Appellant contended that Wyatt would not introduce evidence he wished to have introduced and disagreed with Wyatt's approach to his defense in general. Appellant also objected to Wyatt's continued representation because of the alleged conflict.

Over the next couple of months, Wyatt and appellant continued to not get along. During an aborted plea hearing, appellant stated that he was not satisfied with Wyatt's representation. Eventually, appellant's Alford plea was withdrawn because appellant clearly indicated a desire to go to trial. A couple of weeks before trial, Wyatt filed another motion to withdraw and the court held another hearing. Appellant again complained about a lack of communication with his attorney and mentioned the alleged conflict of interest due to the familial relation between Wyatt's assistant and the victim. But because there was no change in circumstances since the trial court's previous consideration of that issue, the court again declined to find a conflict of interest.

Appellant argued that the trial court abused its discretion and committed plain error by denying Wyatt's motion to withdraw as counsel due to a conflict of interest—namely the familial relationship between his assistant and the victim. The Court noted that a trial court has discretion whether to grant or deny a motion to withdraw as counsel. And further, an indigent defendant is not entitled to have his appointed counsel discharged unless he can demonstrate justifiable dissatisfaction with counsel, such as conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between counsel and client.

Here, the Court found, following a hearing that took place less than one week before trial was to begin, the trial court denied defense counsel's motion to withdraw on the basis of an alleged conflict of interest owing to a familial relationship between his assistant and the victim. But before doing so, the court questioned defense counsel's assistant at length and engaged in a colloquy with appellant as to his concerns with his current representation. And thereafter, the court correctly concluded that there was no conflict of interest when defense counsel did not represent the victim and there was no indication that either he or his assistant possessed information about the case from the victim. Additionally, the Court

found that appellant's complaints about his attorney were primarily related to mere disagreements about strategy. Under these circumstances, the trial court did not abuse its discretion in denying counsel's motion to withdraw.

## **Expert Witnesses; Insanity Defense**

*Hughes v. State, A22A0991 (8/25/22)*

Appellant was convicted of six counts of aggravated assault, three counts of aggravated battery, four counts of possession of a firearm during the commission of a crime, conspiracy to commit armed robbery, and attempt to commit armed robbery. At trial, appellant testified at trial and presented three lay witnesses to support his defense of not guilty by reason of insanity. Appellant testified that he suffers from blackouts and didn't remember the incident. There was also testimony that he has a history of seizures, suicide attempts, memory issues, and illegal drug use. He also would go into rages for no apparent reason.

Appellant contended that he was denied the effective assistance of counsel due to his counsel's misapprehension of relevant caselaw. Specifically, citing *Nance v. State*, 272 Ga. 217, 219 (2) (2000), he argued that because he submitted only lay witnesses to factually support his insanity defense, the State could not rebut this evidence with the testimony of Dr. Perri. He contended that trial counsel waived this procedural limitation by examining Dr. Perri and inviting him to give harmful opinion evidence that was detrimental to his defense.

However, the Court found, appellant's argument was flawed because the expert was called as a witness by the trial court, not the State, pursuant to the procedure outlined in OCGA § 17-7-130.1. When the trial court appoints an expert pursuant to OCGA § 17-7-130.1, the expert should not be considered an expert of the State, even if the expert's opinion supports the position of the State. Here, the defendant gave notice of an insanity defense, and the trial court issued an order directing the Department of Human Resources to conduct an evaluation of the defendant. And, as outlined in OCGA § 17-7-130.1, the expert witness was called by the trial court as a witness after the State and appellant presented their evidence. Therefore, appellant's reliance upon *Nance* was misplaced.

Next, appellant contended that his trial counsel should have objected when Dr. Perri testified on two separate instances that his examinations did not support a finding of "not guilty by reason of insanity." He argued that "Dr. Perri's impermissible expert opinion went to the central issue the jury was to decide and its admission cannot be deemed harmless." But, the Court stated, even assuming, without deciding, that trial counsel should have objected to Dr. Perri rendering an opinion on an alleged ultimate legal issue, appellant could not demonstrate prejudice under the second prong of the *Strickland* standard for ineffective assistance of counsel.

The Court stated that a defendant is presumed to be sane and has the burden to prove by a preponderance of the evidence that he was insane at the time the crime was committed. OCGA § 16-3-2 provides: "A person shall not be found guilty of a crime if, at the time of the act, omission, or negligence constituting the crime, the person did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence." Under OCGA § 16-3-3, "[a] person shall not be found guilty of a crime when, at the time of the act, omission, or negligence constituting the crime, the person, because of mental disease, injury, or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime." A defendant who can distinguish between right and wrong and who commits a criminal act he recognizes is wrong but which he is compelled to commit by an uncontrollable impulse or compulsion has no insanity defense under Georgia law.

Mental illness or abnormality, such as bipolar disorder, is not the equivalent of legal insanity. Evidence that a defendant does not remember committing a crime or was in a blanked-out state of mind during the commission of the acts charged

does not authorize a jury instruction on an insanity defense. Additionally, an inability to distinguish between right and wrong is not a defense to a crime if the inability is a consequence of voluntary intoxication.

And here, the Court found, the trial court appropriately instructed the jury on the law regarding an insanity defense, that it was not required to accept the testimony of an expert witness, and that it should not place any significance on the fact that Dr. Perri was called as a witness by the trial court. The State presented evidence showing that appellant had consumed alcohol all day before the offense, had formulated a plan to rob the store, was stumbling and mumbling in the store before the shooting began, and that the officer confronted him in the parking lot because he thought he was intoxicated. The lay witness testimony offered in support of appellant's insanity defense showed that he had a mental illness, memory issues, and would lose control when he became angry, but provided no evidence as to whether he had the mental capacity to distinguish between right and wrong at the time of the offenses or was suffering from a delusional compulsion. Thus, the Court stated, having reviewed the evidence de novo as it expects reasonable jurors to have done, the Court could not say that a reasonable probability existed for a different outcome had trial counsel objected to the legal conclusions of Dr. Perri.

### **Prior Inconsistent Statements; Video Recordings**

*Rozier v. State, A22A0642 (8/26/22)*

Appellant was convicted of two counts of aggravated cruelty to animals. The evidence showed that while visiting his friend, Powell, at a motel, appellant engaged in a physical altercation with his dog, a six-month old pit bull terrier. This incident left the dog badly injured, with a broken jaw and a broken hip that required several surgeries and a lengthy period of rehabilitation.

Powell testified at trial that appellant knocked on Powell's door at the motel and that when he opened it, the dog "went haywire" and attacked him. Appellant got between Powell and the dog and the injuries to the dog were the result of self-defense in an effort to protect Powell from the dog's unprovoked attack.

However, Powell gave a very different account of the incident shortly after it happened, when he was interviewed by police at the scene. He stated that he had been asleep in the motel room when he awoke to find appellant and the dog "tussling." He heard the dog growl at, and bite appellant and he heard appellant kick the dog. In Powell's words, "the dog bit [appellant] and he just nudded up on the dog," meaning that he "started kicking the dog and stuff." This went on for about 10 minutes, with appellant kicking, punching, and stomping on the dog. After telling appellant to stop, Powell "just sat down and just watched it." Powell's statement to the police was recorded, and over appellant's objection, the trial court allowed the State to play that video recording to the jury on the ground that it was a prior inconsistent statement.

Appellant contended that the trial court erred in admitting the video recording of Powell's statement because the statement was inadmissible hearsay. The Court disagreed.

The Court stated that under OCGA § 24-6-613 (b), extrinsic evidence of a witness's prior inconsistent statement may be admitted if "the witness is first afforded an opportunity to explain or deny the prior inconsistent statement and the opposite party is afforded an opportunity to interrogate the witness on the prior inconsistent statement or the interests of justice otherwise require." OCGA § 24-6-613 (b). And, contrary to appellant's argument, the statement was inconsistent with Powell's trial testimony. Although aspects of the two statements could be harmonized, the Court found that at their core, the two statements told very different narratives: the former depicted Powell waking up to find appellant fighting with the dog after the dog bit appellant; the latter depicted appellant intervening when the dog unexpectedly attacked Powell after Powell let appellant and the dog into his motel room.

In addition, Powell was given an opportunity to explain or deny his prior statement before the trial court admitted it into evidence. Powell admitted to making the prior statement and explained that he did not tell the police that the dog attacked him because he did not want to “get involved.” But Powell also equivocated about his prior statement and testified that he did not completely recall aspects of it. A witness's failure to remember making a statement may provide the foundation for offering extrinsic evidence to prove that the statement was made, this rule has been applied where, as here, a witness does not deny giving a police interview but does not remember aspects of the interview.

Finally, during trial appellant's counsel cross-examined Powell. While appellant argued that he was not given an opportunity to interrogate Powell before the trial court admitted the evidence, the timing of his cross-examination did not run afoul of the plain language of OCGA § 24-6-613 (b). The statute requires for admission of a prior inconsistent statement, that “the witness is first afforded an opportunity to explain or deny the prior inconsistent statement and the opposite party is afforded an opportunity to interrogate the witness on the prior inconsistent statement or the interests of justice otherwise require.” OCGA § 24-6-613 (b) (emphasis supplied). The Court noted that as seen in the grammatical structure of this sentence, the requirement that something occur “first” only applies to the witness's opportunity to explain or deny the statement, not to the opposite party's opportunity to interrogate the witness. Thus, the Court held, because appellant had the opportunity to interrogate Powell about his statement, OCGA § 24-6-613 (b)'s requirement was met, even though this cross-examination occurred after the evidence was admitted. Therefore, the prior inconsistent statement was admissible both as substantive evidence and to impeach Powell, and the trial court did not abuse her discretion in admitting the recording of Powell's prior statement to police.

## **Pleas in Bar; Prosecutorial Misconduct**

*Scott v. State, A22A0989 (8/26/22)*

Appellant was tried before a jury on charges of serious injury by vehicle, homicide by vehicle, speeding, and reckless driving. Before the jury returned a verdict, the trial court granted appellant's motion for a mistrial on the ground that the State had failed to disclose material, exculpatory Brady evidence. Appellant then filed a plea in bar, arguing that a second trial would constitute double jeopardy. The trial court denied appellant's plea in bar. He then filed a direct appeal in reliance on the collateral order doctrine.

Appellant argued that the State intentionally goaded him into moving for a mistrial, so retrial is barred. The Court noted that when a mistrial is granted at the defendant's request due to prosecutorial misconduct, the general rule is that the Double Jeopardy Clause does not bar the State from retrying the case. There is a narrow exception where the prosecutorial misconduct was intended to goad the defendant into moving for a mistrial. However, in order to prevail on such a claim, the defendant must show that the State was purposefully attempting through its prosecutorial misconduct to secure an opportunity to retry the case, to avoid reversal of the conviction because of prosecutorial or judicial error, or to otherwise obtain a more favorable chance for a guilty verdict on retrial.

Appellant argued that the State goaded him into moving for a mistrial because the State did not believe it could secure an appeal-proof conviction. But the Court noted, the trial court found otherwise. When assessing appellant's plea in bar, the trial court found that the prosecutors consistently requested that the jurors continue deliberations to reach a verdict, even after having learned that the jury was split, and argued against mistrial. The court concluded that the record was “wholly inconsistent with the allegation of intentional goading.” And, the Court found, appellant did not show that the trial court clearly erred in finding that the State did not intend to goad him into moving for a mistrial.

Nevertheless, appellant argued, the trial court should have granted his plea in bar to punish the State for its abuses of his rights. But as the trial court held, appellant failed to cite any authority for the proposition that a court may grant a plea in bar to punish the State, rather than to vindicate a defendant's right against double jeopardy where the State has attempted to subvert it. Accordingly, the Court determined, it could not say the trial court clearly erred in finding that the prosecution did not intend to goad the defense into moving for a mistrial, and therefore, the Court affirmed the denial of appellant's plea in bar.

### **Jury Charges; Accomplices**

*Durham v. State, A22A0867, A22A0868 (8/30/22)*

Following a consolidated trial on two indictments, appellant was convicted of two counts of possession of methamphetamine and possession of an illegal weapon. Briefly stated, the evidence showed that appellant lived with his girlfriend, Foster. Based on two separate incidents, appellant and Foster were charged with similar drug offenses. Foster pled guilty and agreed to testify against appellant. At the close of the evidence, the trial court instructed the jury that the testimony of a single witness was sufficient to support a finding, but the jury was not instructed as to the necessity of corroboration of a witness's testimony if the witness was also a co-conspirator, OCGA § 24-14-8. The trial court also instructed the jury on the law of constructive possession and joint possession.

Appellant argued that the trial court plainly erred by failing to instruct the jury as to accomplice testimony. The Court agreed and reversed.

An accomplice is someone who shares a common criminal intent with the actual perpetrator of a crime. Because Foster was a testifying codefendant of appellant, it was erroneous for the trial court to omit the accomplice testimony instruction in light of the fact that it also instructed the jury that the testimony of a single witness was sufficient to support a fact. By failing to give the required accomplice corroboration charge, the trial court impermissibly empowered the jury to find appellant guilty based solely on Foster's accomplice testimony. The jury, as the sole arbiter of credibility, was not properly instructed on the way it needed to judge the evidence. Consequently, because virtually all the incriminating evidence flowed from Foster, the outcome of the trial court proceedings was likely affected by the trial court's failure to provide an accomplice corroboration charge to the jury, and a proper instruction would likely have resulted in a different verdict.

Appellant argued that all the evidence of his guilt flowed from Foster, and the Court agreed. Although appellant lived at the residence and co-owned one of the vehicles in which methamphetamine was discovered, he was not at the property during the initial search. Moreover, the only evidence of appellant's possession of the weapon was Foster's testimony. It was true that appellant had access and control to the contraband as a resident of the house and that his behavior when officers attempted to serve a warrant supported a finding of guilt, and such evidence established that there was sufficient corroboration to support a guilty verdict had the appropriate jury instructions been provided. However, the Court found, under the circumstances, if a conviction could be affirmed despite the trial court erroneously providing a witness testimony instruction wholly opposite to an accomplice corroboration charge, an accused would have no way of knowing whether the jury secured his conviction through permissible means. In effect, laws and jury charges requiring accomplice corroboration would be meaningless. Accordingly, the Court concluded, the trial court erred, and a new trial was warranted.