

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JANUARY 31, 2014

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## THIS WEEK:

- **Jury Array; Mental Competency**
- **Prosecutorial Misconduct; Ineffective Assistance of Counsel**
- **Jury Instructions; Verdict Form**
- **Evidence; Sentencing**
- **Expert Testimony; Justification Defenses**
- **Jury Charges; Judicial Commentary**
- **Conflict of Interest**

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### ***Jury Array; Mental Competency***

*Jackson v. State, S13A1903 (1/21/14)*

Appellant was convicted of murder, armed robbery, aggravated assault and numerous other related charges. He first contended that the trial court erred by overruling his objection to the jury array, contending that the array was not comprised of a fair cross-section of the population of the county. More specifically, he contended that African-Americans were under-represented.

The Court stated that the defendant has the burden of proving purposeful discrimination in the jury array. The Court stated that while traverse jury lists must consist of a representative and fair cross-section of the community to the fullest extent possible, the same is not true of an array. Provided that persons are not systematically excluded on the basis of race or other cognizable grouping, and provided that the jurors comprising a panel are randomly selected from a representative pool, the selection process is not inherently defective. Here, the Court found, appellant presented no evidence of purposeful

discrimination. Accordingly, his challenge to the array failed.

Appellant also argued that the trial court erred by denying his motion for a continuance to evaluate his competency. The record showed that, prior to a hearing on the day before his trial, appellant refused to come to court. At that time, the trial court called the prison, spoke to the medical director, and was informed that appellant had received a “clean bill of mental health.” Appellant was then brought to the courtroom, where the judge asked him about his situation. Appellant complained that he did not receive appropriate mental care in prison and that he had to eat his own feces in order to get any attention. The Court noted that appellant did not exhibit any mental problems at the hearing, itself. At the beginning of trial the next morning, defense counsel requested a continuance to investigate appellant’s competence. The trial court denied the motion for a number of reasons. First, the trial court noted, up until the day before trial, defense counsel had never had any reason to ask for a psychiatric evaluation. Second, the trial court spoke with the jail’s medical director, who had examined appellant and determined him to be in good mental health. Third, based on a colloquy with appellant about his odd behavior, the trial court determined that appellant understood that eating his own feces was improper and had been knowingly done to trigger an evaluation. Finally, the trial court determined, based on appellant’s familiarity with the justice system, he might be attempting to delay trial. Based on all of these considerations, the Court found, the trial court did not abuse its discretion in denying the motion for continuance.

Nevertheless, appellant contended that the trial court erred by failing to conduct,

sua sponte, an adequate investigation into his competency to stand trial. The Court disagreed. Constitutional guarantees require the trial court to inquire into competency, even where state procedures for raising competency are not followed, if evidence of incompetence comes to the court's attention. Here, the trial court spoke to the medical director at the jail, appellant's trial counsel, and appellant, himself, before proceeding with trial. Based on the trial court's investigation, the Court found that the trial court did not err in proceeding to trial.

### **Prosecutorial Misconduct; Ineffective Assistance of Counsel**

*Rush v. State, S13A1441 (1/21/14)*

Appellant was convicted of murder. He contended he was deprived of his constitutional right to effective assistance of counsel at trial based on trial counsel's failure to object to certain remarks made by the prosecutor during closing argument. The Court stated that to prevail on his claim of ineffective assistance, appellant must show that trial counsel's performance was deficient and that, but for such deficiency, there is a reasonable probability that the outcome of his trial would have been different.

First, appellant argued trial counsel was ineffective for failing to object to the prosecutor's statement that "the guilty man flees but the righteous man stands bold as a lion." Appellant claimed this remark constituted an improper comment on his failure to come forward. The Court noted that it is a bright-line rule in Georgia that the State may not comment either on a defendant's silence prior to arrest or failure to come forward voluntarily. However, evidence showing that a defendant attempted to evade arrest is admissible as evidence of flight and statements about flight are proper as circumstantial evidence of guilt. Here, the Court found, the record showed that the prosecutor's statement concerned appellant's inconsistent and evasive statements to police with respect to his location at the time of the murder, rather than his failure to come forward. Although the complained of statement in this case was similar to one found to be an improper comment on a defendant's right to remain silent in *Scott v. State*, 305 Ga.App. 710, 713 (2010), there

the prosecutor's statement, which included additional language asking why Scott failed to give the police a statement if he "hadn't done anything," was clearly directed at the defendant's failure to turn himself in after having been informed the police were looking for him. Here, however, the prosecutor's comment was directed at appellant's actual statements to police that he was somewhere else at the time of the murder despite evidence to the contrary. As a prosecutor has the right to argue reasonable inferences from the evidence, the prosecutor's statement, which simply highlighted facts in evidence, was permissible and trial counsel's failure to object did not render her performance deficient.

Appellant next asserted that his trial counsel was ineffective for failing to object to statements made by the prosecutor which appellant contended implied his trial counsel was not seeking the truth or justice. However, the Court found, in the complained of statements the prosecutor suggested that appellant, not appellant's trial counsel, was responsible for the "new lies" coming out at trial. While it is wrong for the prosecutor to comment that opposing counsel knows the defendant to be guilty or knows his client's case is not meritorious, the prosecutor's comments here did not violate this precept. The wide leeway given to argue all reasonable inferences that may be drawn from the evidence during closing argument encompasses pointing out inconsistencies in a defendant's testimony and urging that, on that basis, the defendant lied. Thus, the lack of objection from appellant's trial counsel to these statements did not constitute deficient performance. Accordingly, the Court concluded, appellant failed to establish his trial counsel performed deficiently in responding to the prosecutor's remarks in closing argument and consequently, his ineffective assistance of counsel claims lacked merit.

### **Jury Instructions; Verdict Form**

*Van v. State, S13A1780 (1/27/14)*

Appellant was convicted of murder, felony murder, aggravated assault, and two counts of possession of a firearm during the commission of a crime. He argued that the trial court erred by giving the jury coercive instructions which favored his conviction, both during the main charge and a subsequent re-charge, regarding

the completion of the verdict form. The Court disagreed.

The Court found from the record that, in the main charge, the trial court fully and correctly instructed the jury on the presumption of innocence, the burden of proof, and the definitions of all crimes involved. Thereafter, with regard to completing the verdict form, the trial court instructed: "[I]f you find and believe beyond a reasonable doubt . . . that the defendant is guilty of murder with malice aforethought, then you must specify such in your verdict and the form of your verdict in that event would be we . . . find the defendant guilty of malice murder." The same instruction was repeated for felony murder, and the instruction was given again in response to the jury's request for a re-charge during its deliberations. Appellant contended that because the trial court told the jurors that they must specify their verdict in the event of a finding of guilty, but did not also instruct the jury that they must specify a not guilty verdict if they retained a reasonable doubt, the jury instruction was improperly coercive and deprived him of his right to due process.

The Court noted that since appellant never objected to the trial court's charge, its review was limited to whether there was plain error in the charge. The Court found that nothing in the trial court's instructions regarding the manner in which the jury was to complete the verdict form mandated a conviction in any way. Ultimately, the instructions merely required the jurors to put in writing whatever verdict they reached, guilty or not. In any event, prior to the instructions about which appellant complained, the trial court clearly and accurately instructed the jurors regarding appellant's presumption of innocence, the State's burden of proof, and the duty to acquit if reasonable doubt existed. Considered as a whole, the jury instructions, including the re-charge, were not erroneous.

Appellant also argued that the form of the verdict was defective because, in ordering the spaces for the jury's verdict, it placed malice murder and felony murder prior to voluntary manslaughter. Appellant postulated that this sequencing may have confused the jurors who, during deliberations, should have considered whether the mitigating circumstances associated with voluntary manslaughter were present prior to reaching a decision regarding murder and felony

murder. But, the Court found, citing *Rucker v. State*, 270 Ga. 431, 435(5) (1999), the trial court properly instructed the jurors on the presumption of innocence, the State's burden of proof, and the possible verdicts that could be returned. Merely listing the offenses on the verdict form in the order of malice murder, felony murder, and voluntary manslaughter did not constitute reversible error.

## **Evidence; Sentencing**

*Foster v. State*, S13A1335 (1/21/14)

Appellant, who was seventeen at the time of the offense, was convicted of malice murder and aggravated assault. He argued a number of evidentiary issues regarding the admission of a letter he wrote while incarcerated to a female co-defendant. The letter instructed the co-defendant to keep quiet about the shooting and told her that the police did not have a case against him.

First, appellant contended that the incriminating letter was not properly authenticated. The Court stated that the genuineness of a writing may be proved by circumstantial evidence. Here, the Court found, testimony showed that the letter in question was signed with the name, "Trae Tha Truth," an alias appellant previously used. The contents of the letter referred to the co-defendant's relatives and friends, known by both appellant and the co-defendant. The letter also discussed the associated charges, and it included appellant's assigned jail cell number. The co-defendant testified that she received the letter on her meal tray, and that she knew it was from appellant based on the names and the content of the letter. Thus, under all of these circumstances, it was very unlikely that anyone other than appellant had written the letter. Accordingly, the circumstances were sufficient to make a prima facie showing of authenticity.

Next appellant contended, the trial court erred by allowing the co-defendant to testify that the phrase "hold it down" contained in the letter to her from him meant "keep quiet." The Court disagreed. A lay witness may relate his or her opinion as to the existence of any fact so long as the opinion is based upon the person's own experiences and observations, and so long as the matter referred to is within the scope of the average juror's knowledge. At the time she was being questioned about

the letter, the co-defendant indicated that she had heard the phrase before and that, in her experience, it meant to stay quiet about a matter. Thus, the Court found no err.

Appellant also argued that the trial court erred by allowing the letter to go out with the jury, thereby constituting a "continuing witness" violation. The Court again disagreed. The letter was not written testimony and did not derive its evidentiary value solely from the credibility of its maker. Instead, it was original documentary evidence, and was properly allowed to go out with the jury.

Finally, appellant contended that because he was a minor, the sentence of life without parole was cruel and unusual punishment. The Court noted that under the recent case of *Miller v. Alabama*, 567 U.S. \_\_\_, 132 S.Ct. 2455, 183 L.E.2d 407 (2012), mandatory life without parole sentences for juveniles are unconstitutional and violate the Eighth Amendment. However, O.C.G.A. § 16-5-1(d) does not mandate life without parole, but instead gives the sentencing court discretion over the penalty. Accordingly, appellant's contention was found to be meritless.

## **Expert Testimony; Justification Defenses**

*O'Connell v. State*, S13A1327 (1/21/14)

Appellant was convicted of the malice murder of her mother. The evidence showed that the victim adopted appellant and her co-defendant sister from an orphanage in Guatemala. Appellant was 11 years old at the time of the adoption. Appellant claimed justification because she allegedly came to the defense of her sister who was being attacked by the victim. At trial, the court allowed two experts to opine that they had diagnosed appellant as suffering from post-traumatic stress disorder and battered person syndrome, but it did not allow them to testify with regard to specific abuses allegedly committed by others against appellant in Guatemala even though that evidence helped form the basis of the experts' opinions. The excluded evidence consisted of statements made by appellant as well as a number of documents, including orphanage and adoption records created in Guatemala.

Appellant argued the trial court erred in refusing to permit the experts to relate the details of appellant's traumatic childhood in

Guatemala because it prevented the jury from giving due consideration to her justification defense. Specifically, appellant asserted the evidence was admissible to show (1) she had a reasonable belief in the victim's use of imminent, unlawful force against her sister, and (2) the specific acts of abuse underlying her experts' opinions. The Court stated that the critical factor in a justification defense is whether a defendant acted with the fear of a reasonable person under the circumstances. Because justification is based on the fears of a reasonable person, the subjective fears of a particular defendant are irrelevant in the evaluation of this defense. For this reason, it is improper to support a justification defense with evidence of violent acts or abuse committed against a defendant by someone other than the victim. Here, appellant sought to introduce evidence of acts committed against her in Guatemala by someone other than the victim in support of her justification defense. This evidence was neither relevant nor admissible for the purpose it was offered and it was properly excluded by the trial court. Although a testifying expert can base his or her opinion in part on hearsay, an expert cannot be used as a conduit to introduce inadmissible hearsay evidence. But, the Court added, even if it could have been said the trial court erred in excluding the proffered evidence of childhood abuse, there was no harm because appellant's experts were permitted to testify that she suffered from PTSD and battered person syndrome as a result of her childhood experiences in Guatemala. This testimony was sufficient to allow the jury to give full consideration to appellant's justification defense.

## **Jury Charges; Judicial Commentary**

*Spearman v. State*, S13A1521 (1/21/14)

Appellant was convicted of felony murder, aggravated assault, and concealing a death in connection with the killing of his wife. He contended that the trial court erred in declining his request for a jury instruction on voluntary manslaughter. Under O.C.G.A. § 16-5-2(a), "[a] person commits voluntary manslaughter when that person causes the death of another human being under circumstances that would otherwise be murder if that person 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 . . . .” Thus, a voluntary manslaughter charge is not required when there is no evidence that the defendant was seriously provoked by the victim and reacted passionately.

The Court found that a voluntary manslaughter instruction clearly was not required in this case based on the evidence regarding appellant’s several initial versions of the events surrounding his wife’s death, or the version to which he testified at trial, in all of which he claimed not to have killed his wife. In the remaining version, appellant claimed that he and his wife got drunk and argued, that she became physically aggressive, that he slapped her, and then when they struggled, he grabbed her from behind and squeezed her neck and chest until she quit fighting and collapsed. But even in that account, the Court noted, appellant never suggested that he acted solely out of anger or other irresistible passion; to the contrary, he said that his intent in hitting and squeezing her was “to get her to calm down” and keep her from hitting him. Thus, the evidence did not support a jury instruction on voluntary manslaughter. Instead, to the extent that this one version of events suggested that appellant grabbed his wife and squeezed her too hard to stop her from fighting him, the trial court instructed the jury on involuntary manslaughter and the affirmative defense of justification. “Appellant was entitled to no more.”

Appellant also contended that the trial court violated O.C.G.A. § 17-8-57 by making an impermissible comment to the jury. The record showed that the trial court charged the jury in the beginning of the case on the basic procedure regarding the presentation of evidence and arguments during the course of the trial. The court then stated as follows: “In other words, what I am saying is don’t jump to conclusions. This is not Law and Order, this is not Matlock; this ain’t CSI. It’s none of that stuff. That stuff is entertainment, but, folks, they wrap that up in forty minutes. And this is the real world. It doesn’t happen like that. They cut corners, . . . [but] this is the real deal. So don’t expect anybody to jump up in the back of the courtroom like they used to do on Perry Mason. It’s just not going to happen. And the wheels of justice turn slowly, but they turn surely.”

Focusing on the phrase “[t]hey cut corners,” appellant contended that the trial court reduced the State’s burden of proof by implying that the jury should expect and excuse “sub-par” work from the investigators and prosecutors involved in this case. Appellant argued that the court thereby made an improper comment to the jury in violation of O.C.G.A. § 17-8-57, requiring a new trial. The Court disagreed. The Court found that appellant mischaracterized the trial court’s statement. In context, the Court held that it was clear the trial court was saying that it was the people involved with television shows who “cut corners,” not anyone involved in this case. The trial judge’s view of the criminal justice system as depicted for entertainment value did not “express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused” under O.C.G.A. § 17-8-57. Accordingly the Court concluded, “[a]dvising jurors that real-world criminal investigations and trials take longer than they do in crime shows may not be an advisable practice, but it is not reversible error.”

### **Conflict of Interest**

*Ferguson v. State S13A1300 (1/21/14)*

Appellant was convicted of felony murder and other related crimes. He contended that the trial court erred by failing to exclude the District Attorney’s office from participating in his motion for new trial hearing because an ADA who worked in that office at the time of the motion for new trial hearing had previously represented him in 2005. The record showed that the ADA in question was hired by the District Attorney’s office in 2008, was in private practice before joining the District Attorney’s office and had represented appellant on a bond issue in connection with his 2005 arrest. However, the record also revealed that appellant ended the ADA’s brief representation of him by hiring new defense counsel for his 2005 and 2006 trials. Moreover, there was no evidence of record that the ADA had any involvement with appellant’s case after being hired by the District Attorney’s office, nor that the attorneys who worked on the case at the District Attorney’s office ever discussed any aspect of the case with the ADA. Therefore, the Court found, there was no error in the trial court’s conclusion that appellant failed to provide any basis for excluding the

District Attorney’s office from participating in the motion for new trial hearing.