

THIS WEEK:

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- **Affirmative Defenses; *McClure***

Jurors; Removal for Cause

Jackson v. State, S22A0764 (10/4/22)

Appellant was convicted of malice murder in the shooting death of Mays. The record showed that after the jury was empaneled, Juror Number 22 asked the bailiff why she had been selected when she had told the attorneys that she knew the victim. The following morning, the trial court questioned Juror Number 22 on the record, and she told the court that she had gone to school with Mays, explaining, “I don't think we ever had any classes together ... but just like having little conversations with him.” She responded that she did not know Mays “outside of school or anything like that.” She also confirmed that she had honestly responded during voir dire that she could be fair and impartial in this case. After some questioning by defense counsel, the court denied appellant’s motion to remove her from the jury at that point, finding “there's been no bias that's been proved.”

However, after the first day of trial, Juror Number 22 sent an email to the trial court and the clerk, and the court spoke with her again on the record. Juror Number 22 explained that she had gone to school with many of the witnesses who had testified the first day, that she had dated a co-indictee's brother, and that she did not “feel safe having anything to do with this case.” She responded that she did not feel she could remain impartial, given the circumstances. The trial court confirmed that Juror Number 22 had not talked about her concerns with any of the other jurors and then granted appellant's motion to remove her as a juror; an alternate became the twelfth juror.

Appellant contended that the trial court erred by failing to remove Juror Number 22 for cause after his motion even though the record showed that Juror Number 22 was ultimately excused. The Court noted that in a similar situation in which a trial court refused to remove a juror for cause and the defendant then exercised a peremptory strike on the challenged juror, it held that the defendant must show harm to prevail on his claim that the challenged juror should have been removed for cause. In that context, the harm resulting from the denial of a request to excuse a juror for cause is shown by demonstrating that one of the challenged jurors who served on the jury was unqualified. And here, appellant ultimately obtained the relief that he requested from the trial court — that the juror be excused for cause. Thus, the Court concluded, appellant could not demonstrate any harm from the trial court's initial failure to excuse Juror Number 22, and his claim failed.

Motions to Sever; Ineffective Assistance of Counsel

Lowe v. State, S22A0812 (10/4/22)

Appellant was convicted of felony murder and other offenses in connection with the July 2017 killing of his wife, Powell, and family violence aggravated assault and cruelty to children in the third degree, crimes that occurred in August 2015. He contended that the 2015 and 2017 charges were improperly joined and that the trial court abused its discretion in refusing to sever them. Specifically, he argued that the offenses were not part of a continuing scheme, that they occurred two years apart, and that the State only joined the offenses because they were similar in character and, as such, would only serve to prejudice the jury. The Court disagreed.

The Court found that given the evidence, the trial court did not abuse its discretion in denying appellant's severance motion because the charged offenses were similar, related acts of physical violence that were part of a continuing pattern of domestic abuse wherein appellant, while intoxicated, lashed out at Powell when he felt that he had been wronged by her. And, had the 2015 and 2017 incidents not been tried together, the trial court would have been authorized to admit evidence of the 2015 incident between appellant and his wife at the murder trial as other-acts evidence demonstrating the parties' prior difficulties, appellant's motive, and the lack of an accident.

Next, appellant argued that although his attorney moved to sever the 2015 offenses from the trial of the 2017 offenses based, in part, on controlling case law, counsel was ineffective because he did not base his severance argument on the most recent ABA Standards concerning joinder of offenses, which is the 1980 version. Appellant contended that severance was "mandated" under those standards and, had counsel based his severance argument on them, the trial court would have been required to sever the charges. Therefore, he argued, counsel's failure to make this argument was clearly deficient, and that deficiency prejudiced him. The Court again disagreed.

The Court found that for at least three reasons, appellant could not show that it was objectively unreasonable for his counsel not to rely on the 1980 standards in the motion to sever, because it was clear that relying on those standards would not have changed the outcome of the motion. First, the 1980 ABA Standards upon which appellant relied, was not binding Georgia precedent on the issue of joinder.

Second, in *Dingler v. State*, 233 Ga. 462, 464 (1975), which appellant's counsel relied on in his severance motion, the Court adopted as the State's rule to evaluate joinder the 1975 ABA Standards on Joinder of Offenses, under which two or more offenses may be joined in one charge, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both: (a) are of the same or similar character, even if not part of a single scheme or plan; or (b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. And here, appellant failed to show how argument based on the non-binding 1980 ABA standards would have prevailed over controlling authority from the Court, especially since a ruling in appellant's favor would require a departure from the rule in *Dingler*. Furthermore, it is well settled that a criminal defense attorney does not perform deficiently when he fails to advance a legal theory that would require an extension of existing precedents and the adoption of an unproven theory of law.

Third, the trial court's pre-trial ruling on appellant's motion to sever showed that it considered *Dingler* and other applicable Georgia law in denying the motion to sever. For example, the trial court specifically cited to the reasoning in *Madison v. State*, 329 Ga. App. 856, 866 (3) (2014), where the Court of Appeals held that joinder was proper because the offenses constituted "prior difficulties" between the victim and the accused. And here, the charges were of the same or similar character and involved a pattern of prior acts of domestic violence against the same victim that would have been admissible

in the trial regardless of whether they were formally charged. Further, appellant's prior acts of domestic violence against Powell showed that he lashed out against Powell violently when he was intoxicated and when he felt that he had lost control. These acts would have been admissible to show appellant's motive. Consequently, the Court held, appellant failed to show that counsel performed deficiently and therefore, his ineffective assistance of counsel claim was without merit.

Ineffective Assistance of Counsel; Prejudice

Lee v. State, S22A0720 (10/4/22)

Appellant was convicted of the malice murder of George Young. The evidence showed that appellant and George's wife, Tia Young, were having an affair and that they conspired to kill George and collect on his one-million-dollar insurance policy. At the time of the murder, appellant was living in the same house with George, Tia, and their children.

Appellant contended that he received constitutionally ineffective assistance of counsel on the grounds that his counsel failed to object to evidence of George's good character. The Court noted that trial counsel articulated that part of the defense strategy at trial involved questioning George's character to argue that others had a motive to shoot him and that they believed that the State would have been able to introduce evidence of George's good character in response. The Court stated that OCGA § 24-4-404 (a) (2) addresses when character evidence of the victim may be introduced in a criminal trial and allows "evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused or by the prosecution to rebut the same" subject to limitations not relevant here. Rule 404 (a) (2) requires that the defendant first introduce evidence of a pertinent character trait of the victim before the State may introduce evidence to rebut that which was presented by the defendant. Thus, trial counsel may have been able to object to some of the State's references to George's good character, which occurred before the defense introduced their character evidence. But, the Court stated, it need not parse those issues here because it concluded that it fell within the wide range of reasonable professional conduct to forbear from objecting to the good character evidence, knowing that the State would eventually be able to introduce that evidence in rebuttal. Thus, the Court concluded, counsel did not perform deficiently here.

Appellant also argued that his trial counsel rendered ineffective assistance by failing to object to the introduction and display of a photograph of George in life with his children. The record showed that after George's employer testified at trial that he knew George, Tia, and their three children, the State introduced a photograph of George standing with his three children. The picture was displayed on a screen visible to the jury for "at least an hour" while the State asked George's employer about details of George's work experience, as well as details about the night of the murder. The photograph also remained on display throughout appellant's cross-examination of George's employer and the State's re-direct.

The Court stated that assuming without deciding that trial counsel performed deficiently by not objecting to the introduction and display of the photograph, appellant failed to show prejudice. The Court found that because the children were at home at the time of the shooting, two of the children were called as witnesses at trial, so the jury was aware of their existence and relationship with George. Further, the photograph was proffered during the testimony of a non-family member. Also, due to the circumstances of this crime, the jury was well aware of the impact that the crime had on the children where their mother and a close family friend were on trial for murdering their father, so it was not clear that the photograph of George with his children elicited much additional improper sympathy, if any, from the jury. Consequently, the Court concluded, there was no reasonable probability that the trial result would have been different if not for the failure to object to the photograph.

Finally, appellant contended that his trial counsel rendered ineffective assistance by failing to object to the improper presentation of and comments on his post-*Miranda* silence. The record showed that during the interview, the detective showed appellant emails between appellant and Tia that revealed a romantic relationship between the two. After the

detective told appellant that it was obvious that appellant and Tia were having some kind of relationship, appellant read the emails and paused without saying anything. Then, appellant requested counsel, and the detective terminated the interview. At trial, the State played the video recording of the interview for the jury, including the portion during which appellant remained silent after he was confronted with the emails, and cut off the video right before appellant requested an attorney. The State then examined the interviewing detective: “Q: Really wasn’t a good answer to that question that you posed to him, was it? A: No, sir. Q: There was a long pregnant pause, wasn’t there? A: Yes, sir.”

Again, the Court stated that premitting whether these failures to object constituted deficient performance, Appellant could not show the requisite prejudice. First, evidence of the romantic affair between appellant and Tia was introduced separately from the interview, so appellant’s silence when confronted with the emails, to the extent that it can be considered a confirmation of the relationship and thus incriminating, was cumulative of other evidence introduced at trial. Second, even without the recording of the interview and comment on appellant’s silence while examining the emails, the evidence supporting appellant’s guilt was substantial. George was found shot on the front porch lying on his back with his feet toward the door and his keys still in the lock, indicating that he was shot from inside the house, and appellant admitted that he was inside the house at the time of the shooting. In the minutes after George’s death, appellant chose to remove a tracking device from George’s car. Also, appellant’s cell phone showed internet searches about poisonous venom and an article about a murder case. It was also undisputed that appellant and Tia were in a romantic relationship and that Tia called George’s life insurance company the day after George was killed regarding his one-million-dollar policy, which supplied a potential motive for the shooting. Thus, the Court concluded, because of the strength of this evidence, appellant could not show that, but for counsel’s deficient performance, there was a reasonable probability that the outcome of his trial would have been different.

Rule 404 (b); Harmless Error

Appellant v. State, S22A0809 (10/4/22)

Appellant was convicted of malice murder in connection with the 2017 shooting death of Danley. Appellant claimed that he shot Danley after Danley came at him with a knife. However, the evidence was inconsistent with appellant’s defense. For example, no knife was found near the body and an autopsy revealed that there were six gunshot wounds to Danley’s body, three of which were fired into his back.

Appellant argued that the trial court erred in admitting the State’s evidence of three prior incidents involving appellant to show plan, preparation, knowledge, and motive under Rule 404 (b). Appellant contended that because all the Rule 404 (b) evidence involved incidents that took place after he had been drinking, the incidents only showed that he had the propensity to be abusive, violent, and angry after drinking.

The record showed that at trial, the State presented Rule 404 (b) evidence through its first four witnesses. The first incident occurred in 2010 when the police were called to appellant’s home to investigate reports of an illegal liquor operation. In the second incident, occurring two months prior to Danley’s murder, appellant was arrested for disorderly conduct. While appellant was in the backseat of the police cruiser, appellant threw himself into the partition between the front and rear seats, claiming that the officer deliberately caused his injury by not fastening his seatbelt and slamming on the brakes. Dashboard cam evidence refuted this claim. The third incident involved domestic violence in relation to appellant’s former girlfriend.

After reviewing each incident in detail, the Court found that the trial court erred in admitting each incident under Rule 404 (b). Nevertheless, the Court found, the evidence supporting appellant’s commission of the murder and undermining his claim of self-defense was substantial. It was undisputed that appellant shot Danley, and the only question was whether

appellant shot in self-defense. The State's expert testified that the evidence at the crime scene did not support appellant's versions of events, and the jury was presented with testimony describing, and photographs showing, the evidence upon which the expert based her opinion. The jury also had reason to be skeptical of appellant's description of what happened because appellant told his friend one version of events (Danley attacked appellant with a shovel while appellant was asleep) shortly before he gave the police a different version of what had occurred (Danley came at him with a knife after the two had fought over money). The first version of events was undercut by the absence of a shovel at the scene. Likewise, the version appellant gave police was contradicted by the evidence at the scene. Appellant never claimed that there was a struggle after Danley retrieved the knife; rather, he said he shot Danley as he approached with the knife, and his counsel argued that the shooting occurred in the "short, enclosed area" where Danley's body was found. Yet the knife with Danley's DNA on it was found ten feet away from Danley, who instead had an ice bag clutched in his hand, and there was melting ice in the blender suggesting that Danley was in the process of making something in the blender when he was shot. Also, although appellant had injuries to his nose, neither he nor Danley had any injuries to their hands consistent with the two having been in a fight.

Furthermore, the other-acts evidence had little bearing on the issues in the case. The State's theory that appellant staged the scene was amply supported by the physical evidence and appellant's inconsistent statements and conduct after the crimes; whether appellant had knowledge about how to shoot at someone inside a house was not seriously contested; and the State was not required to show motive to prove the crimes. In closing argument, the State did not mention the other-acts evidence involving appellant's girlfriend or argue that it supported a motive for Danley's shooting; nor did the State refer to the 2010 aggravated assault arrest and indictment or argue that it showed plan or preparation.

Moreover, the trial court instructed the jury to consider this other-acts evidence for preparation, plan, knowledge, or motive and for no other purposes. The Court recognized the tension between the trial court's instructions to the jury to consider the other-acts evidence for these purposes, and its own conclusion that the evidence was not relevant to these purposes. But the Court presumed that the jury followed those instructions and did not use the other-acts evidence improperly to support that appellant had a propensity towards violence.

Finally, the Court also recognized that the admission of the other-acts evidence carried a risk of prejudice to appellant in no small part because the State chose to emphasize the three prior incidents through the first four witnesses that it called at trial. And, the Court stated, the case presented a close question, but in light of the substantial evidence of appellant's guilt and after conducting a de novo review and weighing the evidence as reasonable jurors would, it concluded that it was highly probable that the error in admitting the other-acts evidence did not contribute to the verdict finding appellant guilty of malice murder. Thus, the admission of the evidence provided no basis for reversal.

Insanity; Mental Illness

Brookings v. State, S22P0556 (10/4/22)

Appellant was convicted malice murder of his wife and stepdaughter during the guilt/innocence phase of his trial and was sentenced to death during the sentencing phase of his trial. Appellant argued that, in the guilt/innocence phase, the State made improper comments in its opening statement and asked improper questions to witnesses concerning his mental condition. Specifically, he contended that the State's opening statement, questions to witnesses, and closing argument impermissibly conflated the issue of "mental illness," which was part of a verdict that he *was* seeking, with the issue of "insanity," which he was *not* alleging. For example, the State mentioned in its opening statement that the mental health evidence would not prove "that [appellant] did not know right from wrong" or was "acting under any delusion or compulsion that over-masked [sic] his will."

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The Court noted that the terms “mentally ill” and “insane” as defined in Georgia law overlap significantly in meaning. The Code provides the following definition for “mentally ill”: “Mentally ill” means having a disorder of thought or mood which *significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life*. However, the term ‘mental illness’ shall not include a mental state manifested only by repeated unlawful or antisocial conduct.” OCGA § 17-7-131 (a) (3) (as renumbered by Ga. L. 2017, p. 471, § 3) (emphasis supplied).

As to “insanity,” the Code provides two definitions that will support a verdict of “not guilty by reason of insanity.” In the first, the definition is met where “the person *did not have mental capacity to distinguish between right and wrong* in relation to [an otherwise-criminal act].” OCGA § 16-3-2 (emphasis supplied). In the second, the definition is met where “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.” OCGA § 16-3-3 (emphasis supplied). The Court noted that much of the controversy in appellant’s case should be understood in relation to this overlap of meanings. Clearly, every person who fits one of the two legal definitions of “insanity” would also qualify as “mentally ill” under the law. But the reverse is not true, as not every person who is “mentally ill” can meet one of the two narrower definitions of “insanity.” Thus, the distinction between these two definitions must be made clear in the charges to the jury when both are at issue in the case. And further, the Court held, parties’ statements and questions that suggest that a defendant must fit the definition of “insanity” to be found “mentally ill” are objectionable.

In appellant’s case, the Court found that some of the State’s statements and questions were plainly not objectionable, as issues such as whether appellant had “a self-control problem” or “d[id]n’t understand the reality the rest of us live in” were directly relevant to whether he had “a disorder of thought or mood which *significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life*.” OCGA § 17-7-131 (a) (3) (as renumbered by Ga. L. 2017, p. 471, § 3) (emphasis supplied). However, the Court concluded, some statements and questions by the State, such as those incorporating the phrases “criminal responsibility” and “overmastering of the will,” would have been somewhat confusing to the jurors as to what it would eventually be called upon to decide under the proper definition of “mental illness” that the trial court eventually provided to them.

As to the one instance of such improper questioning about which appellant showed that he objected to at trial, which involved the phrases “criminal responsibility” and “overmaster[ing] his ability to control himself,” the Court held that the improper questioning did not require a new trial, as it was highly probable that it did not contribute to the guilt/innocence or sentencing phase verdicts. As to the remaining instances where no objection was raised, the Court held that appellant’s claims were waived for the purposes of ordinary appellate review and were not shown to be plain error.

Appellant also argued that it was error for the trial court to permit the State to present evidence against a possible finding of intellectual disability or mental illness in its case-in-chief in the guilt/innocence phase rather than only in rebuttal to evidence first presented by him in favor of such a finding. However, relying on Uniform Superior Court Rule 10.2, the Court noted that it has held that the State is entitled to present its case for such verdicts first. Appellant argued that a different rule should apply because the State is entitled to present expert mental health testimony only if the defense first presents its own. But, the Court stated, first, this argument was overly broad, as it seemed to encompass all expert mental health testimony, whereas the general rule about the State’s use of expert mental health testimony only in rebuttal to the defense’s own use of such testimony is premised on whether the State’s expert has evaluated the defendant in a manner that implicates his or her constitutional right to remain silent. Second, to the extent that appellant’s argument applies to expert mental health testimony that does implicate the constitutional right to silence, the Court held that that right is sufficiently protected when, upon request by the defendant, such testimony from the State is not presented until “an announcement by the defendant that he [or she] intends to present expert mental health testimony” of his or her own at trial. Thus, pretermittin appellant’s failure to raise a related objection at trial, the Court concluded that there was no error in this instance.

Ineffective Assistance; Juror Misconduct

Clark v. State, S22A0630 (10/25/22)

Appellant was convicted of felony murder and other related crimes. At trial, appellant told his trial counsel during a key witness's testimony, that he had noticed a juror "mouthing" something to one or more of the victim's family members, who were seated in the gallery of the courtroom. Appellant reported this to counsel as soon as the witness's testimony concluded, just before a recess, and counsel notified the court that he "may have something to discuss with the Court" after the break. After a 23-minute break, at a bench conference before the jury reentered the courtroom, counsel told the trial judge about appellant's allegation. He said he had investigated during the recess and believed it was "just a glance by a jury member out into the audience." Still, counsel asked the trial court to give the jury a cautionary instruction. The court agreed and, when the jury reentered the courtroom, the judge reminded the jurors to avoid communications and contact with anyone outside the jury, instructing them to "be abundantly cautious about where you glance or whether you hold a glance or who you talk to ... in the hall."

The Court noted that in his motion for new trial, appellant raised the alleged juror incident as the basis for claims of ineffective assistance of counsel and violation of his right to a fair trial. At the hearing, appellant testified that he had seen a female juror in the front row of the jury box "mouthing words to the victim's family" and that one of these family members "was shaking her head" in response. Trial counsel testified that, during the recess following appellant's reporting of the incident, he had spoken with the bailiffs and other court personnel, as well as some of appellant's family members. According to counsel, "no one indicated that they had seen anything other than just routine glancing and so forth, as jurors do during the course of a trial." While admitting that "in hindsight," he "probably should have" asked the court to question the juror, counsel testified that at the time, based on his significant trial experience, his own observations, and the investigation he undertook, he "was satisfied" that he had taken the appropriate steps. He also testified that, during his representation of appellant, appellant tended to "exaggerate" and make statements that were "outlandish."

Appellant contended that his trial counsel rendered constitutionally ineffective assistance by failing to adequately investigate his report of juror misconduct. Specifically, he argued that trial counsel should have insisted that the trial court question the juror under oath about whether she had communicated with the victim's family member or had predetermined appellant's guilt, and that his failure to do so amounted to deficient performance. The Court disagreed.

The Court stated that trial counsel's actions in addressing appellant's allegation about the juror were not so patently unreasonable that no competent attorney would have followed such a course. To the contrary, the record showed that counsel made reasonable efforts to address the juror issue. The trial transcript made clear that trial counsel investigated appellant's claim immediately and brought the issue to the attention of the prosecutor and the court. At the motion-for-new-trial hearing, trial counsel explained that he investigated by asking courtroom officers and appellant's family about the issue, and none of them reported anything unusual. Trial counsel also testified that perhaps he should have asked the trial court to question the juror, but the Court stated, hindsight has no place in an assessment of the performance of trial counsel. Thus, the Court concluded, trial counsel's decision to timely and diligently investigate as he did fell well within the bounds of reasonable and competent performance. Further, the trial court was authorized to credit trial counsel's testimony about his investigation and to discredit appellant's testimony about the incident and did not clearly err in doing so. Therefore, appellant failed to establish that counsel's performance was deficient, so his claim of ineffective assistance failed.

DUI; Refusal of Blood Test

State v. Randall, S22A0664 (10/25/22)

Randall was charged with DUI (less safe). After his arrest, to officer read him his implied consent warnings and requested a blood test, which Randall refused. Randall subsequently moved to suppress the State's use of his refusal. He contended that using a defendant's exercise of his right to refuse a warrantless search against him at trial as evidence of consciousness of guilt constitutes punishment for exercising a plainly available constitutional right and thereby violates a defendant's due process rights under the Federal and State Constitutions. The trial court agree and excluded any evidence of his refusal to consent to the requested blood test. The State appealed.

The Court noted that the State's argument on appeal is that its purpose in introducing evidence that Randall refused a blood test is to explain to the jury why the State is not offering test results into evidence. And the Court noted, Randall, in his appellate brief, did not argue that all evidentiary consequences of refusing a blood test are unconstitutional, pointing to a Virginia statute (Va. Code Ann. § 18.2-268.10 (C)) providing that a DUI suspect's unreasonable refusal to permit a blood or breath test shall be admissible into evidence for the sole purpose of explaining the absence at trial of a chemical test and not as evidence of the defendant's guilt. Thus, the Court found, clarification of the parties' positions in appellate argument had made the constitutional ruling by the trial court on the admissibility of blood test refusal evidence unnecessary. Consequently, the Court ruled that the trial court's order was vacated in this respect, but the Court emphasized, in vacating the trial court's ruling in this case, it expresses no opinion about the important and difficult constitutional questions that remain unresolved.

Thus, the Court stated, through these proceedings, the State restricted itself to using refusal evidence in this case only for the limited purpose of explaining the absence of test results. Therefore, the State may not seek a jury instruction authorizing the jury to draw any other inference from Randall's blood test refusal. And, whether Randall will wish to have the jury instructed regarding the limited purpose for which refusal evidence is admitted is an issue the trial court will take up at the proper time.

Finally, the Court noted that in addition to ruling on the constitutionality of admitting blood test refusal evidence against a defendant, the trial court ruled that, to the extent that the Implied Consent notices set out in OCGA § 40-5-67.1 (b) inform a person that refusing to submit to blood testing may be offered as evidence against him at trial, OCGA § 40-5-67.1 (b) needlessly and unnecessarily chills a defendant's exercise of the constitutional right to refuse a warrantless search. But, the Court found, although Randall challenged the constitutionality of OCGA § 40-5-67.1 (b) in the trial court on the grounds that allowing admission of his refusal to submit to the blood test to show consciousness of guilt violated his constitutional rights, he did not challenge the statute on the basis that the text of the Implied Consent notices chill a defendant's exercise of the constitutional right to refuse a warrantless search. Consequently, the Court stated, the trial court should not have expanded the scope of its review of the constitutionality of the statute beyond that raised by the challenger himself. Accordingly, the trial court's ruling on that issue was also vacated.

Affirmative Defenses; *McClure*

Reese v. State, S22A0521 (10/25/22)

After his first trial ended with a hung jury, appellant was convicted in 2019 for felony murder in connection with the shooting death of Devero. The evidence showed that appellant and Devero were engaged in a drug deal in a vehicle when gunfire erupted, and Devero was shot. The events were recorded on a surveillance video.

The record showed that at appellant's first trial, his defense was he did not shoot Devero. At his second trial, the defense argued both that appellant did not shoot Devero and that, even if he did, he was legally justified in doing so. Appellant contended that the trial court committed reversible error when it denied his request to give a modified version of the

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former pattern jury instruction on affirmative defenses in light of the Court's then-recent decision in *McClure v. State*, 306 Ga. 856 (2019), and when it overruled his objections to the prosecutor's repeated arguments in closing that appellant was legally precluded from claiming justification because he never admitted that he shot Devero. Appellant also argued that the trial court committed plain error in responding to a jury note showing that the jury was swayed by the prosecutor's improper arguments and therefore misunderstood the law of justification.

The Court noted that appellant gave the trial court a copy of its decision in *McClure* and asked the court to give the jury a modified version of the pattern jury instruction on affirmative defenses that incorporated language from *McClure*. The State objected, arguing that the modified instruction was not appropriate, as there was no evidence that appellant had admitted to the shooting. The State further argued that although a defendant need not *testify* in order to receive a self-defense instruction, there must be slight evidence from some source that the defendant *admitted* to the underlying act, and there was no such evidence here. Appellant responded that *McClure* did not require the defendant to admit anything, and that because he had two alternate theories of defense — i.e., that Devero shot himself and that appellant shot Devero in self-defense — he was in the same position as the defendant in *McClure*. The trial court refused appellant's request and appellant renewed his objection to the use of the unaltered pattern jury instruction after the court charged the jury.

The Court stated that although it said in *McClure* that the language “admits the doing of the act charged” in the former pattern instruction was a correct statement of the law as an abstract proposition, that this language can easily be misinterpreted, and that wording more in line with the Court's analysis would be advisable. Further, the Court stated, it made clear that “[a] criminal defendant is not required to ‘admit’ anything, in the sense of acknowledging that any particular facts are true, in order to raise an affirmative defense.” *Id.* at 857. Moreover, it is black-letter law that jury instructions must be adjusted to the evidence in the particular case before the jury.

And here, the Court found, there was ample evidence to support the giving of an instruction on the affirmative defense of justification — far more than the slight evidence that is required to support the giving of a requested jury charge. However, the charge as given was not properly adjusted to the evidence. Although appellant never “admitted” to firing his gun, the evidence could have supported a finding that he did so in self-defense, or at least that the State had not disproven that he did so beyond a reasonable doubt. As appellant stated in his testimony at his first trial, which was admitted into evidence at his second trial, “the [surveillance] video speaks for itself.” The video showed that Devero pulled his gun, that appellant bolted out of the car, that for an instant they passed or clashed, and that a shot was fired. Appellant told the police that Devero pulled his gun, and when the investigator asked, “So was it self-defense?” appellant replied, “self-defense.” Even putting aside appellant's ambiguous response to the investigator's question about self-defense, the surveillance video alone provided slight evidence that, despite appellant's denials, appellant did fire his gun and did so in self-defense after Devero pulled a gun on him. But, the Court held, because none of this evidence amounted to appellant “admitting” that he fired his gun, the charge as given, by stating that an affirmative defense “admits the doing of the act charged,” was, at least post-*McClure*, not a correct, applicable, and complete statement of law.

Moreover, the Court found, the trial court's instructional error was not harmless. Here, the prosecutor blatantly and repeatedly misstated the law in his closing argument by telling the jury that it could not consider self-defense unless appellant admitted that he fired his gun, an argument that directly contravened the holding in *McClure*. As appellant argued in renewing his objection to the pattern instruction after the charge was given, “literally, what was warned about in this case [i.e., *McClure*] is what came out in the [State's] closing. It's a — a direct result of not changing the instructions in the charge.” By the time the jury was deliberating, it had adopted the prosecutor's misstatement of the law, which became clear when the jury sent a note to the trial court that said, “Your charge said defendant could not claim that [i.e., self-defense] because he did not admit to shooting [his] firearm.”

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The court's response to the jury - "I did not say whether or not the defendant admitted to shooting the firearm. That is a question of fact you *must* find." (emphasis added) - arguably made matters worse by suggesting that in order to find that appellant acted in self-defense, the jury had to determine whether appellant ever admitted to firing his gun. At the very least, the court's response did nothing to remedy the misleading "admits the doing of the act charged" language contained in the pattern jury instruction. Thus, the Court concluded, it could not say that it is highly probable that the court's instructional error did not contribute to the verdicts. Accordingly, the Court reversed appellant's conviction and sentence for felony murder. However, the Court found, because the evidence was legally sufficient to sustain the jury's guilty verdicts, the State may choose to retry him.