Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 27, 2015

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THIS WEEK:

Judicial Comments; O.C.G.A. § 17-8-57

Huff v. State, A15A1031 (10/27/15)

Appellant was convicted of armed robbery and possession of a knife during the commission of a felony. He contended that the trial court violated O.C.G.A. § 17-8-57 by commenting on the similarity and probative value of the similar transaction evidence. The Court agreed and reversed his convictions.

The record showed that prior to trial, the trial court conducted a hearing to determine the admissibility of similar transaction evidence and ruled the evidence admissible. Subsequently, when the State called its first similar transaction witness at trial, the trial court, sua sponte, made the following statement to the jury: "I don't know that I made the precise or complete ruling in chambers this morning but, for the Jury, we're to the point of the case where the State is offering what is known as Similar Transaction Evidence. I'm going to give you a charge on that in just a minute to help explain to you what's taking place as far as the presentation of the evidence goes. *But on my decision earlier I want to add that the Court found that the probative value as to the similarity and/or the connection of the Defense's charge outweighs any prejudice to the Defendant and admitted the Similar Transaction Evidence*." (Emphasis supplied)

The Court stated that generally, remarks made by a trial court in discussing the admissibility of evidence or explaining its rulings, do not constitute prohibited expressions of opinion. However, comments by the trial judge on its rulings that include expressions of opinion as to what has been proven, the credibility of a witness, or on a disputed issue of material fact are clearly improper under O.C.G.A. § 17-8-57. Here, the Court found, although the trial court acted properly in making a threshold determination concerning the admissibility of the similar crimes evidence, the trial court should have refrained from commenting on the similarity and probative value of the other offense. Such statements to the jury, even where, as here, it was coupled with an immediate charge on the jury's responsibility to make the ultimate determination on similarity and probative value, violated O.C.G.A. § 17-8-57. Instead, once the trial court determined and ruled outside the presence of the jury that the similar transaction evidence was admissible, it should have simply provided the appropriate limiting instruction about the evidence, without informing the jury of the court's evaluation of the evidence.

Diminished Capacity; PTSD

Brower v. State, A15A1314 (10/27/15)

Appellant was convicted of four counts of kidnapping, two counts of possessing a hoax device, two counts of terroristic threats and possession of a knife during the commission of a felony. The evidence, very briefly stated, showed that appellant's husband held a grudge

against the attorney who had represented him in a previous criminal case. Appellant and her husband entered the law office of the attorney and over the course of a day, held the attorney and office staff hostage.

Before trial, the State filed a motion in limine to exclude testimony from the appellant's expert witness about an affirmative defense of justification, specifically claiming battered woman's syndrome and that the appellant suffered from PTSD. At the pre-trial hearing, the appellant abandoned the battered woman's syndrome defense, but argued that she was justified in committing the crimes because she suffered from PTSD which negated her intent to commit the charged crimes, essentially asserting a diminished mental capacity defense. Appellant's expert, Dr. Marti Loring, a PTSD specialist, proffered that the PTSD was relevant to appellant's criminal case because she believed that her husband was going "into a situation where he was going to die," and that because she had lost one husband in traumatic circumstances, she would act, given a traumatic trigger, to keep her current husband alive. Dr. Loring further offered that upon a triggering event, PTSD sometimes impairs judgment, and that because of her PTSD, appellant "felt like she had no other alternative" but to help her husband commit the crimes at issue. The trial court granted the State's motion.

Appellant argued that she was denied the right to present a defense when the trial court refused to allow her expert to testify about her PTSD diagnosis. The Court noted that appellant did not assert that it was being used as an affirmative defense, but rather that PTSD was relevant to supply an interpretation of the facts outside of the ken of the average layman, specifically the impact of PTSD on her intent to commit the crimes.

The Court stated that expert opinion testimony is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves; i.e., the conclusion is beyond the ken of the average layman. Appellant contended that the excluded testimony was relevant to her only defense, which appeared to be that she could not form the requisite intent to commit the crimes charged because she suffered from PTSD. But, the Court found, evidence of a criminal defendant's mental disability may be presented in support of a defense of insanity or delusional compulsion (see O.C.G.A. §§ 16-3-2 and 16-3-3); a claim of incompetency to stand trial (see O.C.G.A. § 17-7-130); or, since such pleas were authorized, a plea of guilty but mentally ill or guilty but mentally retarded (see O.C.G.A. § 17-7-131) — none of which appellant raised in this case. The Court stated that for more than 150 years, our Courts have consistently upheld the exclusion of evidence of a defendant's diminished mental condition when offered to support other defenses or to negate the intent element of a crime. Moreover, the Court stated, it should be noted that Georgia takes a more restrictive position on this issue than many other jurisdictions, where the admission of evidence relating to a defendant's deficient mental condition to support defenses other than those based on diminished mental capacity or to negate a required element of a crime has been authorized by statute or judicial decision in at least some circumstances. Georgia, however, is not such a jurisdiction, and if the law established by our longstanding precedent is to change, it would be better done as a matter of public policy legislated by the General Assembly. Accordingly, the trial court did not err in excluding the expert's testimony regarding PTSD.

Voir Dire; Strikes for Cause

Platt v. State, A15A1608 (10/27/15)

Appellant was convicted of voluntary manslaughter and related crimes. The evidence showed that appellant was a party to a gunfight in an apartment that resulted in the death of two of the shooters.

He contended that the trial court erred by failing to strike a prospective juror for cause.

The record showed that during voir dire, the prospective juror in question indicated that she was scared of guns. The juror stated that she was unsure if she could overcome her bias because she believed that someone would have a gun only for self-defense or "to hurt somebody," and she did not know any other reason someone would have a gun. When asked if she would find someone guilty just because she did not like guns, the juror responded, "No." The juror then was asked if she would listen to the evidence before finding someone guilty, and she responded: "I would listen to the evidence. I would love to listen to the evidence, but my question would always be, well, why does this person need a gun. And so I would need to understand that there's a good reason for having a gun, other than saying having to defend somebody, which means hurting somebody else, or I'm going to defend my business, [or] a drug company, by hurting somebody else. We would need to overcome that burden to understand why someone would have one."

Later in her exchange with counsel, the juror stated, "I think I am capable of coming in and taking instructions of how to view — [the prosecutor] just went through innocent until proven guilty and taking the facts that are in the courtroom and making a decision of those facts presented beyond a reasonable doubt." The jury also stated that it was her "hope" that she could set her bias aside.

The Court stated that a prospective juror's statement that she "hopes" she could decide the case in an unbiased manner based on the trial court's instructions and evidence does not require the juror to be excused. Furthermore, it is not an abuse of discretion to seat a juror who questions her ability to set aside biases so long as the juror indicates she has no unalterable fixed prejudices. Thus, the Court found, based on the prospective juror's comments, taken as a whole, the trial court was authorized to find that the juror's opinion was not so fixed and definite as to preclude her from service on the jury. The trial court therefore did not abuse its discretion in denying appellant's motion to strike the prospective juror.

Plea Bargains; Role of Court

State v. Lewis, S15G0666 (11/16/15)

Lewis and the State entered into a plea bargain in which Lewis would be agree to plead guilty to reduced charges and be sentenced to 12 months' probation if he testified truthfully at the trial of his co-defendants. The Court accepted the plea, but withheld sentencing and Lewis thereafter testified at the trial. At the ensuing sentencing, the trial court sentenced Lewis to 12 months confinement, apparently finding Lewis' testimony untruthful. On appeal, the Court of Appeals remanded the case, finding that the plea bargain was conditioned on Lewis testifying truthfully and since the trial court did make an explicit finding in this regard, it could not determine if the trial court could reject the

plea bargain. The Supreme Court granted the State's petition for writ of certiorari.

The Court framed the issue as whether Lewis, after relying on the plea agreement and the trial court's acceptance of that agreement to his detriment, had a right to force the trial court to adhere to the terms of the negotiated plea that it had earlier accepted. And, if he had such a right, did the trial court have the authority to determine that Lewis breached the plea agreement in the absence of a claim of breach by the State. The State and Lewis both argued that because the trial court was not a party to the plea agreement, it had no independent role in determining whether the plea agreement's conditions had been met. Thus, they contended, because the State was satisfied Lewis had fulfilled his obligations under the negotiated plea agreement, Lewis was entitled to specific performance of the plea terms. The Court disagreed.

The Court stated that as a general rule, where a defendant has performed under the terms of a negotiated plea agreement to his or her detriment in reliance on the trial court's acceptance of the plea terms, the trial court, like the prosecution, will be bound by its promises. Here, Lewis relied on the trial court's conditional acceptance of the negotiated plea terms to his detriment by waiving his Fifth Amendment rights and giving sworn, inculpatory testimony at the trial of his co-defendants. Having been induced to incriminate himself by promises both made and ratified by the trial court, Lewis was prejudiced thereby and cannot be made whole simply by being allowed to withdraw his guilty plea. Thus, the Court agreed with the Court of Appeals that, under the unique circumstances presented, Lewis would be entitled to specific performance of the negotiated plea terms previously accepted by the trial court, if he testified truthfully on the State's behalf at trial. And since the trial court did not make an express finding with respect to this issue, the Court further agreed with the Court of Appeals that Lewis's sentence must be vacated and his case remanded for a hearing to determine whether he testified truthfully as to all material matters.

In so holding, the Court rejected the broad proposition posited by the parties that once a trial court accepts a plea agreement in a criminal prosecution, it has no authority to determine whether the parties to that agreement, either the State or the defendant, have complied with its terms and no authority to reject the plea agreement and agreed upon sentence based on one party's lack of performance if the other party does not complain of the lack of performance.

Ineffective Assistance of Counsel; Business Records

Hayes v. State, S15A0764 (11/16/15)

Appellant was convicted of malice murder and other related offenses. He contended that his counsel rendered ineffective assistance by failing to object when the State introduced evidence of the victim's cell phone calls, texts, and the location of the associated cell phone towers, without the testimony of the custodian of those records. The Court disagreed.

Under the exception to the hearsay rule for records of regularly conducted business activity, record evidence may be admitted without the custodian's in-court testimony if compliance with the requirements of that exception is shown "by certification that complies with paragraph (11) or (12) of Code Section 24-9-902 . . . ." O.C.G.A. § 24-8-803(6). Appellant argued that the certification that accompanied the records was not notarized or signed under penalty of perjury. But, the Court stated, by its own terms, O.C.G.A. § 24-8-803(6) does not require that the submitted certification be notarized or signed under penalty of perjury. Rather, it looks to O.C.G.A. § 24-9-902(11) and (12), and declares that the certification must meet the strictures of one of those subsections. And, the subsection specifically applicable, O.C.G.A. § 24-9-902(11), places no such requirement on a certificate of authenticity.

Nevertheless, appellant argued, such a requirement should be read into this State's new Evidence Code because evidence tendered under the similar Federal Rule of Evidence 803 (6) requires that the certification be notarized or signed under penalty of perjury. The Court noted that while it is true that when our courts consider the meaning of our new Evidence Code, they should look to decisions of the federal appeals courts construing and applying the federal rules, especially the decisions of the Eleventh Circuit. But, where a provision of the new Evidence Code differs in substance from the counterpart federal rule, as interpreted by federal courts, our courts must correspondingly presume that the General Assembly meant the Georgia provision to be different. And here, the Court found, after comparing the federal rules and the new Evidence Code provisions, it found that the provisions on this issue differ. Therefore, the Court stated, it must presume that the General Assembly meant that the certificate of authenticity required through the operation of O.C.G.A. §§ 24-8-803(6) and 24-9-902(11), need not be notarized or signed under a penalty of perjury. Accordingly, appellant's counsel cannot be faulted for failing to make a meritless objection.