

THIS WEEK:

- **Ineffective Assistance of Counsel; Judicial Misconduct**
- **Motions for Mistrial; Juror Misconduct**
- **Reverse Rule 404 (b) Evidence; Ineffective Assistance of Counsel**
- **Jury Instructions; Transferred Intent**
- **Privately Retained Counsel; Access to Public Funds**
- **Sentencing; Banishment**
- **Rule 404 (b); Motive**

Ineffective Assistance of Counsel; Judicial Misconduct

Moore v. State, S22A1005 (12/20/22)

Appellant was convicted of malice murder and other offenses arising from what began as a group fistfight and ended with the shooting death of the victim. Very briefly stated, the evidence showed that appellant had a gun with him (tucked into his waistband) at the time the fight broke out. Young, who was with appellant at the time, was given the gun by appellant and told, “do what you do.” Young then started shooting, killing the victim. Young testified at trial, admitted being the shooter and said that he snatched the gun from appellant.

Appellant contended that trial counsel rendered ineffective assistance by making misstatements of both law and fact in his opening statement. First, trial counsel said several times that appellant was charged with “actually shooting” the victim, and that the jury should find him not guilty “because there will be no evidence on all of these charges that he shot anyone”—all of which, appellant argued, failed to address the State’s theory that Young was the shooter and appellant was guilty as a party to the crime. And trial counsel also told the jury, incorrectly, that it was Young, not appellant, who said “do what you do” before Young fired at the victims.

But, the Court stated, even if counsel erred in these ways and that he rendered deficient performance, appellant failed to show these misstatements caused him prejudice. To begin with, the jury was instructed that opening statements are not evidence, but rather are “a preview or outline of what [counsel] expects the evidence to be.” And trial counsel mitigated the effect of any misstatements in his opening statement through his conduct over the balance of trial. Although counsel’s opening statement failed to address appellant’s potential party-to-a-crime culpability, his cross-examination and closing argument focused on precisely that issue. Trial counsel extensively cross-examined Young about his testimony that he “snatched” the gun from appellant. During his cross-examination, Young agreed that when he “snatched” the gun, “it was such a quick movement [that appellant] had no time to even think about it.” Trial counsel further elicited from Young that appellant never encouraged him to shoot anyone and that he and appellant never discussed bringing a gun to the fistfight. Trial counsel later returned to the “snatching” question with two other witnesses. And in his closing argument, trial counsel emphasized Young’s “snatching” testimony yet again. Trial counsel told the jury, “[I]f you think [appellant] gave him the gun to shoot that young man, then he’s guilty. On the flip side, ... if you believe, like [Young] said, I snatched it from him, then he is not guilty of murder because that was done solely without his knowledge and [in] a quick, brief second.” Thus, given that trial counsel’s cross-examination and closing argument focused on showing that appellant was not a party to the

crime, appellant did not establish a reasonable probability that counsel's failure to bring up party-to-the-crime culpability in his opening statement affected the outcome of trial.

As to trial counsel's misattribution to Young of the phrase "do what you do," the Court found that the trial testimony established that appellant was in fact the one who spoke the phrase. Appellant did not show that counsel's momentary misattribution in his opening statement was reasonably likely to have affected the outcome of trial, especially given the trial court's jury instruction that opening statements are not evidence. Thus, the Court concluded, appellant's claim of ineffective assistance failed.

Appellant also contends that the trial court deprived him of due process by intimidating Young into testifying for the State, which appellant characterized as a violation of *Webb v. Texas*, 409 U.S. 95 (93 SCt 351, 34 LE2d 330) (1972). The Court disagreed.

The record showed that before trial, Young had agreed to plead guilty and testify against appellant. But just before opening statements, the trial court reported that Young had decided not to testify and that his plea deal was therefore void. Then, in an unrecorded bench conference on the third day of trial, Young explained that he still wanted to plead guilty, but that he did not want to testify because of threats from other inmates in the jail. The next day, Young was brought into court, outside the presence of the jury, and his counsel said that Young had changed his mind again and that he did want to testify. The trial court said that it would reinstate the plea deal if Young testified. At that point the State suggested that the deal was no longer "on the table." But the trial court told Young that if he testified, he would get the benefit of the deal, even over the State's objection. Young ultimately agreed to testify, and after he testified, the trial court found that he had complied with the plea deal and reinstated it.

Assuming without deciding that the trial court's involvement in Young's decision to testify violated appellant's due process rights, the Court found that any error was harmless. Here, it was beyond a reasonable doubt that Young's testimony did not contribute to the verdict. Most of Young's testimony about appellant merely restated facts that were already established and undisputed: that appellant was present at the scene, that appellant had a gun, and that Young used that gun to shoot the victim. Young's testimony on these points was also cumulative of similar testimony from others on the scene. As for Young's testimony about the main contested issue—whether appellant was a party to the crime (because he gave the gun to Young) or merely present (because Young took the gun without his permission)—his testimony was, if anything, helpful to appellant. Young testified that he "snatched" the gun from appellant, and that he did so quickly and without appellant's knowledge. Young also testified that when he shouted to appellant to give him the gun, appellant was standing by the open door of a car, "screaming" at Young and his friends that "it's time to go ... just let it go. Everybody let it go. Come on. Let's go." To a reasonable juror, that testimony would have tended to minimize appellant's involvement in the crime. Indeed, appellant made Young's testimony about "snatching" the gun a centerpiece of his defense that he was not guilty as a party to the crime. Consequently, the Court concluded, because Young's testimony was at worst cumulative of other evidence, and was in many ways favorable to appellant, any error in the trial court's involvement in Young's plea negotiations was harmless beyond a reasonable doubt.

Motions for Mistrial; Juror Misconduct

Mitchell v. State, S22A1202, S22A1304 (12/20/22)

Mitchell and Dorsey were jointly tried and found guilty of malice murder and other crimes. Mitchell argued that the trial court erred when it denied his motion for mistrial after he claimed that two jurors consumed alcohol while on a lunch break. The Court disagreed.

The Court noted that the record showed that after the jury was impaneled and sworn, but before opening statements, the trial court recessed for lunch. During the recess, Dorsey's counsel witnessed two jurors being served beverages by the bartender at a nearby restaurant. When court resumed after lunch, Dorsey's counsel brought to the court's attention that two jurors may have consumed what appeared to be alcoholic beverages and proposed that, because they did not know how the alcohol may have affected the jurors, they should recess until the following morning with an admonishment to the jurors. Mitchell, however, moved for a mistrial. The trial court noted that it had not specifically instructed the jurors prior to lunch not to consume alcohol but decided, out of an abundance of caution, to recess proceedings until the next day and to specifically instruct the jurors not to consume anything that might impair their ability to consider the case.

Initially, the Court noted that Mitchell provided no explanation of why the trial court's remedy was insufficient, arguing only that the State did not meet its burden to show that the juror misconduct was non-prejudicial based on the Court's recent holding in *Harris v. State*, 314 Ga. 51 (2022). The Court noted that Mitchell correctly stated that when irregular juror conduct is shown, there is a presumption of prejudice to the defendant, and the prosecution carries the burden of establishing beyond a reasonable doubt that no harm occurred. However, the State may carry this burden by establishing that the juror misconduct was an immaterial irregularity without opportunity for injury.

And here, the Court found, in opposing the motion, the State argued that the alleged conduct was not so prejudicial as to require a mistrial and that it could be cured simply by coming back the following day with more specific instructions to the jurors. In denying the motion, the trial court specifically noted that it was unclear exactly what was in the beverages or how much was consumed by the two jurors and agreed to recess until the following day out of an abundance of caution. Thus, premitting whether Mitchell established juror irregularity due to the consumption of alcohol as alleged, the Court concluded that the alleged misconduct was a type of "immaterial irregularity without opportunity for injury." *Harris*, 314 Ga. at 54 (2). Accordingly, the Court determined that the trial court did not abuse its direction in denying Mitchell's motion for a mistrial.

Reverse Rule 404 (b) Evidence; Ineffective Assistance of Counsel

Davis v. State, S22A0958 (12/20/22)

Appellant was convicted of felony murder and other crimes in connection with the July 2014 shooting death of Williams. Briefly stated, the evidence showed that appellant shot and killed Williams during a drug transaction between him and Williams's friend, Maye. Appellant never denied shooting Williams. Rather, he claimed at trial that he shot Williams in self-defense. His story was that Maye pulled a gun to try to rob him, so he pulled his own gun and shot Williams in the ensuing fray.

Appellant contended that the trial court erred by declining to admit reverse Rule 404 (b) evidence about an incident that occurred in Alabama 16 months after Williams's murder, in which Maye had allegedly pulled a gun in a bar fight. Appellant filed a pretrial notice of intent, which stated that he intended to present this evidence to show "Maye's opportunity and intent to carry a gun on his person."

Appellant argued that the trial court erred in "declining to admit" this evidence. But, the Court found, appellant failed to identify any ruling to that effect by the trial court. Before trial, the court took the matter under advisement without ruling on it. And at trial, a different judge, while expressing skepticism about whether the evidence was admissible, let appellant explore opportunities to introduce it. First, the court allowed appellant's counsel to voir dire Maye about this incident outside the jury's presence, but Maye asserted his privilege against self-incrimination under the Fifth Amendment to the United States Constitution and declined to testify further on the subject. Next, the court agreed to appellant's counsel's request to have an out-of-state subpoena issued for the police officer to whom Maye had allegedly made a statement about

the Alabama incident. But the next day, before the court issued anything, appellant's counsel told the court that the defense had decided to “move beyond” the issue, and no further efforts were made to present this evidence. Thus, the Court concluded, absent a ruling preventing appellant from introducing evidence of the prior incident, and given his abandonment of the issue, appellant's claim that the trial court erred in this regard necessarily failed.

Nevertheless, appellant also contended that the trial counsel's handling of the reverse 404 (b) evidence amounted to ineffective assistance. Specifically, he argued that the defense lost the opportunity to present evidence of the Alabama bar incident, which showed “Maye's inclination to pull guns on other people,” because counsel was not prepared to present an alternative witness when Maye asserted his Fifth Amendment privilege.

However, the Court found, appellant's own description of the purpose for offering this evidence made clear that the evidence was “propensity” evidence, which is not admissible under Rule 404 (b). Although appellant argued before the trial court that the evidence was being offered to show Maye's “intent” and “opportunity” to wield a gun, neither of these issues was relevant to appellant's self-defense claim: this evidence could have been helpful to appellant only if the jury could infer that evidence that Maye brandished a gun in an incident 16 months after this one made it more likely that he brandished a gun here. And that, the Court stated, is textbook propensity evidence, which the jury would not have been allowed to consider. Appellant therefore failed to prove ineffective assistance on this ground.

Jury Instructions; Transferred Intent

Smith v. State, S22A1109 (12/20/22)

Appellant was convicted of malice murder and other crimes in connection with the shooting death of Adams. The evidence showed that witnesses lived on one side of a duplex with Adams living on the other side. Mickey occasionally stayed with Adams and had sold drugs to appellant. One morning, the witnesses came out their door and immediately saw appellant crouched by the edge of the porch, pointing a rifle at Adams's front door. Smith told them to go inside, which they did and called the police. Less than a minute later, they heard a gunshot. Adams was found lying across the threshold of his front doorway in a pool of his blood, dead. Though his upper body fell outside onto the porch, his feet and ankles were inside the house.

Appellant contended that the trial court erred in denying his written request for a jury instruction on involuntary manslaughter. Appellant's requested involuntary manslaughter instruction was predicated on appellant having allegedly committed the misdemeanor offenses of discharging a firearm while under the influence of drugs or alcohol, OCGA § 16-11-134, and discharging a firearm on the property of another, OCGA § 16-11-104. The trial court denied the request, noting that the defense failed to present slight evidence warranting a charge on involuntary manslaughter.

The Court found that the trial court did not err in denying the requested instruction. Premitting whether slight evidence existed supporting appellant's argument that he was committing either of the alleged predicate misdemeanor offenses, the Court found that the evidence showed that appellant was a convicted felon when he shot Adams. Therefore, the evidence showed he was committing a felony by simply holding the rifle in his hand. And given that the evidence showed that appellant was a convicted felon in possession of a rifle when he admittedly shot Adams, the trial court did not err by refusing to instruct the jury on involuntary manslaughter.

Appellant also contended that the trial court erred in instructing the jury on transferred intent. The trial court gave the following jury charge: “If one intentionally commits an unlawful act, yet the act harmed a victim other than the one intended, it is not a defense that the defendant did not intend to harm the actual person injured.” Appellant conceded that, because he did not object to the trial court's ruling, this claim of error could be reviewed for plain error only.

The Court noted that under the doctrine of transferred intent, when an unintended victim is struck down because of an unlawful act actually directed against someone else, the law prevents the actor from taking advantage of his own wrong and transfers the original intent from the one against whom it was directed to the one who actually suffered from it. Here, the Court found, the State presented evidence that appellant bought drugs from a person named Mickey who sometimes stayed at Adams's home. Appellant admitted that he owed Mickey money for drugs but was not planning to pay him because the drugs were of poor quality. Appellant also feared that Mickey was going to report him to the police. The Court found that this evidence supported the State's theory that appellant had a motive to shoot Mickey and likely intended to, particularly when the evidence showed that Adams was shot almost immediately upon opening his front door — evidence from which the jury could infer that appellant may not have had time to identify who opened the door. Because there was at least slight evidence to support giving the charge, the Court found that there was no error and, therefore, no plain error.

Privately Retained Counsel; Access to Public Funds

Nails v. State, A22A0904 (9/13/22)

In 2018, appellant was charged with one count of child molestation and two counts of sexual battery against a child under the age of 16. His family retained private counsel to prepare a defense. However, appellant claimed that his family had exhausted its resources for his defense, that he was indigent within the meaning of OCGA § 17-12-2, and that his lawyer was, in essence, working pro bono. After the State gave notice of its intent to present evidence including a forensic interview with the alleged victim, appellant moved for a finding that he was indigent as defined by OCGA § 17-12-2 and for funds to hire an expert witness. Citing *Duke v. State*, 311 Ga. 135 (2021), the trial court concluded that (1) there was no “authority for the proposition that a defendant with privately retained counsel” was authorized to receive public money to fund his defense and (2) the Supreme Court's holding in *Duke* was “limited in its application” to cases involving “pro bono counsel [rather than] privately retained counsel[.]”

The Court granted appellant's interlocutory application to determine whether *Duke* requires further proceedings on the question of his status under the Georgia Indigent Defense Act of 2003, OCGA § 17-12-1 et seq. (“IDA”).

The Court noted that the IDA charges the Georgia Public Defenders Council (GPDC) with assuring that indigent criminal defendants receive “adequate and effective legal representation.” OCGA § 17-12-1 (c). The IDA's provision of indigent defense services includes not only legal representation, but also a variety of other support services. The IDA defines an indigent defendant as a person charged with a felony who earns less than 150% of the federal poverty guidelines, “unless there is evidence that the person has *other resources that might reasonably be used to employ a lawyer without undue hardship* on the person [or] his or her dependents[.]” (Emphasis supplied.) OCGA § 17-12-2 (6) (C).

The Court noted that *Duke* held that “when a defendant is represented by *pro bono counsel*, that lawyer is not an ‘other resource’ available to employ a lawyer[.]” 311 Ga. at 141 (2) (a) (emphasis supplied), and further held that there is a “contractual mechanism ... for pro bono counsel representing an indigent defendant to access public funding for ancillary services[.]” *Id.* at 145 (3). But here, appellant has privately retained counsel, who represented him in the trial and continued to do so before the Court. Nevertheless, appellant contended, his family provided the initial funds for his defense, but those funds were now exhausted, and he presently has no resources available for his defense. The Court stated that although *Duke* held that the IDA should be construed broadly and that there is a mechanism for attorneys who represent indigent defendants to request funds for ancillary services needed for an effective defense, the trial court never specifically ruled on the questions of whether appellant was indigent at the time his family retained counsel for him, whether appellant is presently indigent, or whether appellant's counsel is now working on a pro bono basis.

Therefore, the Court determined, under the Supreme Court's guidance in *Duke*, it vacated the trial court's order and remanded for further proceedings, including an evidentiary hearing and findings on the question of appellant's indigency as defined by OCGA § 17-12-2 (6) (C) and the question of whether appellant's counsel is now representing him on a pro bono basis. If the trial court finds appellant to be indigent under that statute, it should then determine whether appellant is authorized to seek "a contract with the GPDC or the circuit public defender that would provide him access to state-funded ancillary services." *Duke*, 311 Ga. at 146 (3). Only after these issues are resolved in the first instance by the trial court might further appellate review be appropriate.

Sentencing; Banishment

Cephas v. State, A22A1144 (9/14/22)

Appellant was charged with felony obstruction of an officer, misdemeanor obstruction of an officer, criminal attempt to commit a felony, giving false information to a law enforcement officer, driving without a license, operating a vehicle without insurance, and possession of a firearm by a convicted felon. He pled guilty to giving false information to a law enforcement officer, driving without a license, and operating a vehicle without insurance. The jury then found appellant guilty of two counts of misdemeanor obstruction of an officer and acquitted him of criminal attempt to commit a felony and possession of a firearm by a convicted felon.

Appellant contended that the trial court erred in sentencing him. Specifically, he took issue with a special condition of probation in which the court banished him "from Georgia except for Hart County." The Court agreed.

The Court stated that as part of the terms and conditions of probation, a court may include a requirement that the probationer "[r]emain within a specified location; provided, however, that the court shall not banish a probationer to any area within this state . . . [t]hat does not consist of at least one entire judicial circuit as described by Code Section 15-6-1[.]" OCGA § 42-8-104 (a) (6) (A). The Court noted that Hart County is part of the Northern Judicial Circuit, which also includes the counties of Elbert, Madison, Oglethorpe, and Franklin. Accordingly, the trial court was not statutorily authorized to banish appellant from the entire state, except for Hart County. Therefore, the Court vacated the banishment provision in appellant's sentencing order and remanded the case to the trial court solely for the purpose of resentencing appellant on this provision.

Rule 404 (b); Motive

Freeman v. State, A22A0996 (9/15/22)

Appellant was convicted of aggravated battery-family violence, aggravated assault-family violence, possession of a knife during the commission of a felony, terroristic threats, making a false statement, influencing a witness, possession of a firearm by a convicted felon, possession of cocaine, violation of a protective order, hindering an emergency telephone call, and obstruction of an officer. Appellant's defense at trial was that he acted in self-defense.

Appellant contended that the trial court erred in admitting evidence of "other acts" he committed against his mother and an ex-girlfriend pursuant to Rule 404 (b). The record showed that the State moved to admit the evidence to show motive and intent. The court agreed and sua sponte found that the other acts were also admissible to show absence of mistake or accident.

First, the Court addressed whether the other acts were admissible to show motive. The Court stated that evidence of another crime may be admitted to show the defendant's motive for committing the crime with which he is charged, but

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not to demonstrate a propensity to act in accordance with the character indicated by that other crime or conduct. Even where motive is not an element of the charged offenses, other acts evidence is relevant to shed light on why a defendant reacted as he did when the victim did not acquiesce to his demands. And here, the Court found, the victim testified that appellant choked and hit her, acted as if he would gouge her eyes out with a knife, took her phone away, and prevented her from leaving after the two could not agree on spending money to get shoes for her daughter. The other acts evidence came from appellant's mother, who testified that her son fired a gun near her head when she refused to give him her cigarettes, and from appellant's ex-girlfriend, who testified that he choked her, punched her, prevented her from leaving, and took her phone when she tried to call for help after the two argued about whether she could spend time with a friend. Thus, the Court determined, the other acts evidence showed appellant's willingness to use physical violence against female victims whom he knew in an attempt to intimidate them or bend them to his will when they did not accede to his demands or were otherwise acting against his wishes. Accordingly, the evidence was relevant for the permissible purpose of showing the impetus behind appellant's actions. And further, in this case, the other acts evidence was particularly relevant given his claim of self-defense and his assertion that the victim was the aggressor. Therefore, the evidence was also relevant to the State's goal of showing that appellant's motive for striking the victim was not self-defense.

Nevertheless, appellant argued, the prejudicial effect of the evidence outweighed any probative value because his prior acts were so similar to those in the instant case. The Court disagreed. Generally, the greater the tendency to make the existence of a fact more or less probable, the greater the probative value. And the extent to which evidence tends to make the existence of a fact more or less probable depends significantly on the quality of the evidence and the strength of its logical connection to the fact for which it is offered; how much it adds to the other proof available to establish the fact for which it is offered; and the need for the evidence. Here, the Court held, because the evidence from the prior acts was needed to counter appellant's theory of self-defense, the trial court did not err when it found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to the appellant. Accordingly, the Court found no abuse of discretion in admitting the other acts evidence pursuant to Rule 404 (b).