

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 16, 2018

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THIS WEEK:

- **Closing Arguments; Prosecutorial Misconduct**
- **Due Process; Courtroom Acoustics**
- **Judicial Comments; Miranda**
- **Crawford; Bruton**
- **Severance; Other Acts Evidence**
- **Voir Dire; Batson**
- **Jury Instructions; Voluntary Manslaughter**

Closing Arguments; Prosecutorial Misconduct

Ware v. State, S17A1516 (1/29/18)

Appellant was convicted of malice murder and other related offenses. He contended that the trial court erred in failing to rebuke the prosecutor for statements made during closing argument. Specifically, he contended the prosecutor violated OCGA §17-8-75, which prohibits trial counsel from making statements within the hearing of the jury regarding prejudicial matters not in evidence. The Court disagreed. The transcript showed that during closing argument, the prosecutor made a statement indicating that, because of his experience in both prosecuting and defending criminal cases, he could predict from the outset in this case that the defendant would present one of two different defenses: either self-defense or a claim that someone else committed the act. The prosecutor stated that

since a self-defense theory was not available under the facts of the case, it was predictable that the defendant would attempt to defend the charges by claiming someone else committed the act that killed the victim. Defense counsel objected on the ground that this argument was improper, but the trial court overruled the objection. The Court found that the trial court's failure to rebuke the prosecutor for the comment was, at most, harmless error. In the context of this case, the jury could not have been misled with respect to the prosecutor's reference to a defense that was not pursued by the defendant since the statement merely reflected the prosecutor's opinion that a defense appellant did not pursue - self-defense - was not available to the defendant based on the evidence presented at trial. He then went on to argue that the defense appellant did present was not credible. In the jury instructions that followed closing arguments, the trial court stated that neither the opening statements nor closing arguments of the lawyers, nor the questions they asked, constituted evidence. Thus, the Court concluded, in light of the substantial evidence of guilt, as well as the trial court's jury instructions, it was highly probable that neither this statement by the prosecutor in closing argument, nor any alleged failure of the trial court to comply with OCGA §17-8-75, contributed to the verdict.

Due Process; Courtroom Acoustics

White v. State, S17A1588 (1/29/18)

Appellant was convicted of malice murder, felony murder, and possession of a firearm during the commission of a crime. He argued that he was deprived of his constitutional right to be effectively present at trial because he was unable to hear due to the poor acoustics in the courtroom. The Court disagreed. The record showed that just prior to the start of trial, defense counsel requested that the court allow the defendant to sit next to defense counsel's assistant. The judge twice told defense counsel he could not hear him, forcing defense counsel to repeat his request before the judge finally denied the request. Appellant also pointed to other instances in the record where someone complained that they could not hear or where witnesses were asked to speak more clearly and loudly. The Court noted that at the hearing on the motion for new trial, appellant claimed that he had trouble hearing during the proceedings. But, at no time did he object at trial or move for a mistrial on that ground. Citing *Jones v. State*, 190 Ga. App. 416, 418 (3) (b) (1989) the Court stated that with regard to a complaint concerning unacceptable acoustics in the courtroom, a defendant must make an objection at trial. Moreover, appellant failed to show that he was deprived of his right to be present due to an inability to hear. In each instance where a witness or counsel was asked to speak louder or repeat a question or answer, they did so. In some of those instances, it appeared that the problem was not that the speaker could not be heard, but that the speaker's question or answer was not understood. Although both assistant counsel for the State and an attorney at counsel table testified at the hearing on the motion for new trial that the acoustics in the courtroom were poor and it was difficult

to hear, appellant did not show any part to the trial he missed because he was unable to hear. When asked during the hearing on the motion for new trial at what point he told trial counsel that he could not hear, appellant referred only to an instance prior to the start of trial, and explained that it prompted trial counsel's request that he be allowed to move. Although he asserted he still could not hear after the court refused to allow him to move, he was not asked and did not explain whether at any time after that he informed counsel that he was unable to hear. Thus, the Court concluded, based on the record, appellant failed to show that he was deprived of his constitutional right to be effectively present.

Judicial Comments; Miranda

Harris v. State, S17A1938 (1/29/18)

Appellant was convicted of malice murder and other crimes. The record showed that appellant's co-defendant Boyd agreed prior to trial to be a State's witness in exchange for a grant of derivative use immunity. However, Boyd notified the prosecutor at trial that he changed his mind about testifying. The State called him anyway and Boyd testified that appellant had nothing to do with the shooting. When the prosecutor tried to impeach Boyd, Boyd stated, "I plead the Fifth." The Court stated to Boyd, "Listen to me, . . . I signed an order saying anything you said up here cannot be used against you. The Fifth Amendment is about the right not to incriminate yourself and say something that can be used against you. I took that power away from the State. You have no right to claim the Fifth Amendment because you cannot incriminate you[rself]. He's asked you a simple question. . . . You said you were going to stand up and be credible and be a man." (Emphasis supplied). Appellant argued that the court's comments about being credible

were a violation of OCGA § 17-8-57. He conceded, however, that he did not object to the trial court's statement and that, as a result, the Court's review was only for plain error pursuant to OCGA § 17-8-57 (b). The Court stated that assuming without deciding that the court's instructions to Boyd about his immunity reflected a comment about his credibility in violation of OCGA § 17-8-57, appellant failed to establish that the error affected his substantial rights, given the strong evidence of guilt against him. Consequently, appellant failed to carry his burden of demonstrating that the court's comments affected the outcome of the trial. Therefore, the comments did not amount to plain error. Appellant also argued that the trial court erred in preventing him from cross-examining the GBI agent who interviewed him about the agent's failure to use a *Miranda* waiver form. The Court again disagreed. The Court found that the GBI agent's failure to use a waiver form was not relevant to any issue at trial. Appellant was not challenging the voluntariness of his custodial statements, a challenge for which a waiver of rights form might have been relevant. Furthermore, to the extent appellant wished to challenge the accuracy of the GBI agent's testimony regarding appellant's custodial statements, the trial court permitted appellant to do so, but he elected not to. Under these circumstances, the Court concluded, the trial court did not abuse its discretion in imposing a reasonable limit on the cross-examination of the GBI agent.

Crawford; Bruton

State v. Smith, S17A1992 (1/29/18)

Smith, Parrish, and several others were charged in a 59-count indictment for various crimes, including murder and attempted robbery, in the shooting death of Rebecca Foley. The State expects the evidence to show

that Parrish, Smith, and another approached Foley as she arrived home to her apartment, attempted to rob her, and then shot and killed her as she attempted to drive away. During questioning by police, Smith was asked where he bought the gun, which was used to shoot Foley. He explained that he purchased it two months after Foley's murder, from someone he met "on the street" named "Jarod or Rod" Parrish. Parrish moved to prohibit the use of Smith's custodial statement at trial on the ground that he was implicated in the statement and had a right to confront Smith. The trial court ruled that because Smith's statement was not clearly inculpatory, severance of defendants under *Bruton* was not required, but that *Crawford*, precludes admissibility in the event Smith does not testify and Parrish has no opportunity to cross-examine him. The State appealed. The Court found that Smith's statement to officers was clearly testimonial in nature, and as the trial court found, pursuant to *Crawford*, it would be inadmissible against Parrish if Smith were unavailable and Parrish not given an opportunity to cross-examine him. Smith's statement would be admissible, however, against Smith himself. However, because the State seeks to try Smith and Parrish together, the Court next considered whether the admission of the statement against Smith would violate *Bruton*. The Court noted that the federal courts and it have interpreted *Bruton* and *Richardson v. Marsh*, 481 U. S. 200, 211 (II) (107 SCt 1702, 95 LE2d 176) (1987) to exclude only those statements by a non-testifying defendant which directly inculcate a co-defendant. Here, the Court noted, the trial court found that because Smith's statement was not "clearly inculpatory" of Parrish, severance of Smith's trial from Parrish's trial was not mandated. But, the trial court's analysis should not have ended there. Since the court found that Smith's statement did not directly inculcate Parrish, it should have

concluded further that the statement would be admissible against Smith with an instruction to the jury to consider the statement only against him. As explained in *Richardson*, even where the co-defendant's statement is facially inculpatory, in some circumstances, if the statement is redacted to remove all references to the defendant, and the court instructs the jury not to consider the confession against the defendant, there may be no Confrontation Clause violation. And here, the Court found, Smith's statement that he bought the gun from Parrish after the murder was not directly inculpatory of Parrish, and so it would be admissible against Smith with an instruction to the jury to consider the statement only against Smith. The trial court therefore erred in ruling that the statement is wholly inadmissible. Therefore, the Court reversed the trial court's ruling on the motion in limine and remanded for further proceedings at which time the trial court may wish to consider whether the references to Parrish's name should be redacted.

Severance; Other Acts Evidence

Pike v. State, S17A1541 (1/29/18)

Appellant was convicted of malice murder and other crimes. The evidence, briefly stated, showed that appellant, Slaton, and the victim committed an armed robbery and were driven to and from the scene by Daniel. Appellant and Slaton were worried that the victim would implicate them in the armed robbery. Two days after the armed robbery, appellant and Slaton took the victim out to a boat ramp where they killed him. Daniel again drove the vehicle used to take appellant, Slaton and the victim to the boat ramp.

Appellant argued that the trial court erred in denying his motion to sever because his defense, which was that the State's evidence did not overcome

his presumption of innocence, was antagonistic to that of his codefendant, Slaton. Specifically, he argued that in the joint trial with Slaton, he was forced to defend himself against not only the proof offered by the State, but also the alibi defense argued by Slaton's counsel, i.e., that only appellant and Daniel killed the victim and Slaton was not present, so that he suffered prejudice amounting to a denial of due process. The Court initially noted that the transcript showed that appellant failed to make the present argument to the trial court. Instead, he argued that severance was required based on the likelihood that at trial the State would "get into" Slaton's extensive prior criminal history, and that appellant would get "lumped up with that," and thus, prejudice the jury against him. Nevertheless, the Court stated, it is not enough for a defendant to raise the possibility that a separate trial would have given him a better chance of acquittal; a defendant is entitled to severance only where there is a clear showing of harm or prejudice and a showing that failure to sever would result in the denial of due process. A defendant cannot rely upon antagonism between co-defendants to show prejudice and the consequent denial of due process; a defendant must show that the failure to sever harmed him. The Court found that appellant's claim that the joint trial with Slaton forced him not only to defend against the proof offered by the State, but also to defend against the defense pressed by Slaton did not demonstrate the required prejudice and denial of due process because such a situation exists in any case in which codefendants have antagonistic defenses. Furthermore, despite Slaton's argued alibi defense, the jury arrived at guilty verdicts against Slaton as well as appellant, obviously accepting the State's case which was substantially the same for appellant and Slaton. Nothing suggested that the outcome of appellant's trial would

have been different had he been tried separately from Slaton. Thus, appellant failed to demonstrate that he was prejudiced by the joint trial so that he was denied due process. Consequently, there was no showing that the trial court abused its discretion in denying severance. Appellant also contended that the trial court erred in granting the State's motion to present evidence of other crimes, wrongs, and acts pursuant to OCGA § 24-4-404 (b), specifically in permitting evidence of the armed robbery two days before the victim's murder. The Court disagreed. The trial court found that evidence of the armed robbery was admissible to show the motive to commit the victim's murder, and evidence of motive is relevant even if it incidentally places a defendant's character in issue. Also, there was ample evidence of the connection between the armed robbery and the killing of the victim, i.e., that the victim's actions during and after the armed robbery caused concern that he would turn in his cohorts to police, leading to his killing. As to the second prong of the test for admission under Rule 404 (b), which is scrutiny under Rule 403, the trial court found that the probative value of the evidence outweighed any prejudice from its admission. And, this determination was within the discretion of the trial court after a common sense assessment of all the circumstances surrounding the extrinsic offense. Moreover, the prohibition of evidence under the Rule 403 balancing test is an extraordinary remedy, which is to be used only sparingly inasmuch as it permits the exclusion of concededly relevant evidence; in close cases, balancing under Rule 403 should be in favor of admissibility of the evidence. Lastly, the trial court properly found that there was sufficient proof that appellant committed the prior armed robbery. Consequently, the Court concluded, there was no abuse of the trial court's discretion in admitting evidence of it at trial.

Voir Dire; Batson

Johnson v. State, S17A1479, S17A1480 (1/29/18)

Appellants were convicted of malice murder. They contended that the trial court erred when it denied their *Batson* challenge alleging racial discrimination in the selection of the jury. The Court disagreed. The record showed that the jury venire was composed of 40 people - 16 black potential jurors (40%) and 24 white potential jurors (60%). The State used its peremptory strikes to remove nine black potential jurors and one white potential juror. The jury ultimately selected had three black jurors (25%) and nine white jurors (75%). When appellants raised a *Batson* challenge, the trial court ruled that they had failed to show a prima facie case of discrimination, but asked the State to offer its reasons for striking each juror anyway. The district attorney said that he struck seven of the nine black potential jurors because they had family members who had been arrested or tried for criminal offenses. The district attorney also said that he had identified five white potential jurors with negative law enforcement experiences, either personally or through their family. One of those was the white juror he struck. He did not strike the other four because one had a son whose criminal charges were later dropped and the other three were in the alternate portion of the juror panel. The district attorney had not questioned any of these potential jurors about their family experiences with law enforcement. Instead, the district attorney explained that he obtained this information when he reviewed the juror list with an ADA, members of the city police department and probation office and the sheriff's office, and a former employee of the sheriff's office. The district attorney also ran the names on the juror list through a computer program showing any prior arrests in the county. Appellants did not dispute the district attorney's information or seek to recall any jurors to question

them further. Based on the prosecutor's explanation, the trial court ruled that "the State has articulated race-neutral reasons for the exercise of its peremptory challenges" and denied the *Batson* motion. At the motion for new trial, it was shown that the information upon which the district attorney relied upon in striking four black potential jurors was wrong. The trial court nevertheless concluded that the district attorney's intention in striking these jurors was not racially motivated. The Court noted that *Batson* involves three steps: (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 the proponent's discriminatory intent. As to the first step, the trial court determined that the appellants had not made a prima facie showing of racial discrimination, but the court proceeded to the second step anyway. Therefore, the Court stated, the issue of whether the court correctly decided the prima facie issue was moot. As to the second step, all that is required is for the proponent of the strike to provide a facially race-neutral explanation for the strike, which need not be persuasive, or even plausible. And, the Court noted, appellants conceded that the trial court correctly found that negative experience with law enforcement by a juror's family member is a race-neutral explanation for a peremptory strike of the juror. As to the third step of the *Batson* analysis, the Court found that the trial court skipped this step by denying the *Batson* motion after ruling that the State had "articulated race-neutral reasons," without further argument from the parties or a finding regarding discriminatory intent. However, the Court found, any error was cured by the court's resolution of the appellants' motions for new trial. After hearing testimony from

potential jurors who were struck and the appellants' arguments against the prosecutor's proffered reasons for striking the challenged jurors, the trial court expressly found that the district attorney's reasons for the peremptory strikes were "legitimate" and "in no way racially motivated." Furthermore, the Court stated, although it is troubling that the information on which the district attorney relied in making four of his ten peremptory strikes was later shown to be incorrect, such later-revealed inaccuracy does not establish that the prosecutor's professed reasons for the strikes were necessarily a pretext for invidious discrimination. *Batson* is only about racial discrimination - it does not prevent the prosecution from relying on inaccurate (but race-neutral) information in striking jurors. However, the Court cautioned, a prosecutor who gives false reasons for peremptory strikes may quickly lose credibility with the court, and reasons that are knowingly or patently false when given will likely be found to be pretextual. But here, there was no evidence that the district attorney knew or even suspected that the information on which he relied in making the disputed strikes was inaccurate, and there was no suggestion at trial that the information was inaccurate. Nevertheless, appellants argued, the district attorney's choice not to question the prospective jurors about their family links to arrests or prosecutions was evidence that he acted in bad faith. But, the Court stated, although the prosecutor could have posed such questions, he was not required to prolong voir dire and potentially embarrass the prospective jurors by interrogating them about their criminally inclined family members. *Batson* does not require that the reasons for striking a jury come only from voir dire. Accordingly, the Court held that the trial court's finding that the district attorney's professed reason for striking the disputed jurors was not a pretext for racial discrimination was supported

by the evidence and that he applied the same criterion to potential jurors of all races. The prosecutor identified five white potential jurors with negative law enforcement experiences, struck one of them, and gave legitimate explanations for not striking the other four. Furthermore, appellants failed to show that the State treated potential jurors known to be similarly situated differently because of their race. Recognizing the "great deference" owed to the trial court's finding that the prosecutor's peremptory strikes were not racially motivated, the Court found that it could not say that finding was clearly erroneous.

Jury Instructions; Voluntary Manslaughter

Burke v. State, S17A1495 (1/29/18)

Appellant was indicted for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony. Over appellant's objection, the court granted the State's request and gave an instruction on voluntary manslaughter. The jury convicted him of felony murder and possession of a firearm during the commission of a felony. At the motion for new trial, appellant argued that the trial court improperly limited the jury's consideration of voluntary manslaughter to a lesser offense of only malice murder, both in its oral instructions and on the verdict form, so that the jury had no option to consider the lesser offense in relation to the felony murder charge. The trial court rejected that argument. The court concluded that a voluntary manslaughter charge was not supported by the evidence - and thus should never have been given at all - and that the jury's rejection of voluntary manslaughter as an alternative to malice murder meant that it also would have rejected that option if it had been given as an alternative to a felony murder conviction. Appellant conceded that he

did not object to the trial court's failure to instruct the jury that it also could consider voluntary manslaughter as a lesser charge to felony murder or to its predicate felony of aggravated assault. However, citing *Edge v. State*, 261 Ga. 865 (1992), he argued that the trial court's instructions amounted to plain error. The Court disagreed. In dicta in *Edge*, the Court stated that when (1) an aggravated assault is perpetrated against the homicide victim and is an integral part of the killing and (2) the evidence authorizes a voluntary manslaughter charge, the jury should be admonished that if it finds provocation and passion with respect to the act which caused the killing, it could not find felony murder, but would be authorized to find voluntary manslaughter. But, the Court stated, regardless of the continued validity of the dicta in *Edge*, it is clear that *Edge's* admonitions about curtailing a jury's consideration of voluntary manslaughter apply only where there is evidence that would authorize a voluntary manslaughter charge. And here, the Court found, considering the evidence presented at trial, it agreed with the trial court's belated conclusion that no voluntary manslaughter instruction was warranted at all, so there was no error, let alone an obvious one. Nevertheless, appellant contended that the trial court's conclusion (in rejecting his motion for new trial) that a voluntary manslaughter instruction was not warranted at all was unfair given that the State had asked for the instruction and the trial court in giving the charge had agreed with the State that the evidence was sufficient to support such a charge. But, the Court stated, even if the State were somehow estopped from arguing that an instruction that the State itself requested was not warranted, reversal under plain error review is warranted only if the alleged errors in the trial court's instructions likely affected the outcome of the proceedings. Given there was no evidence to support a

verdict that appellant was guilty of voluntary manslaughter, any error in the trial court's instructions that limited the jury's consideration of voluntary manslaughter could not have affected the outcome of the trial.