

THIS WEEK:

- **Jury Questions; Recharges**
- **Jail Calls; Rule 403**
- **Pleas in Bar; Declaration of Judicial Emergency**
- **Jurisdiction of Trial Court; Right of State to Due Process**

Jury Questions; Recharges

Montgomery v. State, S22A1302 (1/18/23)

Appellant was convicted of malice murder and related offenses. The record showed that almost two hours into deliberations, the jury sent the trial court a note that said: "Does the defendant need to have pulled the trigger in order to be guilty of felony murder? Or, does the defendant just need to be party to the felony?" The court asked the parties for proposed responses. After a long discussion, the trial court stated to appellant, "[I]f you want me to read the entirety of felony murder defined, which includes a paragraph giving the jury the option to find your client guilty of malice murder and guilty of felony murder, I will do that. I will similarly read the burden of proof reasonable doubt charge because I don't think it's harmful. Is that what you want me to do?" Appellant replied, "Yes, your Honor."

After the jury was brought back and recharged, appellant objected. He stated "I thought the reasonable doubt instruction was what is reasonable doubt. Reasonable doubt is not an absolute doubt. I thought that part was going to be read." Appellant asked the court to bring the jury back out and read to the jury the rest of the instruction entitled "Presumption of Innocence; Burden of Proof; Reasonable Doubt." The State opposed any further recharge. The court said, "We didn't talk about the exact language of exactly what you wanted to have read," added that it believed that it had addressed appellant's concerns and noted that each juror had a written copy of the full initial charge, including the language that appellant wanted repeated to them. Appellant noted his objection for the record.

Appellant contended that the trial court erred in its recharge to the jury, because the court refused to include in the recharge language defining reasonable doubt. The Court stated that if the jury has specifically requested to be recharged on a particular issue, a trial court must recharge the jury on that issue. Absent such a request, the need for additional jury instructions, their breadth, and their precise formulation are left to the sound discretion of the trial court. And here, the Court found, the jury asked the trial court whether, to find appellant guilty of felony murder, it had to find that he pulled the trigger or instead only needed to find that he was a party to the underlying felony. Nothing in the jury's questions suggested that it was confused or uncertain about the legal definition of reasonable doubt, so the trial court was not required to recharge the jury on that issue. Moreover, the trial court acted within its discretion in including in its recharge language regarding the presumption of innocence, the State's burden of proof, and the requirement that the State prove every essential element of the crimes charged beyond a reasonable doubt. Therefore, the Court concluded, the trial court did not abuse its discretion by declining to go further by recharging the jury on the definition of reasonable doubt.

Jail Calls; Rule 403

Whited v. State, S22A1215 (1/18/23)

Appellant was convicted of felony murder, aggravated battery, and cruelty to children in the first degree in connection with the death of his seven-week-old daughter, Dinah. The evidence showed that Dinah had stopped breathing and was taken to the hospital. Over the course of the next few months, medical personnel conducted several additional tests and found that Dinah had "only the very tiniest of brain function." She was taken off life support and died four days later. The GBI medical examiner who performed the autopsy testified that the cause of her death was traumatic brain injury.

Appellant argued that the trial court abused its discretion by denying his motion in limine under OCGA § 24-4-403 to exclude from evidence a recording of a phone call he made while in jail in which he discussed the decision to remove his daughter from life support. During the phone call, appellant expressed concerns that removing Dinah from life support could affect his sentence. He noted that if he did not "pull the plug" on Dinah, he could "just do five years instead of a whole life" in prison. He also stated that he had "another kid out here"; that he had "a life too"; that "two lives aren't worth one"; and that he didn't "want to [pull the plug] and lose [his] life at the same time." Appellant also stated multiple times during the call that he did not harm his daughter and that he loved her. The State argued that the call was relevant to appellant's "frame of mind [] involving the situation with his daughter." Appellant contended that the trial court's denial of his motion was an abuse of discretion.

Initially, the Court noted that the issue was more challenging than most Rule 403 balancing efforts. Appellant's own statements during the jail call concerning the effect Dinah's death would have on his potential sentence could be understood by a jury as indicating callousness or indifference with respect to the wellbeing of his daughter, the victim of his alleged crimes. Moreover, any perceived disregard for his daughter's wellbeing was relevant to the question of appellant's intent towards Dinah on the day she sustained her fatal injuries. Because the State was pursuing a conviction for malice murder, the contents of the call were relevant to the jury's consideration of intent. Evidence of appellant's valuation of Dinah's life in the weeks following her injuries was relevant to a consideration of his intent with respect to his actions on the day Dinah's fatal injuries were sustained. Additionally, appellant's callousness towards Dinah could have refuted any suggestion that Dinah's injuries were caused by accident. Accordingly, the Court found that his statements were both relevant to and probative of whether appellant was responsible for Dinah's injuries.

Nevertheless, appellant contended, the jury hearing his consideration of the impact on himself, and specifically of the criminal charges he would face flowing from the decision to terminate life support for Dinah, was unfairly prejudicial in that it invited the jury to convict on that basis rather than based on proof of the charged offenses. The Court noted that while appellant's discussion of his self-interest in the decision to remove Dinah from life support also carried a risk of unfair prejudice, the magnitude of the prejudicial effect of the recorded call was rightfully considered in light of appellant's repeated statements that he never caused Dinah any harm and that he loved his daughter, which the jury also heard.

Additionally, the Court stated that it was noteworthy in considering the extent of any unfair prejudice that the State's opening and closing statements did not focus on the jail call. Instead, the State did not mention the jail call at all during its opening statement and made only one brief reference to the call during the State's closing statement.

Therefore, the Court concluded, while admission of the call carried some risk of unfair prejudice, especially considering the significant deference it affords to a trial court's admission or exclusion of evidence under Rule 403, the trial court did not abuse its discretion by determining that any unfair prejudice from the admission of the jail call did not substantially outweigh its probative value. Accordingly, the trial court did not abuse its discretion by admitting the recording of the jail call into evidence.

Pleas in Bar; Declaration of Judicial Emergency

Hightower v. State, S22A0870 (1/18/23)

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 17, 2023

Issue 7-23

Appellant was indicted for malice murder and other crimes. Her trial on these charges began in the Superior Court of Fulton County on March 9, 2020. Four days later, on Friday, March 13, the Chief Judge of the Atlanta Judicial Circuit issued an order declaring a judicial emergency due to the continued transmission of the COVID-19 virus. The order stated that no jurors shall report, and no jury trials shall be held for a period of thirty (30) days from the date of the entry of the Order. (the "Fulton County Order"). As a result of the Fulton County Order, and in anticipation of a similar order by the Chief Justice of the Supreme Court of Georgia, the trial court declared a mistrial. Over a year later, appellant filed a plea in bar, which the trial court denied.

Appellant contended that her plea in bar should have been granted because the trial court erred in declaring a mistrial sua sponte over her objection without carefully exercising sound discretion, without considering less drastic alternatives, and without a manifest necessity. Specifically, she argued that the trial court abused its discretion in determining that there was a manifest necessity to declare a mistrial and in failing to consider less drastic alternatives. She contended that the trial court based its mistrial decision, not on any problem with her trial, but rather on the Fulton County Order and its underlying concerns for "community safety." Appellant argued that such concerns were not appropriate to consider in determining whether to grant a mistrial. The Court disagreed.

Relying on *United States v. Jorn*, 400 U.S. 470, 479-80 (II) (91 SCt 547, 27 LE2d 543) (1971), the Court stated that in considering the issue of double jeopardy, the health of trial participants can be integral to conducting a criminal trial. The Court also stated that it does not view the trial court's decision to declare a mistrial in hindsight, but rather from the court's perspective at the time it exercised its discretion. And here, the Court found, at the time the trial court declared a mistrial in this case, the COVID-19 pandemic had created an unexpected and unprecedented global health crisis, which posed a potential threat to the health of the parties, including the defendant, witnesses, jurors, counsel, and court personnel required to appear in court and, as the Fulton County Order stated, "substantially endanger[ed] or infringe[d] upon the normal functioning of the judicial system as it relates to jury service." Appellant's trial took place early in the pandemic, when very little was understood about the nature or spread of the COVID-19 virus, understandably prompting caution by public officials in addressing the crisis based on the circumstances in the surrounding area. The Fulton County Order declared that an emergency existed based on "the continued transmission of Coronavirus/COVID-19 throughout Fulton County."

The trial court was also aware that health issues already had arisen among the participants in appellant's trial. On Tuesday, March 10, one juror informed the court that she was concerned she had "strep" as she had a sore throat that had "progressively gotten worse," and the State informed the trial court that one of its witnesses called to report that she had "flu-like" symptoms that were "getting worse." These circumstances, the Court found, demonstrated that, contrary to appellant's argument, community health concerns potentially arising from COVID-19 presented a problem for her trial. Moreover, the record belied appellant's assertion that the trial court abused its discretion by not considering less drastic alternatives. Before declaring a mistrial, the trial court informed the parties of the Fulton County Order and that it was anticipating declaring a mistrial, but it nonetheless solicited argument from counsel on the matter. The State raised no objection, but the defense objected and was given an opportunity to argue the issue. Defense counsel suggested two options: (1) holding the trial over the weekend to be completed "before the judicial emergency has been declared" on Monday, March 16, and (2) ordering a continuance until "the judicial emergency is over" when the trial could be reset before the same jury. After hearing and having the opportunity to consider the defense's argument and suggestions, the trial court declared the mistrial.

The Court concluded that, under the circumstances present in this case, rejecting the defendant's suggested alternatives was within the trial court's discretion. The first alternative proposed a procedure that would have violated the Fulton County Order, which had already declared a judicial emergency as of March 13 and ordered that jurors should not appear

for jury service for 30 days after that date. And nothing in this proposal would have addressed the concerns underlying that order for protecting the trial participants' health. Moreover, implied in this suggestion was an acknowledgement by the defense that the trial could not have been completed on March 13, and thus it represented an implicit concession that proceeding with the trial that day would not have resulted in a verdict. The second alternative would have necessitated a continuance for an indefinite period and with the uncertainties surrounding the pandemic, no one could predict when the judicial emergency would be over, and there was no assurance that the same jury would have been available to continue the trial at an unknown point in the future.

Accordingly, the Court held, given the COVID-related judicial emergency and 30-day prohibition on jury service in Fulton County, and the potentially COVID-related health concerns among the trial's participants, the trial court did not abuse its discretion in declaring a mistrial based on manifest necessity or in denying her plea in bar.

Jurisdiction of Trial Court; Right of State to Due Process

Kelly v. State, S22A0979 (1/18/23)

In 2015, appellant was convicted of felony murder and other crimes and thereafter, filed a timely motion for new trial. In 2019, appellant filed a motion to disqualify the District Attorney's Office based on an alleged conflict of interest. On April 22, 2021, the trial court entered a consent order granting his motion to disqualify and directed the Attorney General's Office to appoint conflict counsel within 30 days.

On October 19, 2021, at a hearing on the motion for new trial, the ADA explained that the Attorney General had not been able to find a prosecutor to volunteer to take this case and had not yet appointed conflict counsel for the State. Although there was no lawyer present at the hearing who could represent the State without conflict, the trial court heard testimony from appellant and argument from his appellate counsel and asked counsel to “prepare” for the court “an order giving the State 30 days ... if they want to file for a motion for a rehearing,” and “if we don't hear anything from the State during that period of time, then ... prepare an order granting [appellant's] motion for new trial based on ineffective assistance of counsel.” One week later, on October 26, 2021, the trial court entered an order, apparently drafted by appellant's appellate counsel, granting appellant's motion for new trial based on ineffective assistance of counsel and providing that “[t]he State is specially allowed to request a re-hearing on the motion within thirty days from the filing of this order.” A new term of court began on Monday, November 15, 2021. On November 23, 2021—eight days after the new term of court began but within 30 days of the October 26, 2021 order—the State filed a single-page request for a rehearing on appellant's motion for new trial. Following a rehearing, the trial court denied appellant's motion for new trial.

Appellant argued that the trial court was without jurisdiction to consider the State's request for a rehearing because it was filed outside the term of court. The Court agreed. Citing *Barlow v. State*, 279 Ga. 870, 872 (2005), the Court stated that, a trial court has the inherent power during the same term of court in which the judgment was rendered to revise, correct, revoke, modify or vacate the judgment, even upon its own motion. But such authority generally does not extend beyond the same term of court, unless a motion to modify, or vacate, or the like was filed within the same term of court. And here, the State's motion was filed outside the term of court in which the order granting the motion for new trial was entered.

Nevertheless, the State argued, the trial court's initial order granting appellant's motion for new trial must be vacated because it was “null and void for failure to comply with due process and fundamental fairness.” The State offered several lines of reasoning to support its contention that “[t]he process by which the trial court issued its October 26 order was fundamentally unfair” and that the order was therefore void: that the initial hearing on appellant's motion for new trial was held over both parties' objections and the hearing and order were “functionally ex parte”; that the written order did

Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE

WEEK ENDING FEBRUARY 17, 2023

Issue 7-23

not reflect the trial court's oral ruling, and in fact reflected “nearly the opposite”; that the order was drafted by appellant's counsel and adopted by the trial court without giving the State an opportunity to respond; and that the State's failure to appeal directly from the trial court's written order “was dictated by circumstances beyond the State's control.”

The Court noted that the State did not expressly assert that it has constitutional due process rights that the trial court violated during appellant's initial motion-for-new-trial proceedings—but that notion was the common thread that ran through each of its arguments. Thus, the Court stated, it was apparent that, to the extent the State's arguments were grounded in any legal authority at all, they were grounded in the constitutional right to procedural due process. But, the Court noted, the foundation on which the State built its argument contains a conspicuous crack: its insistence that the State must be “afforded the basic tenets of due process that every criminal defendant and every civil party enjoys.” And, the Court found, this erroneous premise was fatal to the State's claims. The word “person” in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union. Furthermore, the Court stated that it was aware of no court, and the State failed to cite any, that has expanded the meaning of the word “person” in the Due Process Clause of the Fourteenth Amendment to encompass states. And, the Court opined, this makes good sense: the Due Process Clause of the Fourteenth Amendment was not intended to protect the government, but rather to secure the individual from the arbitrary exercise of the powers of government. Accordingly, the Court rejected the State's contention that it was deprived of constitutional due process in appellant's motion-for-new-trial proceedings.

Therefore, the Court concluded, because the trial court was without jurisdiction to consider the State's out-of-term request for reconsideration and enter an order denying the motion for new trial, that order must be vacated. And even if the State could challenge the trial court's initial order granting appellant a new trial without having filed a cross-appeal on that issue, the State's due-process challenge failed, and the trial court's initial order granting appellant's motion for new trial remains in effect. Consequently, the case was remanded for further proceedings pursuant to the order granting appellant's motion for new trial.