

THIS WEEK:

- **Affirmative Defenses; Burden of Proof**
- **Closing Arguments; OCGA § 17-8-75**
- **Harmless Error; Cumulative Error**
- **Expert Witnesses; Rule of Sequestration**
- **Child Molestation; General Demurrers**

Affirmative Defenses; Burden of Proof

Taylor v. State, S23A0053 (3/21/23)

Appellant was convicted of three counts of felony murder and three counts of aggravated assault. The evidence showed that appellant was the driver in a drive-by shooting at 126 Central Ave. in which one of his passengers, Solomon, was killed by return fire from one of the people at that residence. At trial, he claimed that he was shot at first and fired his gun in self-defense.

Appellant contended that the trial court's instruction on self-defense was plain error because it misled the jury about who bore the burden of proof for that affirmative defense. His argument focused on the following sentence: It is only necessary that the evidence show beyond a reasonable doubt that the Defendant attempted to cause a violent injury or that the person attempted to cause a violent injury to the alleged victim or intentionally committed an act that placed the alleged victim in reasonable fear of immediately receiving a violent injury." Appellant argued that this sentence, in its most natural reading, wrongly instructed the jury that it could not find that he was justified in shooting at the group outside 126 Central unless it found beyond a reasonable doubt that the 126 Central group put *him* in reasonable fear of receiving a violent injury.

The Court, however, found that appellant's interpretation of the sentence was "strained at best and not one the jury was likely to have considered." Instead, the Court found, when properly considered with the jury instructions as a whole, the meaning of the sentence was clear. The trial court first told the jury that appellant was asserting the affirmative defense of justification. The court explained that the defense may apply if the defendant reasonably believes he must use force to defend himself. And it explained that the defense does not apply if the defendant uses force while he "is attempting to commit, is committing or is fleeing after the commission of a felony." The next words from the trial court were: "And in this case, the arguable felony has been alleged to be aggravated assault." By using the connective word "and" and referring to "the arguable felony," the trial court made clear it was now proceeding to discuss the felony that could disqualify appellant from the defense of justification. It was at that point that the court described the elements of aggravated assault with a deadly weapon, including the sentence to which appellant objected. Thus, the Court found, the trial court was telling the jury that appellant could not rely on the affirmative defense of justification if it found beyond a reasonable doubt that "[appellant] attempted to cause a violent injury to [the 126 Central group] or intentionally committed an act that placed [the 126 Central group] in reasonable fear of immediately receiving violent injury"—that is, if appellant committed aggravated assault.

Consequently, because this was easily the more natural and reasonable reading of the portion of the instruction to which appellant objected, the Court rejected appellant's alternative reading, and thus, his argument that the instruction shifted

the burden to prove self-defense to him. Accordingly, the Court concluded, appellant failed to demonstrate that the instruction was plain error.

Closing Arguments; OCGA § 17-8-75

Meadows v. State, S23A0110 (3/21/23)

Appellant was convicted of murder, aggravated assault, and possession of a firearm during the commission of a felony. During closing arguments, the prosecutor, in three separate instances, made statements which prompted defense counsel to object on the ground that the statements were improper and highly prejudicial. Appellant argued that the trial court committed reversible error when it sustained his objections but failed to rebuke, or sufficiently rebuke, the prosecutor pursuant to OCGA § 17-8-75.

In the first instance, the prosecutor made a comment about the absence of the gun used to kill the victim. Appellant objected and outside the presence of the jury, the parties discussed the matter and defense counsel then withdrew his motion for mistrial and the court sustained appellant's objection. The trial court then stated it would instruct the jury to disregard the prosecutor's statements about the fact that the gun used in the shooting was not presented as evidence at trial, and defense counsel agreed, stating, "Yes, judge, that's what I would ask." When the jury returned to the court room, the court instructed the jury that appellant's objection was sustained, that closing arguments are not evidence, and that they should disregard the prosecutor's statements about the absence of the gun. Thus, the Court found, under these circumstances, it did not need to determine whether the trial court erred by failing to rebuke the prosecutor because the trial court gave the agreed upon curative jury instructions, after which appellant failed to request any additional relief. Having acquiesced to the remedy fashioned by the trial court, appellant could not complain about the trial court's failure to further rebuke the prosecutor.

Appellant next contended that the trial court erred when it failed to rebuke the prosecutor after she stated in closing argument that the State had been unable to retrieve the contents of certain electronic devices investigators discovered in appellant's bedroom and that if investigators had found any evidence in the devices, it would have been presented to the jury. The Court noted that these statements were made in response to defense counsel's argument that the State had failed to properly investigate the crimes or connect the electronic devices to him. Premitting whether this argument was improper under OCGA § 17-8-75, the Court stated that a trial court has no duty to rebuke a prosecutor unless specifically requested by the defendant. And here, appellant's objection to the prosecutor's comment about the electronic devices was sustained, and appellant did not ask the court to rebuke the prosecutor or for any other corrective action. Accordingly, the Court concluded, the trial court, in this instance, had no duty to rebuke the prosecutor.

Finally, appellant argued that the trial court erred by failing to rebuke the prosecutor for improperly commenting on his right to remain silent during closing arguments. The record showed that after making the allegedly improper comments, defense counsel objected and asked that the court admonish the prosecutor in front of the jury and give a charge on a defendant's choice not to testify. The trial court sustained the objection and charged the jury that closing arguments are not evidence, that a defendant does not have to present any evidence nor testify, and that if a defendant chooses not to testify, the jury was not to consider that in any way in making its decision. The trial court also instructed the jury in its final charge that "[e]vidence does not include ... opening or closing remarks of the attorneys," and the "defendant does not have to present any evidence nor testify."

The Court found that even assuming the trial court erred in this instance by not rebuking the prosecutor under OCGA § 17-8-75, any error was harmless. Specifically, considering the trial court's instructions and the strong evidence of appellant's

guilt, the Court concluded it was highly probable that neither these comments by the prosecutor in closing argument, nor any alleged failure of the trial court to comply with OCGA § 17-8-75, contributed to the verdict.

Harmless Error; Cumulative Error

Nundra v. State, S23A0043 (3/21/23)

Appellant was convicted of murder and other offenses in the 2017 shooting death of Moore. Appellant argued that the trial court abused its discretion in admitting, over his objection, evidence of his 1997 convictions for armed robbery and hijacking a motor vehicle. However, the Court stated that even if the admission was error, it was harmless.

First, the Court reviewed the evidence against appellant and found that the evidence of his guilt was very strong. Second, the evidence also made clear that appellant had committed the prior crime a long time ago, and that he had pleaded guilty. And although it did not appear the jury was ever told what sentence appellant received for his crimes, the knowledge of his guilty plea nonetheless reduced the risk that the jury convicted him to punish him for his other crimes, because the jury could infer that appellant had already been punished for those crimes. Third, although the trial court's limiting instructions did not meaningfully explain for which permissible purpose the evidence was relevant, they did, at least, tell the jury what it could *not* do: "You may not infer from such evidence that the accused is of a character that would commit such crimes." And, the Court noted, it has held that this sort of admonition can lower the risk that the jury will convict for the wrong reasons. Nevertheless, the Court stated, to be clear, because these instructions did not sufficiently specify the permissible purposes for which the evidence could be considered, they did not have the same mitigating effect found in other cases where the trial judge specifically instructed the jury on which Rule 404 (b) purposes could be considered. But, the Court stated, even so, the trial court's admonition that the jury "may not infer from such evidence that the accused is of a character that would commit such crimes" reduced the likelihood that the evidence of appellant's past crimes influenced the verdict.

Thus, the Court concluded, because the evidence of appellant's guilt was very strong, because appellant's guilty plea allowed the jury to infer that he had been punished for his prior crimes, and because the trial court instructed the jury not to consider the evidence as proof of his propensity to commit these sorts of crimes, it was highly probable that admitting the 1997 convictions did not contribute to the verdict.

Next, appellant argued that the trial court should not have allowed the State to introduce evidence of the victim's good character and talk about it during closing arguments. The Court noted that various pieces of evidence came in tending to show the good character of the victim and evoke sympathy for him, his widow, and the community. Grubbs, who heard the gunshots from his home and had his wife call the police, discussed his relationship with Moore and described him as the "nicest fellow." Along the same lines, a police captain who responded to the scene said that he had known Moore for "20-something years" and was sad while he gave the victim chest compressions. And the Court noted that most importantly, the State elicited more of this sort of evidence from Moore's widow. In response to a question about why Moore had not retired, she testified that Moore had been planning on retiring but wanted to take care of her, and make sure she was eligible for Medicare before he stopped working. The State also introduced a picture of the two of them together (to which appellant objected under Rule 403). And, asked about cows shown in that photo, Moore's widow testified that she had been forced to sell their cows because she couldn't take care of them by herself. The State also referred back to all of this evidence in closing arguments.

The Court stated that assuming the admission of this evidence was error, it was harmless. Specifically, the evidence against appellant was very strong so the risk that evidence of the victim's good character would lead the jury to convict appellant

for some reason other than guilt was fairly low. Therefore, it was highly probable that the evidence did not contribute to the verdict.

Finally, the Court addressed appellant's cumulative error arguments. The Court noted that when it has identified or presumed more than one error, although the effect of each on its own might have been harmless to the defendant's trial, it must look to whether the combined effect of the errors harmed the defendant. In other words, the Court considers collectively, rather than individually, the prejudicial effect, if any, of trial court errors.

And here, the Court found, it was highly probable that the error in admitting appellant's 1997 convictions and the good character evidence of the victim did not contribute to the verdict. Although the 1997 convictions for a violent crime held the potential for prejudice, and the good character evidence invited sympathy for the victim and his widow, the jury was charged that it was not permitted to be influenced by sympathy for either party and it typically presumes juries follow the instructions that they are given by the trial court, absent evidence to the contrary. And, on the other side of the ledger, there was very strong, independent evidence of appellant's guilt. Thus, the Court concluded, given this strong evidence, which appellant failed to undermine on appeal, it was highly unlikely that the jury in this case was swayed by other acts evidence and the good character of the victim. Therefore, it was not at all probable that the collective effect of the assumed errors harmed appellant.

Expert Witnesses; Rule of Sequestration

Mabogany v. State, A22A1556 (2/13/23)

Appellant was convicted of eleven counts of violation of the Georgia Street Gang Terrorism and Prevention Act, four counts of armed robbery, three counts of aggravated assault, first degree home invasion, and two counts of possession of a firearm during the commission of a felony. Appellant contended that the trial court erred by allowing a police officer to testify as an expert witness in gang activity and to remain in the courtroom during trial. The Court disagreed.

The Court noted that a trial court has broad discretion in accepting or rejecting the qualifications of an expert and it will not disturb such rulings unless there is a showing that the trial court abused its discretion. A witness need not be formally educated in the field at issue to be qualified as an expert.

Here, the Court found, the officer testified that at the time of trial, he had been a criminal street gang intelligence officer for six years. He had taken several extensive gang investigation training courses throughout the country, had been a member of the Georgia Gang Investigator's Association for several years, taught several classes on gangs, instructed new hires at jails on gang trends and symbols, was a leader of the County Gang Task Force, which shares intelligence on Georgia gangs, and had been consulted by local law enforcement agencies to assist with ongoing gang investigations.

Thus, the Court concluded, based on the officer's experience, his extensive training regarding gangs, and his familiarity with their culture and symbols, it could not say that the trial court abused its discretion by qualifying him as a gang expert. Furthermore, any perceived weaknesses in his qualifications were matters of weight and credibility for the jury in evaluating his testimony.

Nevertheless, appellant argued, the trial court committed reversible error when he permitted the officer to remain in the courtroom during the trial over his objection. The Court again disagreed.

The Court stated that a trial court is authorized to permit a witness, including law enforcement officers and experts, to remain in the courtroom during the trial. Further, a violation of the sequestration rule affects only the weight and credibility

of the witness' testimony, not its admissibility. Although appellant could have sought to impeach the witness' testimony based on his presence in the courtroom throughout trial, he did not do so. Therefore, the Court concluded, he could not now claim that he was entitled to a new trial.

Child Molestation; General Demurrers

Yeamans v. State, A22A1451 (2/16/23)

Appellant was convicted of attempted child molestation and computer pornography. The evidence showed that an officer posing as an underage girl named “Kat” on a dating website commonly used for prostitution, was contacted by appellant. Following discussions about various sexual acts she was willing to do for money, they arranged to meet. However, appellant never showed up. He was arrested later at his home in Wisconsin.

Appellant argued that the trial court erred by denying his demurrer to Count 4 because the charge indicted him for having a conversation with “Kat” and not for attempting to commit any actual physical touching or otherwise attempt to commit an indecent act “to or in the presence of or with” “Kat.” Relying on *Vines v. State*, 269 Ga. 438 (1998), the Court agreed.

The Court noted that Count 4 charged appellant only with having indecent conversations with “Kat” via his cell phone. Specifically, it alleged that appellant, in violation of OCGA § 16-6-4, “did by means of an electronic device, to wit: cell phone, engage in immoral and indecent conversation involving sexual intercourse, anal intercourse, oral sex, masturbation and pornography with a person the accused believed to be a child under the age of 16, “Kat”, with the intent to arouse and satisfy the sexual desires of said accused, an act which constitute a substantial step toward the commission of said crime, contrary to the laws of this State, the good order, peace and dignity thereof.”

However, *Vines* held that sexually explicit phone conversations between a defendant and child are not sufficient to establish child molestation under OCGA § 16-6-4. Moreover, the fact that the State couched the allegation in terms of an attempted crime does not save Count 4 because there is no allegation in the count of what acts appellant's conversations with “Kat” were going to lead to; essentially, the language circles back to the conversations themselves as the illegal act. In other words, the only “said crime” alleged in Count 4 was the conversations between appellant and “Kat.” And the earlier general reference to OCGA § 16-6-4 does not save Count 4 because the jury could not have convicted appellant solely for having the conversations with “Kat,” which again, was not in and of itself an illegal act under OCGA § 16-6-4.

Nevertheless, the State contended, the addition of subsection (a) (2) to OCGA § 16-6-4 superseded *Vines* and that a defendant no longer needs be in the presence of the victim to attempt to commit child molestation. Thus, the State contended, the trial court did not err by denying the demurrer to the Count 4. However, the Court found, OCGA § 16-6-4 (a) (2) is limited explicitly to sending pornography with an electronic device to a child, and it was undisputed that appellant never sent pornography to “Kat.”

Finally, the Court stated, while it agreed with the State that to prove an attempted child molestation, the defendant need not ultimately make it into the presence of the victim, the State still must first charge the defendant with intent to commit some specific conduct that amounts to an act prohibited by the statute. And here, the State failed to do so. Accordingly, the Court concluded, the trial court erred by denying appellant's demurrer to Count 4.