Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE

WEEK ENDING MAY 26, 2023
Issue 21-23

THIS WEEK:

- **Entry of Nolle Prosequi; Objections**
- **Prior Consistent Statements; Cross-Examination of Victim**
- **First Offender Act; Pro Se Defendants**
- **Voir Dire; Juror Impartiality**
- **State's Right to Appeal; OCGA § 5-7-1 (a) (5)**

Entry of Nolle Prosequi; Objections

Brown v. State, A22A1340, (3/7/23)

On October 23, 2021, appellant allegedly fired a gun multiple times from his vehicle towards another vehicle. The Solicitor General's Office charged him for the misdemeanor offense of reckless conduct. The case was set for a plea hearing on February 25, 2022, where appellant indicated his desire to enter a non-negotiated guilty plea. At the hearing, the trial court engaged in a plea colloquy with appellant and verified with appellant that he had reviewed his statement of rights form, that his plea was voluntary, that he understood the rights he was waiving by entering a plea, and that there was a factual basis for the plea. The trial court directed appellant to sign his plea on the back of the accusation, at which point the trial court announced: "The plea's been entered."

Thereafter, the trial court proceeded to hear from the parties as to their sentencing recommendations. Counsel for the State recommended a sentence of 12 months' confinement because of the "egregious conduct" in the case. As counsel for the State was speaking, the trial judge requested that both parties approach the bench, and an off-record bench conference was held. After the bench conference, the trial judge announced a break in the proceedings and told the parties to return to the courtroom later that day. After the break, counsel for the State filed a "dismissal," explaining that her office had spoken with the district attorney's office and learned that the district attorney's office planned to indict "th[e] case as a felony." When the trial court asked defense counsel for his position on the matter, defense counsel responded, "I can't stop them." The trial court advised appellant that "this case ha[d] been dismissed against [him]," and the court entered an order of dismissal.

Appellant contended that the trial court erred by dismissing his case without his consent contrary to OCGA § 17-8-3. Specifically, he argued that jeopardy attached after his guilty plea was accepted by the trial court and that under OCGA § 17-8-3, the trial court could not dismiss his case without his consent.

The Court stated that it is true that there are no magic words that are needed to make a proper objection. Nevertheless, it is well settled that objections should be made with sufficient specificity for the trial court to identify the precise basis. Thus, the failure to make a timely and specific objection ordinarily precludes appellate review of that issue. And here, the Court found, when asked by the trial court for his position on the State's request for a dismissal, appellant's counsel simply replied, "I can't stop them," without any further elaboration. This response did not contain the type of specificity that is required to preserve an issue for appellate review. Although, no magic words are required to make a proper objection, the Court stated that appellant was obligated to at least state the nature of his objection to the trial court in order for it to address it on appeal, and his failure to do in this case waived appellate review. Furthermore, the Court found, it could not

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review this issue under a plain error analysis. Thus, in the absence of a specific statutory provision authorizing plain error review for the trial court's dismissal after a defendant has pleaded guilty, appellant's claim was waived for appellate review.

In so holding, however, the Court noted that its opinion should not be read to express an opinion on whether appellant could raise the issue of double jeopardy in any future prosecution based on this same conduct.

Prior Consistent Statements; Cross-Examination of Victim

Johnson v. State, A22A1269 (3/7/23)

Appellant was convicted of rape, incest, and child molestation, all of which involved his stepdaughter, N. J. The record showed that appellant moved in limine to prohibit the State from eliciting testimony from N. J.'s cousin, Hawkins, about statements made by N. J. during her July 2015 outcry. Appellant argued that Hawkins' testimony could not be admitted as a prior consistent statement under OCGA § 24-6-613 (c) because, he said, he had made no allegation of recent fabrication by N. J. or improper influence. Rather, he contended, Hawkins' testimony was nothing more than improper bolstering. The trial court denied the motion and Hawkins testified that, in July 2015, N. J. reported to her that she had been raped by appellant, that it had occurred on more than one occasion, that she had described a specific mark on appellant's "private area," and that N. J. was emotional during the disclosure.

Appellant argued that the trial court erred in allowing Hawkins' testimony. The Court noted that relevant to this appeal, OCGA § 24-6-613 (c) provides as follows: "A prior consistent statement shall be admissible to rehabilitate a witness if the prior consistent statement logically rebuts an attack made on the witness's credibility. … If a prior consistent statement is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive, the prior consistent statement shall have been made before the alleged recent fabrication or improper influence or motive arose."

Thus, the Court found while the final sentence of the Code section effectively codifies our prior decisional law, the first two sentences expand the admissibility criteria to cover prior statements offered to rehabilitate a witness against any attack on a witness' credibility so long as the prior statement "logically rebuts" that attack. Therefore, contrary to appellant's arguments, Hawkins' testimony was not inadmissible merely because appellant did not, as he contended, "impugn[] [N. J.'s] credibility by charging her with recent fabrication or improper influence or motive." Instead, consistent with the plain language of OCGA § 24-6-613 (c) — and subject to exceptions not relevant here — the trial court was also authorized to consider whether Hawkins' testimony logically rebutted appellant's attack on N. J.'s credibility. And here, the Court found, the transcript reflected that the trial court did just this. Indeed, the trial court specifically concluded that Hawkins' testimony was admissible as a consequence of appellant's cross-examination of N. J.

Notably, the Court found, appellant neither recognized the myriad circumstances under which prior consistent statements are admissible under OCGA § 24-6-613 (c) nor addressed whether the trial court properly admitted Hawkins' testimony under the "logically rebuts" provision of the statute. In short, appellant offered no meaningful challenge to the trial court's decision. Nevertheless, the Court concluded, the trial court's ruling was sound. The transcript supported the trial court's conclusion that appellant's intense cross-examination of N. J. — which highlighted the inconsistencies in her various statements and questioned the veracity of her claims — constituted an attack on N. J.'s credibility. Furthermore, Hawkins' very limited testimony logically rebutted that attack. Accordingly, the Court concluded, the trial court did not abuse its discretion in allowing Hawkins to testify.

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First Offender Act; Pro Se Defendants

Ivey v. State, A22A1214 (3/14/23)

Proceeding pro se, appellant was convicted of two counts of interference with government property. The evidence showed that the criminal acts occurred in 2020 while appellant was an inmate at a county jail. Appellant contended that the trial court erred by failing to address the First Offender Act with him. A divided Court agreed.

The Court noted that until July 1, 2015, OCGA § 42-8-61, a provision of the First Offender Act, was entitled "Defendant to be informed of terms of article at time sentence imposed," and provided that "[t]he defendant shall be informed of the terms of [the Act] at the time of imposition of sentence." The statute was amended, effective July 1, 2015. It is now entitled "Defendant to be informed of eligibility for sentencing as first offender," and it now provides: "When a defendant is represented by an attorney, his or her attorney shall be responsible for informing the defendant as to his or her eligibility for sentencing as a first offender. *When a defendant is pro se, the court shall inquire as to the defendant's interest in entering a plea pursuant to the terms of this article.* If the defendant expresses a desire to be sentenced as a first offender, the court shall ask the prosecuting attorney or probation official if the defendant is eligible for sentencing as a first offender. When imposing a sentence, the court shall ensure that, if a defendant is sentenced as a first offender, he or she is made aware of the consequences of entering a first offender plea pursuant to the terms of this article." Ga. L. 2015, p. 422, § 5-74. (Emphasis supplied.) The Court stated that the amended statute, which applies here, thus imposes a duty upon the court to ask a pro se defendant whether the defendant is interested in entering a plea under the Act. And here, the record did not show that the trial court made such an inquiry, even though appellant had been pro se throughout the entire proceeding.

Although the dissent asserted that "the trial judge's duty to inquire with pro se defendants arises only when a guilty or nolo contendere plea is under consideration," the Court stated that nothing in the language of the statute so conditions the trial court's duty.

The dissent also asserted that that the First Offender Act only comes into effect at sentencing and not before. But, the Court found, this conclusion ignores the significant changes made to the Act in 2015. Until July 1, 2015, OCGA § 42-8-61 was entitled, "Defendant to be informed of terms of article *at time sentence imposed*." (Emphasis supplied.) It now is entitled, "Defendant to be informed of eligibility for sentencing as first offender." Similarly, until July 1, 2015, OCGA § 42-8-61 provided that "[t]he defendant shall be informed of the terms of [the Act] *at the time of imposition of sentence*." (Emphasis supplied.) It now provides, "[w]hen a defendant is pro se, the court shall inquire as to the defendant's interest in entering a plea pursuant to the terms of this article." Therefore, the Court stated, it must assume that the General Assembly purposefully omitted the language about the imposition of sentence.

Furthermore, it was not remarkable that, as the dissent noted, nothing in the record indicated that appellant ever considered entering a guilty or nolo contendere plea. But, the Court stated, had he been informed of the possibility of entering such a plea under the Act, he might have.

Nevertheless, while it was clear that the trial court erred, it was less clear what the remedy should be. The Court found that there are three statutes which provide potential remedies for First Offender Act errors (OCGA § 42-8-60 (k), OCGA § 42-8-66 (a) (1) and OCGA § 17-10-1 (f)), but all three concern remedies available after an adjudication of guilt while the error here occurred before appellant had been adjudicated guilty. Since none of these potential remedies redress the trial court's failure to inquire about the pro se defendant's interest in entering a plea under the First Offender Act — as required by OCGA § 42-8-61 — which necessarily must occur before an adjudication of guilt, and the remedy issue was not briefed by the parties on appeal, the Court remanded the case to the trial where the issue could be brief and determined.

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Voir Dire; Juror Impartiality

Quantanilla-Solis v. State, A22A1612 (3/14/23)

Appellant was convicted of statutory rape, two counts of child molestation, and two counts of sexual battery. The record showed that at one point during voir dire, the Court remarked as follows: "if it'll assist jurors, you're required to be fair and impartial now at the beginning. Once you start hearing the evidence, it swings back and forth. You begin to hear it and your mind begins to move. It's required that you be fair and impartial at the beginning, remain fair, but your partiality changes. It may go back and forth as you hear the evidence. And you're required not to make a final decision until all of the evidence is in and the case has been submitted to you." Appellant contended that these remarks were inconsistent with his constitutional right to an impartial jury.

The Court stated that while the remarks were perhaps unartfully phrased, considered as a whole, its essence was a correct statement of the law. The trial court emphasized the long-standing principles that a juror's opinion about any issue in the case must be grounded solely in evidence presented at trial and that no final determination may be reached until all the evidence has been presented and the case submitted to the jury. Indeed, at the heart of the trial court's statement is a tacit recognition that an impartial juror is one whose opinion is not fixed and definite, who is able to set aside any inclination of bias, and who will decide the case based solely upon the evidence at trial.

Furthermore, the Court stated although appellant took issue with the trial court's statement that "partiality changes" and "may go back and forth as you hear the evidence," appellant cited to no authority to support the notion that a juror, upon hearing evidence presented during the trial, must refrain from forming preliminary, unfixed opinions about what that evidence might ultimately prove. And in fact, the Court noted, it has rejected claims raising similar arguments to challenge jurors' impartiality.

Finally, the trial court posed the statutory qualifying questions to the venire, and appellant did not argue that the trial court failed to remove any prospective juror for cause. Moreover, the jury was charged on the presumption of innocence, the State's burden of proof, reasonable doubt, and the duty to decide the case solely on the evidence presented at trial, and the trial court expressly charged the jury that it was "bound by these instructions." The jurors were further charged "not to show favor or sympathy to one party or the other," that they were duty-bound "to consider the facts objectively without favor, affection, or sympathy," and that they "should start [their] deliberations with an open mind" and should "not hesitate to change an opinion if … convinced that it is wrong." Under these circumstances, the Court concluded, appellant failed to show that the trial court's remark likely affected the outcome of the proceedings.

Next, appellant argued that the trial court erred by disallowing several of his voir dire questions. Generally speaking, the questions concerned former President Trump and his prior comments about Latin Americans and his feeling about Latin American immigrants. The questions also concerned feeling about Latin American culture and general feelings about immigration.

The Court stated that the single purpose for voir dire is the ascertainment of the impartiality of jurors, their ability to treat the cause on the merits with objectivity and freedom from bias or prior inclination. In all criminal cases, OCGA § 15-12-133 gives both the State and the accused the right to individually examine each prospective juror and to inquire about "any matter or thing which would illustrate any interest of the prospective juror in the case," including, as relevant here, "any opinion as to which party ought to prevail … [and] any fact or circumstance indicating any inclination, leaning, or bias which the prospective juror might have respecting the subject matter of the action or the counsel or parties thereto[.]" Nevertheless, the scope of voir dire is not unlimited. The scope of voir dire and the propriety of particular questions are left to the sound discretion of the trial court.

And here, the Court found, this was not a case in which the trial court foreclosed all inquiry concerning the subject matter to which the question was directed. Instead, the venire as a whole was questioned to identify prospective jurors with strong feelings about individuals not originally from the United States and about immigration generally. And while the trial court disallowed the politically charged and potentially inflammatory questions appellant proposed, appellant did not assert, nor did the record reflect, that the trial court otherwise restricted appellant's ability to ascertain any bias the prospective jurors held against immigrants.

In fact, the Court found, appellant was permitted to follow up individually with the venire members who indicated they felt strongly about immigrants and immigration and to further probe any bias the prospective jurors held with respect to immigration or any other matter. Appellant likewise was permitted to individually question the remaining members of the venire more generally about their ability to be fair and impartial. Thus, the Court determined, because the trial court permitted questions about immigration and persons not originally from the United States and any bias on the subject, there was no abuse of discretion in the trial court's decision to restrict the scope of voir dire in the limited manner it did.

State's Right to Appeal; OCGA § 5-7-1 (a) (5)

State v. Carswell, A23A0209, A23A0210 (3/16/23)

In Case No. A23A0209, Carswell was charged by accusation with fleeing or attempting to elude a police officer and affixing a license plate to conceal or misrepresent identity. In Case No. A23A0210, the State filed a superseding indictment, which was based on the same incident, and which charged Carswell with fleeing or attempting to elude a police officer, affixing a license plate to conceal or misrepresent identity, two counts of obstruction of a police officer, failure to maintain lane, reckless driving, and improper lane change.

Trial was set to begin on August 8, 2022. At a calendar call on July 13, 2022, both sides announced that they were ready for trial. At a pre-trial conference on July 18, 2022, the State indicated that it had complied with discovery. Shortly thereafter, however, the State provided Carswell with additional discovery. During a conference call on July 25, 2022, the trial court granted Carswell's oral motion to exclude evidence disclosed by the State after the July 18 pre-trial conference. And on July 29, 2022, Carswell filed a written motion to exclude such evidence, pursuant to OCGA § 17-16-6. On August 12, 2022, the trial court issued an order granting Carswell's written motion, finding that the State had acted in bad faith and that its failure to timely disclose the evidence had prejudiced Carswell. The State then filed these two appeals of the trial court's order, contending that it is directly appealable under OCGA § 5-7-1 (a) (5).

The Court noted that OCGA § 5-7-1 (a) (5) provides: "An appeal may be taken by and on behalf of the State of Georgia … in criminal cases … in the following instances: … (5) [f]rom an order, decision, or judgment excluding any other evidence to be used by the state at trial on any motion *filed by the state or defendant at least 30 days prior to trial* and ruled on prior to the impaneling of a jury or the defendant being put in jeopardy, whichever occurs first[.] (Emphasis supplied.). The Court found that the phrase "at least 30 days prior to trial" immediately follows and describes the "motion filed," and stands in contrast to the latter phrase "and ruled on prior to the impaneling of a jury or the defendant being put in jeopardy," which references the actual commencement of trial. A phrase found in a statute must be gauged by the words surrounding it. Thus, it appears that the phrase "at least 30 days prior to trial" should be measured by the scheduled start of trial when the relevant motion is filed.

And, the Court found, considering the timelines for criminal appeals filed by the State, if the phrase "at least 30 days prior to trial" were interpreted to mean the actual commencement of trial, the 30-day limitation in OCGA § 5-7-1 (a) (5) would have little meaning. When the State appeals a pre-trial evidentiary ruling, it is highly likely that trial will not begin during

the pendency of the appeal, because the filing of a notice of appeal by the State in a criminal case typically acts as a supersedeas that divests the trial court of jurisdiction over the matter being appealed. A trial court that begins trial during the pendency of the State's appeal of a pre-trial evidentiary ruling runs the substantial risk that the trial will be declared void. Thus, in most cases where the State appeals a pre-trial evidentiary ruling, trial will not have begun at the time of the appeal, and the relevant motion will have been filed more than 30 days before the actual commencement of trial. Consequently, if the phrase "at least 30 days prior to trial" in OCGA § 5-7-1 (a) (5) were interpreted to mean the actual commencement of trial, the State could appeal in almost all cases where it files an appeal of a pre-trial evidentiary ruling on a motion that is filed at any point prior to the commencement of trial. Such an interpretation would almost render meaningless the 30-day limitation established in paragraph (a) (5). Therefore, the Court held, because this paragraph is focused on timeliness, and indeed on expedition, it rejected such an interpretation.

Furthermore, the Court noted, unlike the nine other paragraphs contained in OCGA § 5-7-1 (a), paragraph (a) (5) includes multiple specific timing requirements, including that the State must file an appeal from a qualifying trial court order "excluding any other evidence to be used by the state at trial on any motion filed by the state or defendant at least 30 days prior to trial and ruled on prior to the impaneling of a jury or the defendant being put in jeopardy, whichever occurs first." Also, unlike the other nine paragraphs, which under OCGA § 5-6-38 (a) allow the State to file a notice of appeal within 30 days of entry of the relevant trial court order, the State's appeal under paragraph (a) (5) may be taken only if the notice of appeal is filed "within two days of such order."

Here, when Carswell filed his motion to exclude on July 29, 2022, trial was scheduled to start on August 8, 2022. Thus, the trial court's order was not based on a motion filed at least 30 days prior to the scheduled start of trial under OCGA § 5-7-1 (a) (5). Accordingly, the Court concluded, because no other statutory provision authorized these appeals, they must be dismissed.