

THIS WEEK:

- **Brady Violations; Appropriate Remedies**
- **Jury Instructions; Plain Error**
- **DUI; Implied Consent**
- **Immunity Hearings; Sufficiency of the Evidence**
- **Closing Arguments; Plain Error**

Brady Violations; Appropriate Remedies

State v. Echols, A18A1263 (9/10/18)

Echols was accused of two misdemeanor counts of family violence simple battery against his girlfriend and grandmother. The record shows that Echols requested discovery including *Brady* material. When the case was called to trial, Echols' counsel informed the trial court that he had just spoken with Echols' girlfriend and she told him that the summary of her statement in the incident report was inconsistent with what she had recounted in her written statement. The trial court briefly recessed, allowing the State time to locate the written statements. The State, however, was unable to find the written statements, did not know the statements' location, and requested a continuance so the officers involved with the case could determine if the statements were located in their files. Echols objected to a continuance and moved for the accusation to be dismissed, arguing that the State's failure to provide the written statements constituted a *Brady* violation. The trial court agreed and dismissed the accusation, reasoning that the State had an obligation to provide the victims' written statements and that the statements were "possibly exculpatory, that it is different than what the police stated in the police report." After the trial court issued a written order dismissing the accusation, the State moved for reconsideration and attached the written statements that were the subject of the alleged *Brady* violation. Before the trial court could rule on the State's motion for reconsideration, however, the State timely appealed under OCGA § 5-7-1 (a) (1).

The Court stated that under *Brady*, the State has two relevant duties regarding what information it must provide to a defendant. First, the State must disclose material information upon a pretrial request for specific evidence. Second, the State must provide obviously exculpatory evidence, regardless of whether defense counsel requested the evidence or not. Here, the Court assumed that the State had a duty to provide Echols with the girlfriend's statement. However, *Brady* is not violated when the material in question is available to the defendants during trial, pre-trial disclosure of material not being required. Whether a disclosure at trial is timely enough to satisfy *Brady* depends on the extent to which the delay in disclosing the exculpatory evidence deprived the defense of a meaningful opportunity to cross-examine the pertinent witness at trial, whether earlier disclosure would have benefitted the defense, and whether the delay deprived the accused of a fair trial or materially prejudiced the defense.

And here, the Court found, although the State could not produce the statement in the brief recess in the proceedings, the failure to produce the statement at that time did not constitute a *Brady* violation because the State could have produced

the statement during the course of the trial or testimony could have been elicited at trial about the discrepancies between the statement and the incident report. Accordingly, it was premature to determine at that time that a reasonable probability exists that the outcome of the trial would have been different had the statement been produced. Thus, the trial court erred in determining that there was a *Brady* violation.

Furthermore, the Court noted that Echols did not cite, nor did the Court discover any authority permitting the trial court to dismiss a criminal prosecution before trial based solely on the allegation that the State committed a *Brady* violation. And, while a criminal prosecution may be dismissed before trial based on the State's failure to preserve potentially exculpatory evidence if the defendant shows that the evidence is constitutionally material and the State is found to have acted in bad faith, the record did not show that Echols argued, or the trial court considered whether the State acted in bad faith in failing to provide the statements or whether the statements were constitutionally exculpatory material. Therefore, the Court concluded, because the trial court erred in finding a *Brady* violation and in dismissing the case for the failure to produce the statements without considering the relevant factors, the trial court's order dismissing the case with prejudice was reversed and the case remanded for further proceedings.

Jury Instructions; Plain Error

Aguirre-Gomez v. State, A18A1259 (9/11/18)

Appellant was found guilty of two counts of reckless conduct (lesser-included offenses of aggravated assault) and possession of a firearm during the commission of a felony. He argued that the trial court committed plain error in its jury charge regarding the possession of a firearm charge. Specifically, because the jury was not informed that reckless conduct is a misdemeanor, it could have mistakenly inferred that reckless conduct would suffice as the predicate felony for the firearm possession charge. The Court agreed.

The Court found that the trial court not only failed to inform the jury that the offense of reckless conduct was a misdemeanor, and therefore a crime that did not qualify as a predicate felony offense, the court's instructions could have misled the jury into believing that reckless conduct was a felony. The court charged the jury, in relevant part, that "[a] person commits reckless conduct when he causes bodily harm to or endangers the bodily safety of another[.]" Almost immediately thereafter, when defining the offense of possession of a firearm during the commission of a felony, the court informed the jury that a felony "is any crime against or involving the person of another." Thus, the jury could have inferred from the charge that reckless conduct was a felony that could satisfy the elements of the offense of possession of a firearm during the commission of a felony, thereby substantially prejudicing appellant's rights. This was an obvious error that likely affected the outcome of the proceedings and seriously affected the fairness of the trial below. Consequently, appellant's conviction for possession of a firearm during the commission of a felony was reversed.

DUI; Implied Consent

Bergstrom v. State, A18A1218 (9/14/18)

Appellant was convicted of DUI (under 21) and DUI (less safe). The evidence, briefly stated, showed that appellant was 17 years old at the time of her arrest. After being read the appropriate implied consent warnings, she stated, "yeah, I'll do whatever you want me to do." But, when the officer tried to contact her parents to pick up her car, appellant became

visibly upset, decrying that her mother was going to hate her, her college prospects would be impacted, and that she was "...going to kill [her]self."

She argued that the trial court erred in denying her motion to suppress the results of her breath test. Specifically, that the trial court erred by failing to find Georgia's implied consent statute unconstitutionally coercive on its face and as applied to her. The Court disagreed.

The Court found that appellant's facial challenge was foreclosed by the Supreme Court's decision in *Olevik v. State*, 302 Ga. 228 (2017). Moreover, the Court rejected her contention that the language of the warning is fundamentally inaccurate with respect to the voluntariness of the search or fails to fully explain the consequences of non-compliance, and thus violates her due process rights. There is no law requiring a full and explicit explanation of all possible consequences of refusal in this context.

The Court stated that her as applied constitutional challenge was in essence an allegation that her consent to the state-administered test was involuntary. The Court found that while it was undisputed that appellant was upset throughout the encounter, the record, including a video recording of her encounter with the arresting officer, sufficiently demonstrated that she consented to the state-administered breath test. Moreover, the Court agreed with the trial court's statement that "it cannot be the law that every time a 17 year old is read implied consent that implied consent is, per se, not understood and coercive[.]" Accordingly, the Court concluded, appellant's as applied challenge also failed.

Immunity Hearings; Sufficiency of the Evidence

State v. Smith, A18A0956 (9/14/18)

Smith was indicted on charges of aggravated assault and reckless conduct. The trial court granted Smith's motion for immunity pursuant to OCGA § 16-3-24.2 and the State appealed.

The evidence, briefly stated, showed that Smith, with the permission of his ex-girlfriend Rashell, went to her family's home to pick up some of his belongings while the family was away. When he heard the family's van approaching the residence, he quickly left the residence and started walking towards his car on the street. Dillon, one of Rashell's brothers, who was known to have violent tendencies and had a strained relationship with Smith, jumped out of the van and ran toward Smith. Smith sprinted to his car, got there first, got in and locked the doors. Dillon planted himself directly in front of the hood of the car. Smith tried to wave Dillon off, telling him that he wished to leave, but Dillon refused to move and remained in front of the car and appeared hostile. Smith started the car. Dillon jumped on the hood. Smith drove down the street with Dillon on the hood. At the end of the street, Smith stopped. Dillon then dismounted from the hood and angrily punched the driver's side window before Smith drove away.

The State argued that the trial court erred in hearing and ruling upon Smith's motion to dismiss after a jury was struck and, thus, after the beginning of trial. The Court disagreed. The Court noted that since the State did not object at the time, it was limited to reviewing the issue under a plain error standard. The Court assumed, without deciding, that there was a legal defect and that the defect was clear and obvious. However, the Court found, the State could not demonstrate the third prong—i.e., that its substantial rights were affected. As the trial court explained in its order, the hearing was conducted "after the jury was struck due to the State's witness . . . not being available before the jury was struck." Thus,

the Court surmised, if anything, the State benefitted from the case proceeding as it did, and it could not now complain about the timing of the hearing on Smith's motion, which was filed before the jury was struck.

The State also contended that the trial court erred in granting the motion when there was no evidence Smith defended himself by using threats or force within the meaning of OCGA § 16-3-21. The Court again disagreed. The Court noted that the trial court found that Dillon jumped onto the hood of the vehicle after Smith started it (but prior to acceleration), and discounted Rashell's testimony to the contrary, determining that her contention that "Dillon had nowhere to go and did not have time to move [was] not borne out by the evidence." Then, based upon both Smith *and* Rashell's testimony, the court concluded that Smith drove at a normal, safe speed; that he did not swerve; and that there was no danger of Dillon being thrown from the hood. The trial court also determined there was no evidence the vehicle was used in a way likely to cause death or great bodily harm. Instead, the court found that Dillon was and remained the initial aggressor and that Smith used his vehicle to protect himself in the manner that he reasonably believed necessary. Accordingly, since there was evidence to support the trial court's findings, the Court affirmed.

Closing Arguments; Plain Error

Shepard v. State, A18A1074 (9/17/18)

Appellant was convicted of aggravated assault and aggravated battery. He argued that the trial court committed plain error when it allegedly permitted the State to make improper remarks suggesting appellant had a propensity for violence during closing arguments. However, relying on *Gates v. State*, 298 Ga. 324, 328-29 (4) (2016), the Court held that notwithstanding Georgia's new evidence code, errors based on improper remarks during closing argument are not subject to plain error review because what is said during closing arguments is not evidence. Therefore, because appellant did not object to the State's argument during its closing, he waived review of the State's arguments.

In so holding, the Court rejected appellant's contention that *Gates* is distinguishable because in *Gates*, the defendant was represented by counsel and here, appellant represented himself at trial. The Court stated that appellant's pro se status did not relieve him of his obligation to object to the State's allegedly improper statements during closing argument. The Court refused to hold appellant to a different or more lenient standard merely because he elected to proceed pro se.