Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 10, 2017

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THIS WEEK:

Coconspirators' Statements in Furtherance of the Conspiracy

State v. Wilkins, S17A0873 (10/2/17)

The State appealed from the trial court's order granting Wilkins' pretrial motion in limine to exclude six incriminating statements made by his co-defendant Jones with regard to a double murder. The trial court held that the statements, while made by a co-conspirator, were not made "in furtherance of the conspiracy" and thus did not fall within the exception to the hearsay rule provided by OCGA § 24-8-801 (d) (2) (E). The Court agreed and affirmed.

The Court noted that OCGA § 24-8-801 (d) (2) (E), provides a hearsay exception for "[a] statement by a coconspirator of a party during the course and in furtherance of the conspiracy, including a statement made during the concealment phase of a conspiracy. A conspiracy need not be charged in order to make a statement admissible under this subparagraph." (Emphasis supplied). This language differs substantially from former OCGA § 24-3-5, which stated: "After the fact of conspiracy is proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." Under this former code section, admissible statements included not only those in which a co-conspirator attempted to pursue or conceal the conspiracy, but also statements which simply recounted the conspirators' participation in the original crime.

The Court also noted that the new Evidence Code governing co-conspirator admissions is by no means identical to Fed. R. Evid. 801 (d) (2) (E), although it includes language from that rule. It departs from the text of the federal rule in several respects, notably by explicitly incorporating the rule, established by our case law decided under the former Georgia Evidence Code, that statements "made during the concealment phase of a conspiracy" are included as part of the co-conspirator exception. And the General Assembly, by expressly incorporating the language of our prior decisions, evinced its intent to adopt the principle that a conspiracy does not necessarily terminate upon the achievement of its object.

Nevertheless, language borrowed from Rule 801 (d) (2) (E) that did not appear in the former Georgia Evidence Code requires that, to fall within the hearsay exception, the statements themselves be made "in furtherance of the conspiracy" whether made before the object of the conspiracy is achieved or during the concealment phase. In interpreting Fed. R. Evid. 801 (d) (2) (E), the Eleventh Circuit applies a liberal standard in determining whether a statement was in furtherance of a conspiracy.

The statement need not be necessary to the conspiracy, but must only further the interests of the conspiracy in some way. Statements made to solicit membership or participation in the conspiracy and statements explaining the conspiracy to a new member are made in furtherance of the conspiracy. However, the Court found, this liberal standard is not without limits. A "retrospective statement" regarding matters that have already occurred, and that is not intended to foster involvement in the conspiracy, is not a statement in furtherance of the conspiracy. And a statement that merely "spilled the beans" to a third party could hardly be considered to have advanced any object of the conspiracy. Similarly, a statement which was not made to conceal the conspiracy and served only to disclose the scheme, or which merely informed the listener of the declarant's activities, is not admissible under Fed. R. Evid. 801 (d) (2).

In reviewing the six hearsay statements sought to be admitted under the coconspirator exception, the Court stated that the State conflated the issue of whether a statement was made in furtherance of the conspiracy with the issue of whether it was made during the concealment stage of the conspiracy. But, the Court found, while they were made during the concealment stage, none of the statements were made in furtherance of the conspiracy. Instead the statements were either retrospective, statements merely disclosing the scheme, or statements implicating a coconspirator, and therefore not admissible. Accordingly, the Court held that the trial court's determination that the statements by Jones were not made "in furtherance of the conspiracy" was supported by the evidence and was not clearly erroneous.

Trial Transcripts; Recreation

Johnson v. State, S17A1105 (10/2/17)

Appellant was convicted of murder and related crimes following a six-day trial. All of the original verbatim trial transcript materials were later destroyed in a fire at the court reporter's house. The State ultimately provided appellant with a 14-page, double-spaced document purported to be a complete narrative recreation of the trial transcript. Appellant contended that the trial court erred in denying him a new trial because the recreated transcript is not sufficiently detailed to allow him a fair opportunity to appeal or to allow meaningful appellate review. The Court agreed.

The Court noted that pursuant to OCGA § 17-8-5 (a), 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. Here, the trial court concluded that the recreated transcript is correct and sufficient for appeal. The Court found that under the OCGA § 5-6-41 (g), the first part of the trial court's ruling — that the recreated transcript is correct — is not reviewable. Appellate review is available, however, as to whether the recreated transcript is complete — meaning sufficient for appellant to identify errors and for the Court to evaluate the errors then enumerated. An appellant is entitled to a "complete and correct" transcript, one that "disclose[s] what transpired in the trial court" not only "truly" but "fully," OCGA § 5-6-41 (f).

And here, the Court found and detailed, the 14-page, double-spaced document purporting to be a complete narrative recreation of the trial transcript was woefully deficient in many, many ways. Thus, the Court held, because the whole original verbatim transcript of his trial was lost and the narrative recreation is manifestly inadequate, appellant was not given a fair opportunity to identify any trial errors and resulting harm or deficient performance by counsel and resulting prejudice.

Nevertheless, the State argued. the narrative recreation was sufficient because it showed that the evidence that appellant murdered the victim was overwhelming, largely due to his videotaped statement. Thus, the State insisted, any errors that trial counsel or the trial court might have committed were necessarily harmless. But, the Court stated, it cannot evaluate the strength of the evidence without a complete account of the overall evidence, and it certainly cannot evaluate the effect of unknown errors. Engaging in such speculation would not provide appellant the appeal to which he is entitled. "We cannot hold that an appellant is not entitled to a complete trial transcript simply because it appears from the record that exists that he is clearly guilty." Accordingly, the Court held, because appellant has been deprived of the ability to appeal his convictions, the trial court should have granted his motion for a new trial.

Victims; Character Evidence

Faust v. State, S17A1177 (10/2/17)

Appellant was convicted of felony murder while in the commission of an aggravated assault and possession of a firearm during the commission of a felony. The evidence showed that the victim, Brown, sold shoes out of his car. Appellant called Brown and requested shoes in a certain size. Brown arrived at an apartment complex to attempt to close the sale with appellant. Brown and appellant began to discuss the shoes and their prices. Appellant called over a friend, Kevin Milton, who began to haggle with Brown over pricing, at which time appellant walked away. But, appellant came running back toward the car, aiming a rifle at Brown. Brown immediately pulled his pistol out, grabbed Milton in a headlock, and put the pistol to Milton's head. Appellant then fatally shot Brown in the chest. At trial, appellant admitted that he killed Brown, but testified that during negotiations for a purchase by Brown of crack cocaine, Brown drew his weapon first, held Milton at gunpoint, and demanded the drugs. According to appellant, he retrieved his rifle, Brown fired at him first, and appellant then shot Brown.

Appellant argued that the trial court erred in excluding evidence that Brown had methamphetamine on his person when he was killed. Appellant contended that evidence was relevant to support his theory of the case that Brown had been negotiating a drug deal with Milton when appellant had to defend himself and Milton, and to disprove the State's theory that Brown was an innocent shoe salesman being robbed of his hard-earned money. The Court noted that this case was tried under the old Evidence Code and that a murder victim's character generally was irrelevant and, thus, inadmissible. Evidence that impugns a victim's character cannot be admitted unless it has some factual nexus with the conclusion for which it is being offered. Otherwise, character evidence would be admitted routinely, disguised as relevant to whatever speculative theory the proponent managed to put forth.

Here, the Court noted, the trial court admitted evidence that the drug ecstasy was found in Brown's system, but excluded evidence that 50 methamphetamine tablets were discovered in Brown's underwear. Appellant

did not present any evidence that Brown had taken methamphetamine, nor did appellant show how Brown's possession of methamphetamine would make it more likely that he would attempt to purchase cocaine or to rob appellant and Milton. The only other apparent purpose of showing that Brown possessed methamphetamine and thus was not merely an innocent shoe salesman would be to impugn his character. Thus, the Court found no connection between Brown's possession of methamphetamine and appellant's theory that he did not attempt to rob Brown but instead that appellant justifiably shot Brown when Brown attempted a robbery during a purchase of cocaine after taking ecstasy. Therefore, the Court held, because appellant offered only speculation of any such factual nexus, the trial court did not abuse its discretion in excluding evidence of the methamphetamine found on Brown's person. Moreover, the Court found, the trial court admitted not only evidence that Brown had taken an illegal drug, but also testimony indicating that Brown had previously been involved in drug deals. Consequently, even assuming that Brown's possession of methamphetamine should have been admitted, the error was harmless, especially in light of the strong eyewitness testimony of appellant's guilt.

Representation of Counsel; Time of Termination

Walker v. State, S17A1083 (10/16/17)

Appellant was indicted for malice murder and other crimes and the State initially sought the death penalty. Thereafter, appellant pled guilty to felony murder and other crimes. During the same term of court, appellant filed two pro se motions to withdraw guilty pleas. The State moved to dismiss the pro se motions because counsel represented appellant when he filed them. Appellant's trial counsel subsequently withdrew and new defense counsel filed an amended motion to withdraw. Although the amended motion was filed outside the term of court, defense counsel argued that the motion should relate back to the timely pro se motions made by appellant. The trial court granted the State's motion to dismiss.

Appellant contended that a defendant in a capital case should be "deemed unrepresented" after the entry of sentence. The Court disagreed. The Court noted that appellant cited no authority for the novel proposition that a lawyer's representation of a criminal defendant, whether facing the death penalty or otherwise, terminates the moment that a judgment of conviction and sentence is entered. In fact, a holding that criminal defendants' representation by counsel terminates automatically on the entry of a judgment and sentence — whether following the return of a jury verdict or the entry of a guilty plea — would make little sense. Thus, the Court concluded, at a minimum, legal representation continues — unless interrupted by entry of an order allowing counsel to withdraw or compliance with the requirements for substitution of counsel — through the end of the term at which a trial court enters a judgment of conviction and sentence on a guilty plea, during which time the court retains authority to change its prior orders and judgments on motion or sua sponte for the purpose of promoting justice.

Here, the Court found, appellant filed his pro se motions seeking to withdraw his guilty pleas well before the end of the term in which the judgments of conviction and sentence on his guilty pleas were entered. Consequently, the trial court correctly treated his two pro se filings as legal nullities, because he was represented by counsel when he made them.

Nevertheless, appellant contended his amended motion to withdraw guilty pleas transformed his previous two pro se filings into filings made by his later-appointed counsel. However, the Court stated, an amended motion is not a time machine that allows a litigant to change past events. And, although appellant invoked the "relation back" doctrine for amendments of pleadings in civil actions, he cited no authority for applying that doctrine in this criminal context. Moreover, even in the civil context, a pleading purporting to amend a prior filing that was a nullity - as appellant's pro se motions to withdraw guilty pleas were - does not relate back in time to the date of the non-filing, as the trial court recognized. Accordingly, the trial court did not err in dismissing appellant's motions.

Grand Jury Proceedings; Attendance

Olsen v. State, S17A1014 (10/16/17)

Appellant, a former police officer, was indicted for felony murder and other charges relating to the shooting of an unarmed suspect. Former OCGA §17-7-52 permitted law enforcement officers facing criminal charges arising out of the performance of their duties to be present during the presentation of evidence to the grand jury, along with counsel. As a result, Olsen witnessed the presentation of evidence to the grand jury that ultimately returned an indictment against him, and observed the manner in which the proceedings were conducted. The parties stipulated at the motion hearing that as many as twelve to fourteen individuals were present during some or all of the presentation of evidence to the grand jury in this case: appellant and his three attorneys, who were permitted to be present two at a time; the then-serving DA who planned to try the case; five ADAs, one or more of whom were present at various times during the proceedings for the purpose, according to the State, of handling witnesses and observing testimony; several staff members of the DA's office who, according to the State, assisted with audio visual equipment and facilitated the orderly presentation of witnesses; a court reporter who was present for the duration of the proceedings but recorded only appellant's testimony; and an expert retained by the State who observed the proceedings and testified after appellant had testified. Appellant moved to dismiss the indictment because allegedly unauthorized persons were present in the grand jury room during the prosecutor's presentation of evidence. The trial court denied the motion and the Supreme Court granted interlocutory review.

The Court first addressed whether these fourteen people violated the recognized need for grand jury secrecy and compromised the grand jury's independence from outside influence. The Court noted that while federal rules strictly specify what persons are authorized to be present during the presentation of evidence to the grand jury, no such limitation exists pursuant to Georgia statutory law or procedural rules. Nevertheless, appellant argued that even absent a statutory basis for such a limitation, the Court should look to the common law and the historical importance of grand jury secrecy and impose a limit on the number of people who may be present during the presentation of evidence to the grand jury. The Court declined.

The Court stated that despite the absence of express rules in this state governing who may be present during the presentation of evidence

to the grand jury, statutory law does exist addressing the secrecy of grand jury proceedings and this law has been changed over time by the legislature. Thus, the legislature clearly knew, at the time of this proceeding, how to make explicit its intent to require secrecy of persons attending the evidentiary stage of a grand jury proceeding, but it did not impose that requirement on either the grand jurors or the prosecuting attorney. Consequently, the Court presumed the legislature's failure to impose such a requirement was a matter of considered choice. And, given that presumption, the Court declined to extend the requirement of secrecy applicable to grand jury proceedings in Georgia beyond that which is currently imposed by statute. "The expansion of grand jury secrecy requirements, if an expansion is to be made, is properly the domain of the legislature or the appropriate procedural rule-making body. We similarly conclude that any strict limitation on the number of persons who may be present during the presentation of evidence to the grand jury is an issue for the legislature, not the courts."

Nevertheless, the Court stated, "[t]his does not mean that prosecutors have unfettered discretion to invite mere spectators to grand jury proceedings." Furthermore, the Court cautioned that prosecutors should "take care to conduct grand jury proceedings in a manner that does not discourage witnesses from testifying fully and frankly, that protects against the risk that the accused might flee to avoid prosecution, and that ensures persons who are ultimately not indicted are not the subject of public ridicule."

Finally, the Court addressed whether appellant was prejudiced by the presence of these individuals such that the trial court erred in refusing to dismiss his indictment. The Court noted that appellant conceded there was no actual prejudice during the evidentiary stage of the grand jury proceedings. Pursuant to Georgia statutory law, neither grand jury members, prosecutors, nor grand jury witnesses are bound to secrecy regarding the evidence presented to the grand jury. The interests served by the confidentiality of grand jury proceedings primarily include the State's interests in preventing witnesses from being reluctant to come forward with incriminating testimony, preventing witnesses from being in fear of retribution from the accused, and preventing the person at risk of indictment from fleeing or influencing witnesses or grand jurors. Here, the Court found, the record did not reveal any such interests were compromised. And, the interest of the accused in assuring that persons who are accused but not indicted by the grand jury are not held up to public ridicule was not present in this case because appellant was indicted. Consequently, appellant could not demonstrate prejudice by the number of persons from the prosecutor's office who were present at the proceedings, or by the presence of the expert witness who also testified. Accordingly, the order denying appellant's motion to dismiss the indictment was affirmed.

Jury Deliberations; Allen Charges

Cannon v. State, S17A1127 (10/16/17)

Appellant was convicted of malice murder and aggravated assault. Appellant contended that the trial court abused its discretion when it gave an Allen charge after a juror stated his unwillingness to continue listening and discussing the case with the other jurors. The record showed that during the course of its deliberations, the jury sent the trial court a note that two of the jurors had made up their minds and that one of those two jurors had stated an unwillingness to deliberate any further. The trial court made inquiries of the juror who was identified as unwilling to deliberate and confirmed that the juror had come to a conclusion and was not willing to listen or discuss the evidence with the other jurors any further. The trial court announced that it would be striking the juror and replacing him with the alternate. Appellant objected and requested the trial court continue to make inquiry or to give the Allen charge. The trial court inquired of the juror once again and the juror again confirmed that he was unwilling to deliberate further. At that point, the State also requested the Allen charge and the trial court gave the charge as the parties requested.

The Court held that since appellant requested the Allen charge, he could not now be heard to complain of any purported error which his conduct engendered. Furthermore, to the extent appellant's trial counsel was ineffective for requesting the Allen charge, rather than requesting some other action by the trial court, the claim also could not be sustained. At the motion for new trial hearing, trial counsel testified that he asks for an Allen charge in such circumstances, rather than juror removal or mistrial, because, in his experience, requesting the Allen charge hastens jury deadlock and increases the chance the trial court will grant a mistrial. Thus, the Court held, because counsel's request was a strategic decision which was not outside the broad range of professional conduct, his performance was not deficient.

Appellant also contended that the trial court's response to a question from the jury improperly emphasized the count of felony murder such that the jury would conclude it was required to find appellant guilty of felony murder if it found him guilty of aggravated assault. The Court disagreed. The record showed that the jury sent a note to the trial court, asking the following question: "If we find the defendant guilty of aggravated assault, must we also … find [him] guilty of felony murder or are the two charges independent?" The trial court responded as follows: "Each count must be considered separately. However, Count 3 is identified as the underlying felony stated in Count 2. Please continue to deliberate." Appellant objected, arguing that the trial court should add the words: "Yes, you can find the defendant guilty of one, not guilty of the other." The trial court refused appellant's request because it believed adding such language would constitute improper commenting on the evidence.

The Court found that there was no dispute that the initial charges given concerning each count in the indictment were proper. The jury was also properly admonished to treat each count in the indictment separately. The recharge at issue reiterated that each count was to be considered separately and, as such, constituted a correct statement of the law. The recharge also correctly stated that Count 3 (aggravated assault) was the underlying felony mentioned in Count 2 (felony murder). Furthermore, the fact that the jury acquitted appellant of malice murder indicated it understood the concept of considering each count in the indictment separately. Accordingly, the Court found no reversible error.

Jury Charges; Lesser Included Offenses

Harris v. State, A17A0761 (9/18/17)

In a bifurcated jury trial, appellant was found guilty of aggravated assault and pos-

session of a firearm by a convicted felon. Appellant contended that the trial court erred in failing to charge the jury on the lesser included offense of reckless conduct as an alternative to aggravated assault, as he requested. The Court held that it was "constrained to agree."

OCGA § 16-5-21 pertinently provides that "(a) A person commits the offense of aggravated assault when he or she assaults … (2) [w]ith a deadly weapon. …" The trial court instructed the jury as to both types of assault that could support an aggravated assault charge (attempting to commit a violent injury to another or committing an act that places another in reasonable apprehension of immediately receiving a violent injury). The indictment alleged in one count that appellant made an assault upon the person of Johnson with a rifle by pointing it at her, without specifying which of the two types of assault he committed. Appellant contended that the jury could have been allowed to consider the possibility that in fighting over the gun, he negligently pointed the gun at Johnson. At trial, he requested that the jury be instructed on the lesser included offense of reckless conduct pursuant to OCGA § 16-5-60 (b), defined as "caus[ing] bodily harm to or endanger[ing] the bodily safety of another person by consciously disregarding a substantial and unjustifiable risk that [one's] act or omission will cause harm or endanger the safety of the other person and the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation."

The Court noted that any evidence that the defendant is guilty of the lesser included offense mandates giving a requested written charge on the lesser included offense. And here, it was undisputed at trial that appellant angrily confronted Johnson, that Edward tried to block appellant's access to Johnson, that appellant tried to wrestle the rifle away from Fann during the confrontation, and that Johnson was afraid that appellant would use the gun against her. Therefore, appellant was not entitled to a reckless conduct charge as a lesser included offense of aggravated assault with a deadly weapon based on OCGA § 16-5-20 (a) (2) for committing an act which placed another in reasonable apprehension of immediately receiving a violent injury.

However, the Court found that appellant was entitled to a reckless conduct charge as a lesser included offense of aggravated assault with a deadly weapon based on OCGA § 16-5-20 (a) (1) for attempting to commit a violent injury to the person of another. Based on the testimony regarding the struggle between Appellant, Edward and Fann, the jury could have found that appellant pointed the gun at Johnson accidentally, and therefore endangered her by consciously disregarding a substantial and unjustifiable risk that his act or omission would cause harm to or endanger the safety of Johnson, and the disregard constituted a gross deviation from the standard of care which a reasonable person would have exercised in the situation. "Though this evidence of reckless conduct was slight, it was sufficient to mandate the charge on the lesser included offense."

Finally, the Court noted, a charging error is presumed to be prejudicial and harmful unless the record shows that it was harmless. Here, the Court found, because the indictment did not specify the type of assault underlying the aggravated assault charge, the jury received instructions on both types of assault, and there was some evidence in the record to support a conviction for aggravated assault based on either type of underlying assault (attempting to commit a violent injury to the person of another pursuant to OCGA § 16-5-20 (a) (1) or committing an act that places another in reasonable apprehension of immediately receiving a violent injury pursuant to OCGA § 16-5-20 (a) (2)). And, nothing in the record demonstrated that the jury convicted appellant of aggravated assault for putting Johnson in reasonable apprehension of immediately receiving a violent injury, rather than for attempting to commit a violent injury to her, with the rifle. Therefore, because the trial court's failure to charge the jury on the lesser included offense of reckless conduct was not harmless, the Court reversed for a new trial on appellant's conviction for aggravated assault.

Motions for New Trial; General Grounds

Atkins v. State, A17A1486 (9/20/17)

Appellant was convicted on charges of aggravated child molestation and child molestation. She alleged that the trial court applied the wrong standard when reviewing her motion for new trial based on general grounds. The Court agreed.

The Court noted that OCGA § 5-5-20 authorizes the trial court to grant a new trial in any case when the verdict of a jury is found contrary to evidence and the principles of justice and equity, and OCGA § 5-5-21 empowers the trial court to grant a new trial where the verdict may be decidedly and strongly against the weight of the evidence even though there may appear to be some slight evidence in favor of the finding. Read together, the statutes provide the trial court broad discretion to sit as a thirteenth juror and weigh the evidence on a motion for new trial alleging the foregoing general grounds.

Here, the Court found that appellant moved the trial court to grant her a new trial based on general grounds contending in part that the only evidence against her—the victim's testimony regarding the sexual encounter for which she was convicted—was not credible. The trial court denied the motion and in reaching its conclusion, acknowledged that appellant sought a new trial based on general grounds. However, the trial court applied the sufficiency of the evidence standard outlined in Jackson v. Virginia, to deny her motion. Thus, the Court held, the trial court erred because the standard of review for motions brought under OCGA §§ 5-5-20 and 5-5-21 goes to the weight, not the sufficiency, of the evidence presented. Moreover, the Court found, nothing in the order suggested that the trial court performed its duty to exercise its discretion and weigh the evidence in its consideration of the general grounds for the motion. Accordingly, the Court concluded that it was compelled to vacate the denial of appellant's motion for new trial and remand the case to the trial court for consideration of appellant's motion under the proper legal standard embodied in OCGA §§ 5–5–20 and5–5–21.

Third Party Guilt; Rule 404 (a)

Pittmon v. State, A17A0963 (9/26/17)

Appellant was convicted of battery, cruelty to children in the first degree, and cruelty to children in the second degree. The evidence showed that appellant worked in the infant room of a daycare center. The victim, an 18-month-old, suffered second and third degree burns following a bath given to him by appellant. At trial, appellant's defense was that she never burned the child, and he must have been burned earlier in the morning while still at home with his mother. In support

of this defense, appellant sought to present evidence showing that the mother exhibited bad parenting regarding the victim's siblings. However, the trial court ruled that evidence of the mother's poor parenting of her other children was not admissible to show that the mother burned the victim in this case simply because she was a bad parent.

The Court noted that under OCGA § 24-4-404 (a): "Evidence of a person's character or a trait of character shall not be admissible for the purpose of proving action in conformity therewith on a particular occasion," subject to certain exceptions not applicable in this case. Based on appellant's argument that the mother's prior bad parenting supported appellant's theory that the mother burned the victim, the Court found that the evidence at issue could not be used by the jury to show that the mother burned the victim without relying on the impermissible inference that the mother's bad parenting of other children made it more likely that she burned the victim in this case. This is not a permissible use of evidence under OCGA § 24-4-404 (a), and therefore, the Court held, the trial court did not abuse its discretion by excluding the evidence supporting such an inference.

Moreover, the Court added, unlike cases in which the defense was entirely precluded from introducing evidence of a third-party's guilt, the trial court did allow appellant to make relevant challenges to the mother's parenting and conduct with respect to the victim. Thus, appellant elicited testimony that the victim was occasionally dirty and had lice. Specific to the day in question, appellant was allowed to cross-examine the mother about her careless bathing of the victim and whether she had spilled any hot liquids on the victim that morning. And appellant was allowed to elicit expert testimony that the victim's burns would not have resulted in blisters until hours after the burning event. All of this supported appellant's theory of third-party guilt. Accordingly, the Court found no reversible error.

Vehicular Homicide; Lesser Included Offenses

Turner v. State, A17A1045 (9/26/17)

Appellant was indicted for one count of malice murder, two counts of felony murder, and two counts of aggravated assault. Following her trial, a jury found her guilty of the lesser included offense of first degree homicide by vehicle as to the three murder counts, and not guilty of the two aggravated assault counts. The evidence showed that Felder, who was the father of appellant's children, was involved with another woman named Kelley. Appellant drove to Kelley's home. Felder approached the car and after Felder and appellant argued, appellant sprayed mace in Felder's face. Appellant then drove away, but turned around and drove at a high rate of speed toward where Kelley and the victim were standing. Appellant hit the victim, killing her.

Appellant contended that the trial court erred in not giving her requested charge on homicide by vehicle in the second degree based on failure to maintain a lane. She argued that she was not driving in a reckless manner, but had only failed to maintain her lane, which then resulted in the death of the victim. Thus, the facts justified a lesser included charge of homicide by vehicle in the second degree, and the trial court's failure to so charge constituted plain legal error. The Court disagreed.

Initially, the Court noted that because the difference between first and second degree vehicular homicide is the predicate traffic offense, second degree vehicular homicide is considered a lesser included offense of first degree vehicular homicide. Thus, a written request to instruct the jury on second degree vehicular homicide must be given in a case charging first degree vehicular homicide if there is any evidence showing that a less culpable traffic offense caused the fatal collision.

But here, the Court found, there was no evidentiary support for the charge of second degree vehicular homicide for committing a traffic violation less culpable than reckless driving, specifically, failure to maintain a lane. While certainly, appellant ultimately failed to maintain control of the car in a designated roadway, because the victim was killed in the driveway of a home in the subdivision, the evidence did not support her contention that this less culpable offense caused the victim's death. Here, the evidence, including appellant's own statements to police that she was driving in a "fit of fury," and "like a bat out of hell," her admission that she had driven despite being blinded by mace, and the eyewitness testimony that appellant had purposefully driven in the direction of Kelley and the victim did not support a charge of second degree vehicular homicide for failure to maintain a lane, and the trial court did not err in refusing to so charge.