Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 13, 2018

THIS WEEK:

Jury Instructions; Expert Testimony

Wade v. State, S18A0327 (6/18/18)

Appellant was convicted of murder and related offenses arising out of the beating death of Keon, an 18-month-old. He argued that that the trial court erred when it failed to give his requested instructions on accident, as well as the State's burden to disprove affirmative defenses beyond a reasonable doubt. Specifically, he contended that the victim's mother's testimony concerning appellant's explanation of Keon's fatal injuries — namely that Keon hit a lockbox after falling out of bed and that appellant fell on top of Keon after tripping over a gate — constituted "slight evidence" sufficient to warrant the instructions.

OCGA § 16-2-2 states that "[a] person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking, intention, or criminal negligence." The affirmative defense of accident arises when a defendant contends that his acts were accidental or a product of misfortune rather than criminal intent or negligence. Evidence that Keon may have fallen from the bed while sleeping and injured himself does not involve *homicide* by accident, but only death from accidental means not attributable to any conduct, culpable or otherwise, on the part of the defendant. Likewise, appellant's "admission" that, in the days leading up to Keon's death, he had "tripped over a board" and fallen on top of the boy did not account for the extent of Keon's injuries, and, thus, provided no basis for an accident instruction.

Furthermore, the Court found, even if the evidence supported an instruction on accident, the trial court's refusal to give the instruction did not mandate reversal. The accident defense applies where the evidence negates the defendant's criminal intent, whatever that intent element is for the crime at issue. Here, the jury was properly and fully instructed that the State had the burden of proving beyond a reasonable doubt that appellant acted with the requisite malicious intent to commit each of the crimes charged, and the jury's conclusion that appellant acted with malice thus necessarily meant that it would have rejected any accident defense, which is premised on the claim that he acted without any criminal intent.

Appellant also argued that that the State adduced improper expert testimony and that, as such, he was entitled to a mistrial. The Court noted that a physician testified that Keon's injuries were "nonaccidental" and were consistent with a "stomp, kick, or punch." Likewise, the medical examiner opined that some of Keon's injuries were "nonaccidental," meaning that the injury "was inflicted by another individual." The trial court denied appellant's repeated requests for a mistrial.

OCGA § 24-7-704 (b) provides as follows:

"No expert witness testifying with respect to the mental state or condition of an *accused* in a criminal proceeding shall state an opinion or inference as to whether the accused did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone."(Emphasis added.) The Court stated that an expert testifies "with respect to" the mental state or condition of a defendant when an inference of the facts testified to is that the defendant had the mental state or condition constituting an element of the crime. The operative language of Rule 704 (b) focuses on the defendant and prohibits opinion testimony as to whether he did or did not have the requisite intent.

The Court found that although appellant argued that the testimonies of the experts "at a minimum … injected the impermissible inference that [he] caused Keon's injuries intentionally," this was simply not the case. The expert's testimony concerned the nature of the injuries inflicted on the victim, not the mental state of the defendant. Whether the accused committed an intentional act to harm the victim is a different question than whether someone likely committed an intentional act to harm the victim. Thus, there was no 704 (b) violation here.

Miranda; Invocation or Right to Counsel

Taylor v. State, S18A0619 (6/18/18)

Appellant was convicted of two counts of felony murder and underlying predicate acts. He contended that the trial court erred in denying his motion to suppress his second custodial statement because he invoked his right to counsel. The Court disagreed.

Briefly stated, the evidence showed that appellant was interviewed on the day of his arrest. Prior to that interview, he was given *Miranda* warnings and executed a written waiver of his right to counsel. The initial custodial interview was audio and video recorded. Appellant was interviewed again the next day, after he had attended a bond hearing. Again, the interviewing officer read appellant his *Miranda* rights from a form, and again appellant signed a written waiver of his rights. The second interview was also recorded. During this second interview, after executing a written waiver of his right to counsel, appellant made the statement, "She told me not to talk, that's what she told me." The interviewing officer stated: "I'm not sure who she is, so this is purely a decision you have to make right here for you." Later in the interview, appellant stated: "She told me not to talk." The officer replied: "What's that got to do with anything, I don't understand what you're saying." Appellant responded by saying, "Because I'm — I'm just thinking to myself."

The Court found that appellant never informed the officer that a lawyer had been appointed to represent him, and never explained whether "she" referred to a lawyer. Moreover, at no point during the interview did appellant expressly invoke the right to counsel despite being informed that he could have a lawyer present during the interview. A request for a lawyer must be clear and unambiguous; the mere mention of the word "attorney" or "lawyer" without more, does not automatically invoke the right to counsel. Here, appellant did not refer to a lawyer, but only referenced what an unidentified "she" told him to do. Even a reference to a lawyer that is so ambiguous or equivocal that a reasonable officer under the circumstances would understand only that the suspect might be invoking the right to counsel does not require the cessation of questioning. When the officer told appellant he did not understand his reference to "she," appellant responded that he was merely thinking to himself. Given the ambiguity of appellant's comments about who had advised him not to talk, the Court held that appellant did not invoke his right to counsel during the second interview. Regardless of whether appellant was actually represented by counsel at the time of his second custodial interview, the record demonstrated that he waived in writing his right to have counsel present at the interview and he never explicitly invoked his right to counsel thereafter. Accordingly, the trial court did not err in denying appellant's motion to suppress the recordings of the second interview.

Demonstrative Evidence; Photographic Re-creation of Crime Scenes

Rickman v. State, S18A0841 (6/18/18)

Appellant was convicted of felony murder and possession of a firearm during the commission of a crime. The evidence, briefly stated, showed that the victim and his two brothers were walking past a Mustang and a Charger that were both waiting at a red light. Words were exchanged between the brothers and the vehicle occupants. A fight broke out when occupants of the Mustang got out to confront the brothers. Shots were fired from the Challenger in which appellant was a passenger. The victim was killed by a .380 bullet.

Appellant argued that the trial court erred in admitting photographs that showed a re-creation by police of the crime scene. The evidence showed that officers borrowed a Mustang and a Challenger similar to those driven at the time of the shooting, closed the roads near the actual location of the shooting, and, early one morning while it was still dark, positioned the borrowed vehicles where video footage showed that the actual vehicles had stopped. One officer testified that the purpose of the reenactment was to help determine where the vehicles and people involved were in relation to each other, what the line of sight was, and what directions the bullets may have traveled. After numerous photographs were taken of the vehicles at the scene and daylight arrived, one officer of the same height as the victim was positioned in an area near the driver's side of the Mustang where a blood spot showed that he had been shot. Five photographs show the officer posing as the victim. Based on the location where the .380 caliber shell casing was discovered, three of those five photographs also showed another officer posing as a shooter standing beside the passenger side of the Challenger, and the other two showed the view of someone exiting the passenger side of the Challenger. The State emphasized that those five photographs showed only possible locations from which the .380 shell casing could have come, and this was confirmed by the testifying officer. A sixth photograph showed the view that a seated driver of the Challenger would have had.

Appellant argued that the photographic evidence was improper because it was substantially different from the facts of the case, was not a fair and accurate representation of the events sought to be depicted, and as a result, was prejudicial and misleading to the jury. The Court disagreed.

Demonstrative evidence, which includes reenactments and pictures used to aid the trier of fact in understanding the issues and facts at trial, is irrelevant and inadmissible unless accompanied by witness testimony that shows

that the demonstrative evidence is substantially similar to the actual conditions or events at issue. Demonstrative evidence implicates several provisions of the new Evidence Code. It must be relevant, see OCGA § 24-4-401, and it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence, see OCGA § 24-4-403. In addition, under OCGA § 24-6-611 (a), the mode and order of presenting demonstrative evidence is subject to the reasonable control of the trial court so as to make the presentation effective for the ascertainment of the truth and to avoid needless consumption of time. These provisions of the new Evidence Code, OCGA §§ 24-4-401, 24-4-403, and 24-6-611 (a), mirror Federal Rules of Evidence 401, 403, and 611 (a).

The general foundational requirement for demonstrative or experimental evidence under the Federal Rules of Evidence is a showing not that the conditions of the demonstration are identical to the actual event at issue, but that they are so nearly the same in substantial particulars as to afford a fair comparison in respect to the particular issue to which the test is directed. And the trial court has broad discretion to determine whether the substantial similarity requirement has been satisfied. The Court noted that the Eleventh Circuit has allowed the use of demonstrative photographs of a re-created crime scene within the trial court's discretion when officers identified the photographs as similar to the actual crime scene, they addressed inconsistencies between the photographs and the actual crime scene, the jury was put on notice that the photographs may not have precisely captured a firearm's exact location, and the trial court told the jury that the photographs did not show the actual vehicle and what was happening that night.

Here, the Court found, the photographs were taken at the actual location of the shooting using the same types of vehicles in the same positions as the actual vehicles. The fact that the particular photographs at issue were taken in daylight was not material to the determination of the possible positions of vehicles, persons, and the murder weapon. And the daylight condition for the photographs was mitigated by the opportunity to compare them with other photographs of the reenactment that were taken in the dark with the area illuminated only by street lights. The position of one officer in five of the photographs was based on substantial evidence of the victim's actual location. The other officer, who appeared in three of those photographs, was positioned near the shooter's approximate location as shown by eyewitness testimony and the location where the .380 caliber shell casing was discovered. Both the officer who testified, and the trial court, made it clear that the photographs did not show what actually happened, but only a theory as to how it could have happened. Thus, the Court concluded, considering the record as a whole, the trial court's admission of the six reenactment photographs did not constitute an abuse of discretion.

Voluntary Manslaughter; Sufficiency of Provocation

Ware v. State, S18A0028 (6/18/18)

Appellant was convicted of felony murder and other crimes in connection with the shooting death of his wife, Michelle. The evidence showed that after appellant came home one evening, Michelle confronted him about his drinking and lack of employment. Appellant expressed remorse, but Michelle said that she did not think he'd be able to change. She then said, "Robert, I'm seeing somebody else that I'm in love with." Appellant looked at her without speaking, and Michelle continued, "It's not going to work between us because I can't love you no more." Appellant then grabbed a pistol from the drawer next to him and shot Michelle at close range in the back of the head.

Appellant argued that the trial court erred in denying his request for a jury instruction on voluntary manslaughter. The Court stated that voluntary manslaughter is the killing of another human being under circumstances that would otherwise be murder when the killer "acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person." OCGA § 16-5-2 (a). A jury charge on voluntary manslaughter is required only when there is some evidence that the defendant acted in this manner. And it is a question of law for the courts to determine whether the defendant presented any evidence of sufficient provocation to excite the passions of a reasonable person.

Words alone, regardless of the degree of their insulting nature, will not in any case justify the excitement of passion so as to reduce the crime from murder to manslaughter where the killing is done solely on account of the indignation aroused by use of opprobrious words. However, there is a limited exception to this rule for words informing a defendant of "adulterous conduct." In that one circumstance, words alone may constitute the serious provocation sufficient to excite a sudden, violent and irresistible passion sufficient to require a jury charge on voluntary manslaughter.

But in order for the conduct communicated by such words to amount to the sort of provocation necessary to reduce a murder to manslaughter, they must disclose adulterous conduct or, in the case of unmarried persons, sexual relations with other persons during the course of a relationship. Conversely, statements by a victim that she wants to end the relationship, is involved with or prefers the affections of another, or even has chosen to leave the defendant for another — but that stop short of disclosing extra-relationship sexual conduct — have never been deemed sufficiently provocative to excite sudden, violent, and irresistible passion in a reasonable person such that a voluntary manslaughter charge is required.

And here, the Court found, Michelle's statements, "Robert, I'm seeing somebody else that I'm in love with," and "It's not going to work between us because I can't love you no more," were not sufficiently provocative to excite "sudden, violent, and irresistible passion" under OCGA § 16-5-2 (a) because they did not disclose adulterous, sexual conduct. Rather, her statements expressed to appellant that she wanted to end their relationship, and that she loved another person. The Court noted that these are the types of statements it has found do not rise to the level of provocation required by Georgia's voluntary manslaughter statute. However disheartening they may be to the listener, they cannot mitigate a deadly response. And, the Court noted, there was no evidence that Michelle taunted appellant with, bragged about, or even recounted to appellant any sexual relations with another man, as has been required in the past for adulterous conduct disclosed by words to be sufficiently provocative. Accordingly, because there was no evidence of sufficient provocation to excite the passions of a reasonable person, no jury charge on voluntary manslaughter was required.

Record on Appeal; Missing Records

Gadson v. State, S18A0123 (6/18/18)

Appellant Joseph Gadson and his brother Nkosi Gadson were tried together and found guilty of the murder of Amady Seydi and other crimes committed against Seydi and his girlfriend Tarah Medsker over the span of three weeks in the fall of 2005. Appellant contended that he could not obtain full and fair appellate review of his convictions because certain documents were missing from the record of his trial. In his amended motion for new trial — eight years after the trial — appellant asserted, and the State then conceded, that the record was missing five documents: the arrest warrants for appellant and Nkosi; the search warrant for the brothers' apartment and the affidavit that was submitted to obtain the search warrant; and a "Charge Disposition Report" that listed additional charges against appellant that were contemplated by the State but not alleged in the indictment.

The Court stated that a defendant who is tried and convicted has a right to appeal and a right to a transcript of the trial to use in bringing that appeal. An appellant who is deprived of an adequate trial transcript has effectively been denied his right to appeal. In felony cases, the State is responsible for ensuring that a correct and complete transcript is created, preserved, and provided to the defendant upon his request. But if the State does not fulfill its duty to file a complete transcript after a guilty verdict has been returned in a felony case, the defendant is not automatically entitled to a new trial. Instead, OCGA §§ 5-6-41 (f) and (g) allow any party who contends that the record "does not truly or fully disclose what transpired in the trial court" to have the record completed either by stipulation of the parties or, if the parties cannot agree, by the decision of the trial court.

Where all or an important portion of the original verbatim transcript of a trial is lost and the transcript reconstructed pursuant to §§ 5-6-41 (f) and (g) is manifestly inadequate, an appellant is not required to specify how he has been harmed by a particular error that may have occurred at trial but is now buried in unrecorded history. But where, as here, an otherwise verbatim transcript is missing only one or a few parts of the trial, an appellant is not entitled to a new trial unless he alleges that he has been harmed by some specified error involving the omitted part and shows that the omission prevents proper appellate review of that error.

Here, the Court found, although appellant made a general assertion that he had been harmed by the incomplete record, he alleged no specific harm from the omission of his and Nkosi's arrest warrants and the affidavit that was submitted to obtain the search warrant of their apartment. In any event, the discussion of these three documents in the trial transcript would have been sufficient to allow the Court to review their admission into evidence, had they been the subject of such an enumeration of error.

Appellant did allege particularized harm from the missing search warrant for the apartment, claiming that the omission prevented the Court from adequately reviewing his objection to the warrant's admission into evidence during the trial. The trial transcript showed that appellant objected to the warrant's admissibility on the ground that it had additional documents attached to it, including other search warrants. But, the Court found, the transcript also clearly indicated that appellant got what he asked for. The State agreed to limit the exhibit to the one-page search warrant, and after the close of the evidence, the parties confirmed on the record that the additional pages attached to the search warrant had been removed.

Moreover, during its deliberations, the jury sent a note to the trial court asking if there was "a list of evidence." The court understood the question to be seeking a list of all of the evidence admitted during the trial and ultimately told the jury that there was no such list. When the court was discussing with the parties its proposed response to the note, the prosecutor said that she believed the jury was "referring to the evidence log from the search warrant, which we did admit into evidence . . . but I think in an abundance of caution, we just all agree [sic] that we would not send that back." The Court found that to the extent the prosecutor was saying that the evidence log (rather than the search warrant) was admitted into evidence, the transcript showed that she was mistaken. In any event, her comment indicated that the additional pages attached to the search warrant — and possibly the search warrant itself — were not given to the jury during its deliberations. Thus, the existing record was sufficient for the Court to determine that appellant suffered no harm with respect to the missing search warrant.

Finally, appellant contended he was harmed by the record's omission of a document entitled "Charge Disposition Report," which the trial transcript indicated was created by the District Attorney's office and listed additional potential charges against appellant that were contemplated by the prosecutors but not included in the indictment. The transcript also indicated that the Report was accidentally attached to the indictment that was given to the jury during its deliberations. The jury later sent the trial court a note saying that the charges in the indictment differed from those listed in the Charge Disposition Report. After the court read the jury's note to the parties, appellant moved for a mistrial on the ground that the jury had been confused by the Report. The court denied the mistrial motion, but then brought the jurors back into the courtroom, instructed them that the Charge Disposition Report was irrelevant and that they needed to concern themselves only with the charges in the indictment, and removed the Report from the jury room. Despite these curative measures, appellant reiterated his motion for mistrial.

Appellant contended that without seeing the Charge Disposition Report that the jury saw, the Court could not properly review whether the trial court abused its discretion in refusing to declare a mistrial. The Court disagreed. The jury's note to the trial court was included in the record; it listed the potential charges against appellant that were included in the Charge Disposition Report inadvertently given to the jury which led to the jury's question. The Court found that the note — and the parties' discussion with the court about its response to the note — provided it with sufficient information about the missing report. The trial transcript also included appellant's mistrial motions, the trial court's decision not to grant a mistrial, the court's curative instruction to the jury, and the court's direction that the Report be removed from the jury room. The Court stated that it needed no more to decide that the trial court did not abuse its discretion with regard to this issue.

Accordingly, the Court concluded, appellant failed to show that he was harmed by the handful of minor omissions in the trial transcript. The loss of the five documents was

unfortunate, as was the resulting delay in resolving appellant's motion for new trial, but appellant was not entitled to a new trial on this ground.

Habeas Corpus; Tolling Provisions

Abrams v. Laughlin, S18A0594 (6/18/18)

In 2005, appellant pled guilty to four counts of kidnapping. Acting pro se, appellant filed his habeas petition in 2016, alleging that his kidnapping convictions were not supported by sufficient evidence of asportation under *Garza v. State*, 284 Ga. 696 (2008). On the State's motion, the habeas court dismissed the petition as untimely under OCGA § 9-14-42 (c) (1) and (3). The Court granted appellant a certificate of probable cause to appeal.

The Court noted that subsection (c) of OCGA § 9-14-42 provides for a period of limitations to seek a writ of habeas corpus in state court for the denial of a federal or state constitutional right. In the case of a felony other than one involving a death sentence, any action must be filed within four years from one of four alternative dates. The time provided in paragraph (c) (1) begins to run upon "[t]he judgment becoming final by the conclusion of direct review or the expiration of the time for seeking such review." Appellant's kidnapping convictions became final when the time for appeal expired on November 16, 2005. Thus, because he did not file his habeas petition within four years of that date, it was untimely under OCGA § 9-14-42 (c) (1) and subject to dismissal unless it was timely under another paragraph.

Appellant contended that the statute of limitation was tolled under OCGA § 9-14-42 (c) (3). This paragraph provides for tolling until "[t]he date on which the right asserted was initially recognized by the Supreme Court of the United States or the Supreme Court of Georgia, if that right was newly recognized by said courts and made retroactively applicable to cases on collateral review." The Court stated that this paragraph potentially applied to appellant's habeas petition because the right that he asserted was initially recognized by *Garza*, was subsequently identified as a substantive right that should be applied retroactively, see *Hammond v. State*, 289 Ga. 142, 143-144 (1) (2011), and was thereafter applied retroactively to cases on collateral review, see *Wilkerson v. Hart*, 294 Ga. 605, 607 (2) (2014); This raised the question of when the time provided pursuant to paragraph (c) (3) begins to run. Is it the date when the asserted right was initially recognized, when that right was made retroactively applicable to cases on direct review, or when the right was made retroactively applicable specifically to cases on collateral review?

The Court found that the only natural reading of the text of paragraph (c) (3) identifies in its first clause one date and one date only as the date from which the limitation period runs: the date on which the right asserted was initially recognized by it or the U. S. Supreme Court. The second clause — if that right has been newly recognized by the courts and made retroactively applicable to cases on collateral review — imposes a condition on the applicability of this subsection. The second clause therefore limits the application of (c) (3) to cases in which applicants are seeking to assert rights newly recognized by the "said courts" and made retroactively applicable to cases on collateral review. Consequently, the Court held, if it decides a case recognizing a new right, a convicted felon not sentenced to death seeking to assert that right will have four years from the Court's decision within which to file his habeas petition, and he may take advantage of the date in the first clause of OCGA § 9-14-42 (c) (3) only if the conditions in the second clause are met. Here, therefore, because the right asserted by appellant was "newly recognized" in *Garza*, appellant had four years from the date of the *Garza* decision, November 3, 2008, to file his habeas petition even though the *Garza* right was subsequently "made retroactively applicable to cases on collateral review." As appellant's petition had to be filed no later than November 3, 2012 and it was not filed until 2016, it was not timely under paragraph (c) (3) of OCGA § 9-14-42.

Appellant also contended that the statute of limitation was tolled by OCGA § 9-14-42 (c) (4). This paragraph provides that the statute of limitation is tolled until "[t]he date on which the facts supporting the claims presented could have been discovered through the exercise of due diligence." Appellant argued that, as a pro se litigant, he did not know about *Garza*, but filed his habeas petition as soon as he heard about the change in the law of kidnapping in that case. However, the Court found, assuming that appellant sufficiently raised this contention, it was without merit because the time provided in paragraph (c) (4) plainly begins to run on the date when "the *facts* supporting the claims presented" (emphasis supplied), not "the law," could have been discovered by due diligence. Specifically, the Court found, *Garza* established new factors for assessing the asportation element of Georgia's pre-2009 kidnapping statute and constituted a substantive change in the law with respect to the elements of kidnapping. Thus, *Garza* represented a change of law, not fact. Instead of altering the factual landscape, it announced a generally applicable legal rule. As a result, *Garza* does not constitute a "fact" that can reset the statute of limitation under paragraph (c) (4) of OCGA § 9-14-42. Accordingly, because appellant's habeas petition was not timely pursuant to any of the alternative paragraphs of the statute of limitation in OCGA § 9-14-42 (c), the habeas court correctly dismissed the petition as untimely.

Mistrials; Manifest Necessity

Carmen v. State, S18A0586 (6/18/18)

Appellant was indicted for murder, armed robbery, and other offenses. The State sought the death penalty. The facts, very briefly stated, showed that on January 28, 2013, the trial court approved Christian Lamar to serve as lead counsel for appellant and Kimberly Staten-Hayes to serve as co-counsel, and they represented appellant throughout the nearly two years of his pretrial proceedings and trial preparation. On October 24, 2014, which was just 11 days before voir dire began, Gabrielle Pittman filed a notice of appearance to join the defense team. The record showed that Ms. Staten-Hayes had been responsible for preparing for the guilt/innocence phase and that Mr. Lamar had been responsible for preparing for the sentencing phase. Ms. Pittman had joined the defense team just two weeks prior to voir dire, that it had been intended that she would participate only in jury selection, that she had done other, unspecified things for the defense since then, and that she would not be prepared to catch up on nearly two years of preparation but could be prepared for "targeted things."

Midway through the guilty/innocence phase of the trial, Ms. Staten-Hayes learned that her niece had attempted suicide. Ms. Staten-Hayes was apparently emotionally distraught and needed to go to her niece, who

was in Nashville, TN. The court announced that it would not proceed further that day and would give the parties an opportunity to state their position regarding a mistrial or continuance. Mr. Lamar proposed a 13-day continuance until the Tuesday after Thanksgiving, December 2, which he said would allow him and Ms. Pittman to "come up to speed" in case Ms. Staten-Hayes could not return. The State joined that proposal, but it asked the trial court to ensure that appellant, in seeking the 13-day continuance, was committing "to the fact that if Ms. Staten-Hayes is not in the position to proceed, that he would be willing to proceed with his other counsel of record on December 2." The court, however, stated, "I can tell you now, you are not going to go forward with a lawyer who just got this case when you and Ms. Staten-Hayes have had it for two years." The trial court then added, "And I'm not going to put her in a position of having to decide between her niece and this trial."

Over the objections of both parties, the court decided that a manifest necessity existed and declared the mistrial. The court stated that "the failure to declare a mistrial would — if this trial were to continue — result in a set of circumstances that the court does not believe could be defended, both with respect to any verdict which might be returned, and should the matter be taken up on appeal at some later point in time." Appellant then filed a plea in bar, which the court denied.

Appellant argued that the trial court abused its discretion in finding that a manifest necessity existed. The Court stated that it must remain mindful that that decision involved the emotional health and ability to proceed of one of the two attorneys who had spent nearly two years preparing appellant's case for trial and whose absence, at least arguably, might not have simply harmed appellant but might have significantly frustrated the ends of public justice.

Appellant next argued that the trial court's stated concern about future appeals regarding counsel's representation amounted to a substitution of defense strategy and did not constitute a manifest necessity. However, the Court found, the trial court had a valid concern that appellant's representation might be inadequate. This concern was voiced in terms of the likelihood of reversal on appeal or relief on habeas corpus, which would render the trial an exercise in futility.

Appellant next argued that the trial court abused its discretion by resting its decision to grant a mistrial on an incorrect understanding of the Unified Appeal Procedure. Specifically, that the Unified Appeal Procedure simply requires the appointment of two attorneys who meet specified "minimum qualifications," and Ms. Pittman met the requirements to replace Ms. Staten-Hayes as Mr. Lamar's co-counsel. The Court disagreed. First, appellant's assertion was not supported by the record, because the trial court made no reference to the Unified Appeal Procedure in considering and then declaring a mistrial. Instead, the trial court referred repeatedly to two core concerns: (1) Ms. Staten-Hayes was effectively incapacitated as counsel and should not be relied upon to determine the timing of her return to court under the circumstances; and (2) Ms. Pittman, regardless of the fact that she was qualified under the Unified Appeal Procedure, was simply unprepared to serve as appellant's sole co-counsel. Second, even if the trial court had referred to the Unified Appeal Procedure as a factor supporting its exercise of discretion in declaring a mistrial, doing so would not have been unjustified. Obviously, the requirements of the Unified Appeal Procedure must yield to constitutional mandates wherever they are in conflict, including the constitutional mandates governing the declaration of mistrials. However, it would not have been error for the trial court to weigh the Unified Appeal Procedure's concern for the appointment of qualified counsel as it exercised the discretion afforded to it under constitutional mandates regarding mistrials.

Finally, appellant argued that the trial court rushed to declare a mistrial. The Court again disagreed. Here, the trial court took a recess, inquired further into the circumstances at hand, allowed extensive argument, and only then concluded that a 13-day continuance would not be sufficient to serve the interests of justice. And, although the trial court did not question the jury on the matter, the Court concluded for two reasons that the trial court's discretion was not abused by its failure to do so. First, at times such a direct inquiry may be desirable yet still not be absolutely necessary. Second, and more importantly, the totality of the trial court's comments, particularly those following the suggestion by appellant's lead counsel that the jury could be left unaware of the reason for a continuance, showed that the trial court's core focus was on whether a 13-day continuance would be sufficient to ensure that appellant's trial was conducted in a manner that served the ends of justice in light of the severe emotional distress of his co-counsel of two years and the unpreparedness of the third attorney who had only two weeks before joined the case.

Nevertheless, appellant argued, the trial court *could* have delayed ruling on a possible mistrial until after a shorter continuance and a further report from the defense about whether appellant's co-counsel of two years felt that she could return or whether any new arguments could be raised regarding the ability of his lead counsel to proceed without her assistance. However, the Court found, the trial court clearly stated that it had considered the relevant circumstances, which included a serious suicide attempt by the affected attorney's close family member who had recently lost her mother, the trial court's direct observation of the attorney's severe emotional distress, the trial court's concern that the attorney would not be in a sound position to decide whether she could or should return following a shorter continuance, and the unpreparedness of the other attorney available to serve. And, the Court stated, even if it might have chosen a different course in appellant's case as trial judges, the course chosen by appellant's trial court was not unreasonable. Accordingly, the Court concluded that the trial court did not abuse its discretion in declaring a mistrial and, in turn, denying appellant's plea in bar based on alleged double jeopardy.