Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 10, 2009

THIS WEEK:

Batson; Brady

Blackshear v. State, S09A0743

Appellant was convicted of murder and other related crimes. He argued that during voir dire, the State committed a *Batson* violation. The evaluation of a *Batson* challenge involves a three-step process: (1) the opponent of a peremptory challenge must make a prima facie showing of racial discrimination; (2) the proponent of the strike must then provide a race-neutral explanation for the strike; and (3) the court must decide whether the opponent of the strike has proven discriminatory intent. Here, appellant established a prima facie showing of discrimination by demonstrating that the State used its strikes to remove five black members of the jury panel. But, the Court held, the State gave race-neutral reasons for its strikes. Thus, the State explained, one prospective juror was removed because she had been arrested by an officer involved in appellant's arrest and she had a drug problem; one prospective juror had been a victim in a previous case and had been uncooperative with the prosecutor's office; one was struck because the juror made it clear that she just did not want to be there; and the last two were struck because they allegedly knew many people involved in the case.

Appellant also argued that the State committed a *Brady* violation. During the investigation of the crimes, a confidential informant provided police with information indicating the crimes may have been committed by someone known as "Twan." Although the defense moved for disclosure of the C.I., the State said that it did not know the C.I.'s name. At trial, one of the State's witnesses stated that the name of the C.I. was "written down somewhere." To prevail on a *Brady* claim, 1) the defendant must show that the State possessed evidence favorable to the defendant; 2) the defendant did not possess the evidence nor could he obtain it himself with any reasonable diligence; 3) the prosecution suppressed the favorable evidence; and 4) had the evidence been disclosed to the defense, a reasonable probability existed that the outcome of the proceeding would have been different. The Court held that pretermitting the first three factors, appellant could not prove a reasonable probability existed that the outcome of his trial would have been different. Thus, the defense was provided the informant's statement identifying Twan as a possible suspect and files documenting the State's investigation and ultimate conclusion that Twan was not involved in the crimes. Moreover, the jury was presented with testimony of several co-defendants and witnesses identifying appellant as the shooter,

as well as appellant's own admission to police that he was paid money to shoot the victim.

Jury Charges; Re-Opening Evidence

Nelms v. State, S09A0889; S09A0890

Appellants were convicted of malice murder and concealing the death of another. They argued that the trial court erred by refusing to give their requested charges on voluntary manslaughter and mutual combat. A voluntary manslaughter charge is warranted only if there is evidence that an accused acted solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. Here, the Court found that the evidence established that one appellant threatened to get rid of the victim and then lured her into the woods for that purpose. While the appellant that lured the victim into the woods wrestled with the victim, the other appellant then approached the victim, pulled her away from the first appellant, and inflicted the fatal wounds with a knife. While only slight evidence is necessary to entitle a defendant to a charge on voluntary manslaughter, no evidence was presented that the appellants acted with provocation sufficient to excite the passion necessary to support a charge on voluntary manslaughter. Fighting prior to a homicide does not constitute the type of provocation that would warrant a charge of voluntary manslaughter. The Court also found that a charge on mutual combat is warranted only when the combatants are armed with deadly weapons and mutually agree to fight. Since there was no evidence that the victim was armed with a deadly weapon, a charge on mutual combat was not warranted by the evidence.

One appellant also argued that the trial court erred in not re-opening the evidence to allow him to testify. The record showed that after the State rested its case, the court addressed both defendants and ascertained that they had sufficient time to discuss with their attorneys their decisions not to testify. The defense then presented its case, all parties rested, and the evidence was closed. The following morning, one appellant asked the court to reopen the evidence to allow him to testify. The State objected because all its witnesses had been excused from their subpoenas and thus no rebuttal testimony would be available if needed. The Court held that the discharge of all the witnesses for one side after the case has been announced closed is good ground for refusing to reopen the case at the instance of the other party. Moreover, since appellant did not make a proffer of his testimony, the Court could not determine how appellant was harmed by the ruling.

Expert Witnesses; Judicial Comment

Paslay v. State, S09A0521

Appellant was convicted of the malice murder of his wife. He argued that the trial court erred by excluding the testimony of one expert witness and one lay witness regarding his abuse by the victim. Appellant sought to show that was undergoing emotional and physical turmoil at the time of the crimes. He argued that the evidence went to his mitigation of the element of intent, because he was pursuing a verdict of voluntary manslaughter. The Court held that the trial court did not err. With regard to voluntary manslaughter, the question is whether the defendant acted out of passion resulting from provocation sufficient to excite such passion in a reasonable person. Whether the provocation was sufficient to excite the deadly passion in a particular defendant, like appellant, was irrelevant.

Appellant also argued that the trial court violated OCGA § 17-8-57 by expressing or intimating an opinion as to what had been proven or as to his guilt. The evidence showed that appellant and his victim-wife got into an argument over child support and custody issues involving appellant and his ex-wife. During a line of questioning by defense counsel, the trial court stated, "What's the purpose of all this, [defense counsel]? This doesn't have anything to do with this case does it? . . . Well, how? I mean all this is very interesting about he had problems with his former wife and they had a divorce and they had children and . . . she didn't pay support. But we're talking about a murder case here involving another person." The Court held that OCGA § 17-8-57 is not usually violated by colloquies between the judge and counsel regarding the admissibility of evidence. Since the trial court's comments concerned the relevance of the testimony at issue and did not constitute an opinion as to what had been proven or whether appellant was guilty, there was no error.

Transcripts

Bagley v. State, A09A0355

Appellant was charged and convicted of five misdemeanors. Prior to trial, neither he nor his retained counsel requested that his case be transcribed. He argued that the trial court had a duty to advise him of the right to obtain a transcription at his own expense, assess his indigency, or otherwise counsel him about the perfection of a trial record. The Court disagreed. OCGA § 5-6-41 (b) provides that "in misdemeanor cases, the trial judge may, in his discretion, require the reporting and transcribing of the evidence and proceedings on terms prescribed by him." OCGA § 5-6-41 (j) provides, "in all cases, civil or criminal, any party may have the case reported at his own expense." Thus, whether or not a transcript is to be prepared in a misdemeanor case initially lies within the sound discretion of the trial court. Absent a demand for a transcript prepared at the expense of the requesting party, the reporting of such a case is not demanded by law. Since appellant made no such demand, the Court concluded that he had not been denied a transcript of his misdemeanor convictions.

Juveniles

In the Interest of T. H., A09A0098

Appellant appealed from an order denying his motion for a sentence reduction. The record showed that in April 2005, the juvenile court ordered that appellant's suspended designated felony order be reinstated and he was ordered to serve two years in restrictive custody. In March, 2006, the juvenile court entered a second designated felony order. The juvenile court ordered that appellant serve an additional four years in custody concurrent to the two years he was already serving. In August, 2006, the juvenile court entered an amended order designating appellant's release date as "when the child reaches the age of Twenty (20)." In June, 2008, appellant filed a motion for a sentence reduction maintaining that "the State's interests have been met and the purposes of the order have been accomplished" because he was rehabilitated.

Appellant argued that the Court should overturn it previous decisions holding that a child in restrictive custody as a designated felon could not be released early on the ground

that the release would be in the child's best interest. The Court declined the invitation. Appellant then argued that his early release should have been granted because he was a different person after his two years of detention in that, among other things, he had received his GED, submitted to the discipline at the YDC, taken classes at a technical college, and was mature and no longer a threat to society. The Court held that appellant's arguments were, in essence, that early release was appropriate because he had been rehabilitated. But, those grounds did not authorize a sentence reduction because they were merely arguments that the release would be in the child's best interest.

Indictments; Demurrer

McDaniel v. State, A09A0654

Appellant was convicted of aggravated assault. The indictment read as follows: "In the name and behalf of the citizens of Georgia, [the grand jurors] charge and accuse CHRISTOPHER MCDANIEL with the offense of AGGRAVATED ASSAULT . . . in the County and State aforesaid, on the 17TH day of JUNE, Two Thousand Seven, did unlawfully make an assault upon the person of [the victim], a non-sibling living in the same household, by shooting said victim, contrary to the laws of said State, the good order, peace and dignity thereof." Appellant did not challenge the indictment before trial. After trial, he filed a motion in arrest of judgment arguing that because the indictment did not specify what means or object he used to shoot the victim, his conviction should be reversed because he could admit the charge as made and still be innocent. The Court held that if a defendant can admit the charge and still be innocent, the indictment is fatally defective and can be questioned by general demurrer or by motion in arrest of judgment. However, exceptions which go to the form of an indictment must be made by special demurrer or motion to quash. A general demurrer attacks the legality of an indictment, and thus is permissible to be raised after verdict by a motion in arrest of judgment even if there was no earlier objection. In contrast, a special demurrer is waived if not raised before pleading to the merits of the indictment.

Here, the Court held, Appellant's allegation that his indictment was deficient because it did not contain all the essential elements of the crime was, in essence, a special demurrer seeking greater specificity. The failure to file a timely special demurrer seeking additional information constitutes a waiver of the right to be tried on a perfect indictment. In this case, appellant could not admit the allegations of the indictment without admitting that he was guilty of a crime because the indictment alleged that he was guilty of an aggravated assault by shooting the victim. The only way he could be guilty of an aggravated assault was by shooting the victim with a deadly weapon, or with a means likely to result in serious bodily injury, or by discharging a firearm from within a motor vehicle toward her. In all of those cases, appellant would be guilty of a crime. He therefore was required to file a timely special demurrer and having failed to do so, he waived his right to be tried on a perfect indictment.

Terroristic Threats

Brown v. State, A09A0295

Appellant was convicted of two counts of terroristic threats. He contended that the evidence was insufficient to convict because he did not communicate the threat to his wife and mother-in-law directly or indirectly, and he did not intend that the threat be communicated to them. The evidence showed that appellant while in a custody battle with his wife, fled to Mexico with his child. He was apprehended quickly and brought to Georgia. He asked his lawyer whether everything he told her would be confidential. When she said yes, he told her that when he was released he was going to kill his wife and his mother-in-law and then himself. Appellant's mother also sent the lawyer letters written to her by appellant referencing murder and killing. Appellant's conduct and other statements lead the lawyer to believe appellant intended his threats. The lawyer, after consulting with the State Bar, contacted the authorities under the crime-fraud exception to the attorney client privilege.

The Court held that the evidence was sufficient. The fact that the speaker did not communicate the threats directly to the victim does not alone preclude a conviction if the threat is stated in a manner which will support the inference that the speaker intended or expected the threat to be conveyed to the victim. Here, appellant was familiar with the law and apparently had a working knowledge of attorney-client privilege in that he knew there were exceptions to the rule. Thus, the fact finder could infer that, when appellant made the threats, he intended that his threats would be communicated to the victims and that the letters and his conduct were designed to insure that the threats were communicated to his wife and mother-in-law.

Gambling; Video Gaming

State of Georgia v. Damani, A07A1015; A07A1016; A07A1017; A07A1018

The State brought a forfeiture action against various types of video gaming machines, including "nudge-em" games. The State contended that the machines were illegal because they paid out rewards in violation of OCGA § 16-12-35 (d), and that they were illegal slot machines or variations thereof pursuant to OCGA § 16-12-20 (2) (B). The Court noted that "[t]he term 'a single play of the game or device' is key to our analysis." OCGA § 16-12-35 (d) (1) (B). The Court determined that when a gaming machine suspends play until the player uses accumulated winnings to continue play upon on it, "a single play of the game or device" has occurred. The Court then held that OCGA § 16-12-35 (d) (2) does not allow for the accumulation of tokens, vouchers, or tickets in amounts exceeding $5 for a single play of the game or device. "The clear intent of OCGA § 16-12-35 (d) is to limit the rewards available for a single play of a bona fide amusement machine to things of minimal value in order to discourage the evils generally associated with gambling. The legislature has spoken, and we must assume that it means what it said." Thus, the Court held, the machines are forfeitable to the State because they do not comply with the redemption provisions of the statute by offering payouts exceeding $5 for a single play of the game or device.

The Court then summarily determined that because the machines violate OCGA § 16-12-35 (d), the issue of whether the machines are slot machines or variations thereof was moot.

Ineffective Assistance of Counsel

Frazier v. State, A09A0418

Appellant was convicted of aggravated assault. He contended that the trial court erred

in denying his motion for new trial based on ineffective assistance of counsel. The police took a videotaped statement from appellant that was in violation of *Miranda*. Defense counsel did not seek to suppress the statement and at trial did not object to the admission of the video in its entirety. The Court held that because the statement "was simply not admissible during the prosecution's case-in-chief," trial counsel's failure to object to the admission of the statement was deficient. The failure to object was also prejudicial to appellant because the jury's verdict likely turned on the credibility of the witnesses, including appellant.

Accusations; Demurrer

Frix v. State, A09A0172

Appellant allegedly sent sexually explicit text messages to a minor. The State charged him with (1) electronically furnishing obscene materials to minors in violation of OCGA § 16-12-100.1 (Count 1); (2) distribution of harmful materials to a minor in violation of OCGA § 16-12-103 (Count 2); and (3) obscene telephone contact with a minor in violation of OCGA § 16-12-100.3 (Count 3). Appellant argued that all three counts are subject to demurrer because his conduct did not fall within the ambit of any of the statutes.

The Court held that Appellant was correct as to Count 1. The words "electronically furnishes" under OCGA § 16-12-100.1 (a) (3) is defined as "(A) To make available by electronic storage device, including floppy disks and other magnetic storage devices, or by CD-ROM; or (B) To make available by allowing access to information stored in a computer, including making material available by operating a computer bulletin board. The Court noted that the State conceded that sending a text message over a cellular phone does not meet the definition of "electronically furnishes" set forth in OCGA § 16-12-100.1 (a) (3) (B) as to allowing access to information stored in a computer. But, the Court also found that the conduct does not meet the definition under OCGA § 16-12-100.1 (a) (3) (A) either. Thus, the Court held that while modern cellular phones are capable of storing large amounts of electronic information, interpreting the statute as a whole, it could not conclude that sending a text message constitutes making material available "by electronic storage device" within the meaning of that subsection.

Appellant also contended that Count 2 on the accusation charging him with distribution of harmful materials to a minor in violation of OCGA § 16-12-103 should also have been dismissed. This statute provides that "[i]t shall be unlawful for any person knowingly to sell or loan for monetary consideration or otherwise furnish or disseminate to a minor: . . . (2) Any book, pamphlet, magazine, *printed matter however reproduced*, or sound recording which contains . . . explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors." The Court held that text messages are "printed matter" in the sense that they are comprised of words or numbers capable of being read by the recipient. Therefore, the Court held, Count 2 was valid.

Finally, the State conceded that Count 3, charging obscene telephone contact with a minor in violation of OCGA § 16-12-100.3 should have been dismissed because a text message, which is in written format and not capable of being heard, is not "aural matter" within the meaning of OCGA § 16-12-100.3 (b).

Similar Transactions

Walley v. State, A09A0323

Appellant was convicted of aggravated sexual battery and child molestation of a 12 year old victim. He contended that the trial court erred in admitting as a similar transaction his rape of a 22-year-old. The Court held that a difference in age is not determinative of similarity. Instead, it is just one factor to be considered. The proper focus is on the similarities, not the differences between the separate crime and the crime in question, and, this rule must be liberally extended in cases involving sexual offenses because such evidence tends to establish that a defendant has such bent of mind as to initiate or continue a sexual encounter without a person's consent. Focusing on the similarities, not the differences, the Court concluded that the similar was properly admitted. Here, both victims were females with whom appellant had a previous good relationship and over whom he had a position of authority and both incidents also occurred in the middle of the night when the victims were not fully alert or fully capable of resisting the initiation of sexual contact.

Mistrial; Jury Charges

Hilliard v. State, A09A0131

Appellant was convicted of aggravated sexual battery and child molestation. He argued that the trial court erred in denying his motion for a mistrial after a child advocate witness improperly bolstered the testimony of the victim. The evidence showed that on cross-examination and in response to repeated questions by defense counsel regarding whether the victim's testimony could have been affected by a threat from a DFACS worker that she and her siblings would be taken away from their mother if victim did not cooperate with the investigation of appellant, the witness stated that she thought the victim was telling the truth during her interview of the child. Defense counsel objected to the response, which the trial court sustained, and immediately instructed the jury to disregard the witness' opinion of the victim's veracity. The Court distinguished *Patterson v. State*, 278 Ga. App. 168 (2006) and similar cases because in those cases the State had elicited the testimony from the witnesses, either on direct or re-direct examination, and the trial courts had overruled defense objections to the evidence, allowing the witnesses to testify about the victims' credibility. Here, however, the statement was made on cross-examination, and asserted prejudice based on induced error is not a basis for reversal. Additionally, because the trial court immediately issued a curative instruction to the jury to disregard the testimony concerning the victim's credibility, and because the trial court took corrective measures to ensure a fair trial, the trial court's denial of the motion for mistrial was not an abuse of discretion.

Appellant also argued that the trial court erred in refusing to give his requested jury charge on the lesser included offense of sexual battery. The Court held that there was no evidence presented at trial that warranted a charge on sexual battery. Appellant's theory of the case consisted of attacking the victim's veracity and denying that he had any physical contact with her. Thus, because appellant denied any contact with the victim, the evidence presented at trial did not afford the jury the alternative of finding him guilty of sexual battery in lieu of child molestation. Therefore, the trial court did not err by refusing to give instructions for sexual battery as a lesser included charge.