

THIS WEEK:

- **Authentication; Prior Inconsistent Statements**
- **Right to be Present; Bench Conferences**
- **Perjury; OCGA § 17-1-4**

Authentication; Prior Inconsistent Statements

Cruz. State, A18A1082 (10/26/18)

Appellant was convicted of rape, aggravated sodomy, first degree burglary, aggravated assault, false imprisonment, and terroristic threats. The victim was his estranged wife and mother of his three children. The record showed that prior to the victim's trial testimony and outside the jury's presence, the defense sought a ruling on the admissibility of a letter, written on several pages of note paper, sent by the victim to appellant while he was in jail. The State objected to the admission of the letter on the grounds that it had been altered: portions were missing and parts of it were highlighted and underlined. Moreover, although the victim admitted writing the majority of the letter, she denied writing the portion on the back of the page that appellant asserted contained a prior inconsistent statement (the "Disputed Portion"). The trial court agreed with the State that the defense could ask about the Disputed Portion but made no ruling on the admissibility of the letter at that time. At trial, defense counsel cross-examined the victim regarding the letter, but the trial court refused to admit it.

In its order denying appellant's motion for new trial, the court gave the following three reasons for excluding the letter: (1) the letter, which had been in appellant's possession, showed signs of potential tampering — it had been highlighted, underlined, and a portion of one page appeared to have been cut — although neither the victim nor appellant admitted to these alterations, and the Disputed Portion was the only portion of the letter written on the back side of a page; (2) no witnesses other than appellant were called to testify about the handwriting; and (3) no additional evidence of the victim's handwriting was proffered to be used as exemplars for the handwriting comparison.

The Court found that the trial court erred in refusing to admit the letter because additional exemplars were required to compare to the Disputed Portion even though the victim identified portions of the letter as containing her handwriting. Although exemplars may be found in writings other than the document sought to be admitted into evidence, the trial court cited no authority, and the Court found none, holding that a handwriting exemplar must come in the form of a separate document. Rather, an exemplar can be any properly authenticated, voluntary writing.

Also, the Court stated, an exemplar is not necessarily required to authenticate a handwritten document. Implicitly recognizing that a document may be authenticated by other means, the trial court also excluded the letter because the only evidence that the handwriting in the Disputed Portion belonged to the victim came from appellant's testimony. Although under OCGA § 24-9-901 (b) (1) and (2), a writing may be authenticated through such nonexpert opinion testimony, “[p]reliminary questions concerning ... the admissibility of evidence shall be determined by the court,” and those “preliminary questions shall be resolved by a preponderance of the evidence standard.” OCGA § 24-1-104 (a). And here, the Court found, the only evidence in the record that the victim wrote the Disputed Portion was appellant's self-serving testimony, which the trial court, in its proper discretion, found as a preliminary matter was not credible enough to make out a prima facie case to authenticate that portion of the letter.

The Court also found that the trial court acted well within its discretion in determining that an alternative and independent basis existed for excluding the letter. The trial court found that the letter proffered at trial had been tampered with as it contained alterations that neither the victim nor appellant admitted to making, including highlighting and one page that had been cut.

Furthermore, the Court noted, the trial court allowed defense counsel to question the victim about the letter, and the jury heard the pertinent language from the Disputed Portion during that cross-examination. Therefore, even if the trial court's exclusion of the letter could be considered error, the Court found any error to be harmless in light the other evidence at trial.

Right to be Present; Bench Conferences

Johnson v. State, A18A0980 (10/29/18)

Appellant was convicted of armed robbery and hijacking a motor vehicle. He argued that his absence from bench conferences throughout the trial violated his right to be present during all stages of his trial. In a 2-1 decision, the Court agreed and reversed his convictions.

The trial court stated near the beginning of trial “that I don't normally have defendants, especially a defendant who is in custody, approach the bench whenever we have bench conferences. What I will do is make as many notes as I possibly can and put whatever objections or discussions we have at the bench on the record. If there is something else that you want to say to supplement, then that's fine. But I'm not comfortable with having a defendant, especially one that's in custody, considering that we have right now four lawyers and two defendants — well, six lawyers including the attorneys from the State - six lawyers and two defendants, one of whom is in custody. And I right now have one deputy in the courtroom. So I'm not comfortable having everybody approaching. So we will put whatever discussions we have at the bench on the record at the appropriate time.”

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The Court noted that thirteen bench conferences took place during the voir dire of potential jurors 5, 17, 25, 26, 28, 35, 37, 39, 45, and 46. The trial judge, counsel for the State, counsel for co-defendant, and counsel for appellant were the only persons present at these discussions. When voir dire of all potential jurors concluded, the trial court asked for any motions to strike for cause. Potential jurors 25, 26, 37, and 45 were thereafter struck for cause for hardship reasons. Juror 39 was struck for cause based on his intimation that he believed the burden of proof was on the defendant and his doubt that he could be impartial.

The Court stated that embodied within the constitutional right to the courts is a criminal defendant's right to be present and see and hear all the proceedings which are had against him on the trial before the court. This right attaches at any stage of a criminal proceeding that is critical to its outcome if the defendant's presence would contribute to the fairness of the procedure. However, it does not extend to situations where the defendant's presence would be useless - for example, during bench conferences dealing with logistical or procedural matters or questions of law about which a defendant presumably has no knowledge. Because a defendant's presence at bench conferences dealing with such topics bears no relation, reasonably substantial, to the fullness of his opportunity to defend against the charge, his right to be present is not violated by his absence from such bench conferences.

And, the Court stated, it is well-established that proceedings at which the jury composition is selected or changed are critical stages at which the defendant is entitled to be present. Therefore, appellant had the right to be present at these bench conferences discussing whether a potential juror would be struck for cause. Nevertheless, the Court stated, it's conclusion that it was improper to exclude appellant from these bench conferences did not conclude the inquiry because the right to be present belongs to the defendant, and he is free to relinquish it if he so chooses. A defendant waives his right to be present if he personally waives it in court; if counsel waives it at the defendant's express direction; if counsel waives it in open court while the defendant is present; or if counsel waives it and the defendant subsequently acquiesces in the waiver. And while a defendant bears the burden of showing that he was denied the right to be present at bench conferences, the State bears the burden of showing that the defendant waived that right.

Turning to this issue, the Court found that in its brief on appeal, the State made no argument with regard to waiver or acquiescence. Also, the record indicated that an initial discussion of the trial court's rule excluding the defendant from bench conferences was held off the record. Several references were made to this discussion, including defense counsel's renewal of a prior, off-the-record objection, which the trial court acknowledged. Appellant was in the courtroom at the time the bench conferences took place; he was present for the individual voir dire of each of the jurors preceding the bench conferences; he was present when the trial court, following voir dire of all potential jurors, asked for motions to strike; he was present when counsel gave their reasons for or objections to striking a potential juror; and he was present when the trial court announced its rulings. However, appellant did *not remain silent* in the face of this knowledge. To the contrary, the Court found, at the time appellant would have been aware of what was actually occurring during the bench conferences — that is to say after voir dire had concluded, the jurors were struck for cause, and the trial court announced

in open court what was discussed during the bench conferences — his counsel expressed, on the record, that appellant was not waiving his right to be present by not being present during the bench conferences. Thus, the Court concluded, appellant could not have acquiesced in counsel's waiver of his presence at the bench conferences when counsel made no such waiver. Accordingly, based on the particular facts and circumstances of this case, the Court found that the State did not meet its burden of showing that the defendant waived his right to be present.

Finally, the Court stated, the denial of the right to be present guaranteed by the Georgia Constitution is not subject to harmless error review on direct appeal. Consequently, appellant's conviction was reversed, and appellant was entitled to a new trial.

Perjury; OCGA § 17-1-4

Walker v. State, A18A1439 (11/19/18)

Appellant was convicted of possession of a knife during the commission of a crime involving the person of another, family violence battery, and cruelty to children in the third degree. Briefly stated, the record showed that the victim was reluctant to testify and stated on direct examination that she was in court only because the police went and brought her in after she failed to report to court per her subpoena. She testified that prosecutors threatened to lock her up and put her children in foster care if she did not testify. Nevertheless, she testified that appellant slapped her face as she slept and then repeatedly struck her in the head and face, pulled a knife on her, and threatened to kill her. She further testified that appellant repeatedly threatened to kill the children in front of her and held the knife to her baby's throat.

On the second day of trial, the victim was called as a defense witness. She testified that parts of her testimony on the first day of the trial had been a lie. She reiterated that she felt pressured to testify against appellant by threats that her children would be taken away from her if she changed her story from her pretrial statement. The victim confirmed that she woke up that day to appellant slapping her in the face, but she blamed a fistfight with another woman for the visible injuries to her face. She testified that her son who testified on the first day did see appellant hit her that day, but also testified that her son was a liar. She specifically denied that appellant had used a knife and threatened to kill her and the baby, and she stated that she did not want him prosecuted for that.

The day after the trial court sentenced appellant, the State secured an indictment against the victim for two counts of perjury, alleging that she testified falsely on the first day of appellant's trial to the effect that appellant threatened to kill her and the children and brandished a knife at her and that she testified falsely to the opposite effect on the second day of trial. The victim entered a negotiated guilty plea to the *second* count of perjury.

Appellant contended that the verdict was based on the perjured testimony of the victim and must be set aside pursuant to OCGA § 17-1-4. The Court disagreed. Generally, a recantation of a witness' trial testimony, after judgment is

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entered, is merely impeaching of the trial testimony and does not establish a convicted defendant's right to a new trial, even if the witness states under oath that her prior trial testimony was false. An exception to this rule is created when a trial witness is convicted of perjury with respect to her trial testimony and the trial court concludes that the guilty verdict could not have been obtained without the perjured testimony. The only other exception to the rule against setting aside a verdict based on a challenge to trial testimony is where there can be no doubt of any kind that the State's witness' testimony in every material part is purest fabrication. That exception is met when the witness' testimony is shown to be an impossibility.

Here, the Court found, the victim pled guilty to committing perjury with respect to her *exculpatory* trial testimony, not her inculpatory testimony during the State's case-in-chief. Under the circumstances, the trial court could not conclude that the jury's guilty verdicts could not have been obtained without the victim's admittedly perjured exculpatory testimony for the defense.

Nevertheless, appellant argued, OCGA § 17-1-4 speaks in terms of whether a verdict could have been obtained "without the evidence of the perjured *person*" (in this case, the victim), rather than in terms of the perjured *testimony* (in this case, the victim's exculpatory testimony) and, based on this, that there was no evidence that he possessed a knife. But, the Court stated, the issue is whether the verdict could have been obtained without the perjured testimony. And here, because, in the words of the statute, the verdict in this case was not obtained "in consequence of corrupt and willful perjury," but rather despite the victim's perjury, OCGA § 17-1-4 did not provide a basis for setting aside the judgment.