Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 1, 2018

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THIS WEEK:

Verdict Forms; Lesser Included Offenses

Jones v. State, S18A0263 (4/16/18)

Appellant was convicted of malice murder and theft by taking. He contended that the trial court erred in rejecting his request to include separate lines on the verdict form for voluntary manslaughter and involuntary manslaughter as lesser offenses of malice murder and felony murder. Instead, the trial court used a verdict form that provided a blank line next to each count of the indictment, and instructed the jury to write in its verdict on each count in the space provided. The court also instructed the jury on the lesser offenses of voluntary manslaughter and involuntary manslaughter, and provided clear and detailed instructions on how to complete the verdict form whether the jury found appellant not guilty, guilty of either of the lesser offenses, or guilty of the offense charged.

The record showed that during deliberations, the jury sent out a note asking if voluntary manslaughter and involuntary manslaughter fell under malice murder, and the trial court recharged the jury that those were lesser offenses of both malice murder and felony murder. Later, the jury sent another note advising the court that it had reached a verdict on all counts except Count 1, and that one juror believed it should be voluntary manslaughter. The trial court responded to the second note by instructing the jury, with the consent of both parties, to continue deliberating.

The Court found no error in providing a verdict form that requires the jury to write its verdict on each count by hand, as long as the form is accompanied by appropriate instructions related to the charges and how the verdict should be entered on the form. Here, viewed in conjunction with the jury instructions as a whole, the verdict form did not mislead jurors of reasonable understanding, and there was no indication in the record that the jurors had any difficulty completing the verdict form according to the court's instructions. The jury's request for clarification was adequately addressed by the court's recharge on the lesser offenses, and the jury's later note advising the trial court that one juror believed the verdict on Count 1 should be voluntary manslaughter did not indicate any remaining confusion about the verdict form. Instead, it showed that the jury understood that it could find appellant guilty of voluntary manslaughter on Count 1. Finally, because the court appropriately instructed the jury on the lesser offenses of voluntary and involuntary manslaughter, it was not error to fail to include them on the verdict form.

Contention Jury Deliberations; Mistrials

Meadows v. State, S18A0314 (4/16/18)

Appellant challenged the trial court's denial of his plea in bar based on double jeopardy after the court — sua sponte and over appellant's objection — declared a mistrial of

his murder trial during jury deliberations. In its order denying the plea, the court said that the deliberations were contentious and that it declared the mistrial "in the interest of juror safety." The record, briefly stated, showed shortly after the jury began deliberating, a juror asked to be excused because she said she was "not in her right mind." The judge, after consulting with the parties, replaced her with an alternate. Thereafter, a sheriff's deputy told the judge on four separate occasions during the three hour deliberations that he could hear the jury and that their deliberations were very volatile. On the fourth visit, the deputy told the judge that the deliberations were "out of hand." Although there was some indication that the jury was deadlocked, the judge did not give an *Allen* charge. Instead, he declared a mistrial.

The Court stated that under the Double Jeopardy Clause, to avoid barring a second trial, the court may declare a mistrial without a defendant's consent or over his objection only when taking all the circumstances into consideration, there is a manifest necessity for doing so, which means a high degree of necessity. Here, there were some indications that the court granted the mistrial because it believed the jury would be unable to reach a unanimous verdict. But, the Court stated, that would have been a dubious decision, as the jury had been engaged in deliberations for less than three hours after a four-day murder trial when the court declared the mistrial and had not clearly expressed itself deadlocked or received an *Allen* charge. But, at the hearing on appellant's plea in bar and in its order denying the plea, the trial court stated explicitly that it granted the mistrial *solely* "in the interest of juror safety."

The Court found that any conclusion that the jurors were or felt unsafe was, at best, only tenuously supported by the record. The judge did not mention the deputy sheriff's reports to the parties until he was telling them that he had already decided to declare a mistrial. Most significantly, the trial court did nothing to try to confirm the deputy's reports with the jurors by asking if any of them felt the least bit unsafe during their deliberations.

Also, the attenuated factual support for the court's decision to terminate the trial was exacerbated by the court's failure to consider alternatives to declaring the mistrial. The Court noted that it has repeatedly emphasized that, before concluding that manifest necessity for a mistrial exists, the trial court should give careful, deliberate, and studious consideration to whether the circumstances demand a mistrial, with a keen eye toward other, less drastic, alternatives, calling for a recess if necessary and feasible to guard against hasty mistakes. But here, there was no indication in the record that the trial court evaluated any alternative less drastic than a mistrial. With regard to whether the jury was making progress in its deliberations, there was discussion of giving an *Allen* charge, but again, the trial court made it clear that the mistrial was not ordered due to a belief that the jury was deadlocked. After the court sprung the mistrial on the parties, appellant's counsel suggested polling the jurors individually, but the court summarily denied that proposal. The court indicated that it was unfamiliar with that procedure, even though polling jurors is a routine way to determine if they have been improperly influenced or are hopelessly deadlocked before ruling on a mistrial motion. Moreover, there were other obvious alternatives to abruptly declaring a mistrial due to second-hand reports of contentious or even unsafe jury deliberations: Instructing the jurors to take a break and relax; sending the jurors home for the day; admonishing the jurors to keep their deliberations civil and respectful; and determining if a specific juror was responsible for creating the volatile environment and admonishing or removing that juror. The trial court here did none of these things, and there was no indication that it considered such alternatives.

Finally, the Court stated, the trial court did not cite and the State did not identify any decision from anywhere in the country in which a mistrial has been granted under circumstances like those presented here. Contentious jury deliberations, without more, do not establish the manifest necessity required for a constitutionally permissible mistrial. "If heated debate alone were sufficient grounds for mistrial in all criminal cases, the criminal justice system could not function." This is not to say that juror safety concerns, when factually supported by the record, could never be a proper ground for a court's decision to terminate a trial prior to the jury reaching a verdict. Even in such exceptional cases, however, the concerns may be resolved by the removal of the juror who poses a threat, and the trial court should address that matter, when possible, before deliberations potentially devolve into brawls. Here, there was no indication that the bailiff overheard anything in the nature of the violent physical fight in the jury room that warranted a mistrial and the trial court should have addressed any perceived or developing threats to juror safety, at least in the first instance, by means other than precipitously abridging appellant's constitutional right to a verdict by the jury that was impaneled and sworn to decide his case. Accordingly, the Court found that the trial court abused its discretion in declaring a mistrial over appellant's objection, and his plea in bar should have been granted. Appellant may not be retried, and particularly given the delay between the mistrial and this decision, the Court stated that he should be promptly ordered released from confinement upon the return of the remittitur.

Jury Charges; Lesser Included Offenses

Soto v. State, S18A0346 (4/16/18)

Appellant was convicted of malice murder and related offenses arising from the shooting death of the victim and the aggravated assault on the victim's friend, Arriaga. The evidence, briefly stated, showed that appellant was the victim's employer and wanted to have a romantic relationship with her. Since she did not want such a relationship, appellant harassed and threatened her. One morning, the victim called Arriaga for a ride to work. When they arrived in the parking lot, appellant was waiting in his white van. The victim told Arriaga that the driver of the van was the person who had been following and threatening her and that the driver was obsessed with her and wanted to be her boyfriend. Nervous, the victim asked Arriaga to drop her off right in front of the store where she worked. When the victim got out of the vehicle, appellant pulled in front of Arriaga's vehicle and began shooting at the victim. She was hit six times, including several times in the back. Appellant then fired at Arriaga, hitting the door and the front of Arriaga's vehicle. Arriaga ducked down and drove away, hitting several cars in the parking lot.

Appellant argued that the trial court erred in denying his requests to charge the jury on reckless conduct and terroristic acts, because they were lesser included offenses of aggravated assault. The Court stated that a written request to charge a lesser included offense must always

be given if there is any evidence that the defendant is guilty of the lesser included offense. The evidence that the defendant committed the lesser offense does not need to be persuasive, but it must exist. A trial court is justified in refusing to charge on the lesser offense where there is no evidence that the defendant committed a lesser offense.

The Court noted that because reckless conduct is an act of criminal negligence that causes bodily harm or endangers the bodily safety of another, it may be a lesser included offense of aggravated assault by attempting to injure. But, a charge on reckless conduct is warranted only when there is evidence that the defendant acted negligently. Here, appellant testified that he intentionally shot at Arriaga or at Arriaga's truck (while Arriaga was in it), and that he did so either to defend himself or to place Arriaga in fear of harm. Thus, the Court found, appellant was not entitled to claim justification given that he shot at Arriaga while attempting to flee after the commission of a felony. Because there was no evidence that appellant was simply negligent in firing his gun at Arriaga, the evidence established only that appellant intended to commit an act that placed Arriaga in reasonable apprehension of immediately receiving a violent injury, which amounted to aggravated assault. Consequently, the trial court did not err in refusing to give the requested jury charge on reckless conduct.

Appellant also argued that his shooting of Arriaga's moving vehicle constituted the offense of terroristic acts and that this was a lesser included offense of aggravated assault. The Court disagreed. Under OCGA § 16-1-6 (1), a lesser crime is "included in" the greater where "[i]t is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of [the other crime]." The *Drinkard* "required evidence" test is used in determining whether one crime is included in the other. Under that test, the question is not whether the evidence presented at trial establishes the elements of the lesser crime, but whether each offense requires proof of a fact that the other does not.

As charged, the State could secure a conviction on aggravated assault by proving that appellant committed an assault in either manner contained in the simple assault statute, so long as the State also proved that he did so through the use of a gun. Proving either type of simple assault — attempting to injure the victim or committing an act that places the victim in fear of harm — requires proof different from that required to sustain a conviction for terroristic acts. A person commits the offense of a terroristic act when that person, while not in the commission of a lawful act, "shoots at … a conveyance which is being operated or which is occupied by passengers[.]" OCGA § 16-11-37 (b) (2) (2002). This type of terroristic act requires proof that a person shot at a conveyance that is being operated or is occupied by passengers, and such proof is not required to establish a simple assault. Because the offense of terroristic acts for shooting at a conveyance requires proof of a fact that the offense of aggravated assault does not, the crime of terroristic act is not a lesser included offense of aggravated assault. Therefore, appellant was not entitled to his requested jury charge.

First Offender Sentencing; Behavior-Incentive Dates

Mays v. State, A18A0434 (4/25/18)

Appellant pled guilty as a "first offender" under OCGA § 42-8-60, et seq. to one count each of aggravated assault, misdemeanor family-violence battery, and third-degree cruelty to children. At sentencing, the trial court adopted the State's recommendation to sentence him to ten years of probation. Appellant argued that, in sentencing him, the trial court erred by failing to give him a behavioral-incentive date as required by OCGA § 17-10-1 (a) (1) (B). The Court disagreed.

OCGA § 17-10-1 (a) (1) (B) provides, in relevant part: "When a defendant is convicted of felony offenses, has no prior felony conviction, and the court imposes a sentence of probation, not to include a split sentence, the court shall include a behavioral[-]incentive date in its sentencing order that does not exceed three years from the date such sentence is imposed." The Court noted that it was undisputed that appellant had no prior felony convictions, and the trial court imposed only a sentence of probation. But significantly, the plain language of OCGA § 17-10-1 (a) (1) (B) provides that it only applies "[w]hen a defendant is convicted of felony offenses." Because appellant was sentenced as a first offender, he was not convicted of any felony offenses. Thus, given the plain language of OCGA § 17-10-1 (a) (1) (B), the trial court correctly concluded that it was not required to include a behavioral-incentive date in appellant's ten-year sentence of probation because his guilty plea did not result in a conviction.

Nevertheless, appellant contended, in enacting OCGA § 17-10-1 (a) (1) (B), the General Assembly could not have "intended" to preclude defendants who qualify for first-offender treatment from the benefit of a behavioral-incentive date because doing so does not "square with common sense or good public policy." The Court stated that generally speaking, appellant is correct that courts must construe statutes in a way that squares with common sense and sound reasoning. Furthermore, courts have a duty to consider the results and consequences of any proposed construction and not construe a statute as will result in unreasonable or absurd consequences not contemplated by the legislature as evinced by the relevant text. But, the Court found, even if appellant's public-policy concerns are valid, he failed to identify any absurd results of adhering to the plain language of OCGA § 17-10-1 (a) (1) (B). And, when the language of a statute is plain and susceptible to only one natural and reasonable construction, as here, courts must construe the statute accordingly.

Burglary; Units of Prosecution

Cordle v. State, A18A0903 (4/30/18)

Appellant was convicted of two counts of burglary. He argued that because both burglaries occurred in the same building, "the rule of lenity and the prohibition against double jeopardy" required the trial court to merge the convictions and sentence him on only one count. The Court noted that in determining the precise conduct criminalized by a particular statute, courts must look to the statutory language itself. If the conduct or "unit of prosecution" is clear and unambiguous from the statutory text, the court must attribute to the statute its plain meaning. But, if the legislature's choice of the unit of prosecution is unclear from the statutory text, the ambiguous statute must be construed strictly against the State so as to impose the lesser punishment.

Pursuant to the burglary statute in effect at the time of the crimes, "[a] person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within . . . any building . . . or any room or any part there-

of." Former OCGA § 16-7-1 (a). Appellant contended that this language does not clearly establish "whether the legislature intended for a person to be convicted of burglary twice for entering one building that contained two businesses." He thus argued that the statute is ambiguous, requiring the Court to construe it in favor of merger.

The Court found appellant's "strained interpretation of the burglary statute" to be meritless. Pursuant to its plain language, the statute prohibits an individual harboring the requisite intent from entering or remaining within any building or portion of a building without proper authority. Our courts have interpreted the word "building" broadly, refusing to limit the term to buildings of any particular type or in any particular condition. And by extending the statute to "any room or any part" of a building, the legislature demonstrated that external physical structures do not necessarily govern the burglary analysis.

Here, the Court found, the indictment charged — and the jury found — that appellant separately entered two distinct businesses with the intent to commit theft inside each shop. The businesses were operated and controlled by different individuals, neither of whom authorized appellant's entry. Furthermore, although housed within the same overall structure, the two businesses occupied different areas, were separated by a wall, and had doors leading to the outside. Given these circumstances, the legislature intended to punish each of these unauthorized entries. To find otherwise would ignore the disparate nature of the entries, as well as the plain statutory language. Simply put, two criminal violations occurred here. The trial court, therefore, properly sentenced appellant on both counts of burglary.