Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 14, 2017

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THIS WEEK:

Mistrial; Prosecutorial Misconduct

Stanley v. State, S16A1636 (2/27/17)

Appellant was convicted of malice murder and related crimes. He argued that the trial court erred when it denied his motion for a mistrial regarding the prosecution's use of the word "murder" when questioning witnesses during the trial. The record showed that before opening statements, appellant moved in limine to bar the prosecution from using the term "murder." The trial court denied the motion in limine, but admonished the State not to elicit testimony calling for witnesses to make statements about ultimate issues in the case. The record showed that the prosecution used the word "murder" approximately 12 times while examining witnesses. Most of the time, the prosecutor used the word while questioning the lead investigator for the case. Out of those 12 occasions when the prosecutor used the word in a query, appellant objected three times. After the first objection, the trial court admonished the prosecutor to refrain from using the word "too much," but did not bar the prosecutor's use of the word. The trial court sustained appellant's second objection and when appellant objected a third time, the trial court gave a limiting instruction to the jury.

The Court stated that the trial court was not obligated to bar the prosecution from using the word "murder" as appellant requested. The prosecutor's use of the word "murder" in his 12 queries to witnesses did not require those witnesses to opine on the ultimate issue in the case—whether appellant was guilty or not guilty of malice murder and related crimes stemming from the victim's death. The trial court's curative instruction to the jury had the effect of mitigating any possible unfairness to appellant. Thus, the Court concluded, appellant failed to show that the term 'murder' was used in an inappropriate way to influence the jury. Accordingly, the trial court did not abuse its discretion in denying the motion for mistrial.

Double Jeopardy

Jones v. State, S16A1742 (2/27/17)

In 2010, appellant was tried before a jury for malice murder, felony murder, and cruelty to children in the first degree in the death of his girlfriend's 17-month-old daughter. The jury acquitted appellant of malice murder and was unable to reach a verdict on the charges of felony murder and cruelty to children, resulting in a mistrial on those counts. When the State retried appellant in 2012, the jury found him guilty of both felony murder and cruelty to children in the first degree.

Appellant argued that the trial court erred in denying his plea in bar because double jeopardy prohibited his retrial. The Court disagreed. The Court noted that the doctrine of issue preclusion ordinarily bars relitigation of an issue of fact or law raised and necessarily resolved by a prior judgment. Here, appellant

argued that because the jury acquitted him of malice murder, it necessarily determined "the issue of ultimate fact" - that he did not inflict "multiple blunt force injuries to the head and face of the victim and he therefore could not be retried for the other two offenses that alleged the same fact. Specifically, he argued, that the State did not present the jury with multiple theories of malice and intent, and that the jury necessarily decided he did not maliciously intend to injure the victim.

But, the Court noted, in *Yeager v. United States*, 557 U.S. 110 (129 S.Ct. 2360, 174 L.E.2d 78) (2009), the Supreme Court explained that a jury's inability to reach a verdict should play no role in determining the preclusive effect of an acquittal. Thus, *Yeager* prohibits consideration of the jury's failure to reach a verdict on the cruelty to children count (and the felony murder count predicated on cruelty to children), in determining the preclusive effect of an acquittal on malice murder. Moreover, a finding that the accused did not intend to kill the victim does not preclude a finding that he or she intended to cause the victim physical pain. Therefore, the Court concluded, because appellant failed to prove that collateral estoppel applies in this case, the trial court did not err in denying his plea in bar based on double jeopardy.

Money Laundering; Hearsay

Akintoye v. State, A16A1625 (3/16/17)

Appellant was convicted of two counts of theft by taking, two counts of theft by deception, two counts of exploitation of an elder person, one RICO count, and three counts of money laundering. The evidence, briefly stated, showed that appellant conned three out-of-state elderly people into sending him money. The first victim, D. R., sent money believing she was helping an internet friend she met on a dating website. The second two victims, J. M. and J. R., each sent money believing that they were sending money to their respective grandsons to secure a release from jail. In all three instances, the money was wired to an account held by a woman named Crawford who, within 48 hours, then transferred most of the money to appellant.

Appellant contended that the evidence was insufficient to support his money laundering convictions. The Court noted that this was an issue of first impression in Georgia. In pertinent part, the plain language of O.C.G.A. § 7-1-915(c). provides that a person commits the offense of money laundering when that person: "knowing that the [monies] involved in a currency transaction represent the proceeds of some form of unlawful activity, conducts or attempts to conduct such a transaction which in fact involves the proceeds of specified unlawful activity: . . .[w]ith the intent to promote the carrying on of specified unlawful activity[.]" Thus, appellant's indictment created four elements that the State had to prove: (1) knowledge that the funds involved in a currency transaction represented the proceeds of unlawful activity; (2) conducting or attempting to conduct a transaction which involves the proceeds of the specified unlawful activity; (3) using the funds or proceeds from the specified unlawful activity; and (4) acting with the intent to promote the carrying on of the specified unlawful activity. In this case, the specific unlawful activity was the deposit and withdrawal, or the attempted withdrawal, of more than $1,500 in funds obtained through theft or deception from D. R., J. M., and J. R.

The Court found that the evidence met the first two elements — knowingly conducting a transaction involving the proceeds of the specified unlawful activity — because the jury was authorized to find that appellant was part of a conspiracy which knowingly deceived D. R., J. M. and J. R. into believing that they had to wire funds into Crawford's accounts which resulted in the victims effectuating those wire transfers. The evidence also met the third and fourth elements — using the funds from the specified unlawful activity with the intent to promote the carrying on of that activity. The evidence showed that appellant intentionally had Crawford withdraw or attempt to withdraw and then deposit or attempt to deposit the funds which were obtained through appellant's and Crawford's conspiracy to scam the victims, into accounts which appellant controlled. Moreover, each of these actions promoted appellant's illegal activities of scamming the elderly including his pattern of racketeering. Consequently, the evidence was sufficient to support appellant's convictions for three counts of money laundering.

Appellant also contended that the trial court erred in admitting J. M.'s grandson's testimony on the ground that it constituted inadmissible hearsay. The record showed that J. M. died before trial and the State called his grandson to testify as to the scam.

The Court found that the statements J. M. made to his grandson were admissible as an "excited utterance" which is defined in O.C.G.A. § 24-8-803(2), as "[a] statement relating to a startling event made while the declarant was under the stress of excitement caused by the event or condition." In determining whether statements are made under the stress of the exciting event, a court may consider the time lapse between the exciting evidence and whether the declarant made the statement spontaneously and in the absence of prompting. And here, the Court found, the evidence showed that J. M. was 91-years-old; he made the statements in question to his grandson immediately after learning that he had been scammed into wiring more than $6,000 by a man who falsely posed as his grandson; and when J. M. made the statements, he was confused and very distraught. Under the totality of the circumstances, these statements were made under the stress of excitement caused by a startling event and the statements related to the startling event.

The Court also found that the evidence was admissible under the residual exception to the hearsay rule as set forth in O.C.G.A. § 24-8-807. First, J. M. died prior to trial and therefore, he was clearly unavailable to testify as a witness. Second, his statements to his grandson provided evidence of a material fact — that he wired money under false pretense. Third, the circumstances provided sufficient guarantees of trustworthiness, given J. M.'s close relationship with his grandson, the absence of any indication that J. M. had a reason to be untruthful, and the similarity between what was told to J. M. and to J. R. Fourth, no other comparable evidence that J. M.'s wire transfer was induced by fraud. Fifth, the State gave pretrial notice of its intent to offer J. M's statements. Sixth, the general purposes of the evidence rules and the interests of justice were best served by admission of J. M's statements because otherwise the State could not prosecute the crime against J. M. And finally, the Court found, the evidence of J. M.'s statements was more probative that any other evidence because the State had no other evidence showing why J. M. wired the money into Crawford's account. Consequently, the grandson's testimony regarding J. M.'s

statements was admissible under the residual exception to the hearsay rule.

Prior Bad Acts; Rule 414

Harris v. State, A16A2041 (3/16/17)

Appellant was convicted of six counts of child molestation. The evidence showed that he molested the granddaughter of his girlfriend. The victim, her siblings and the victim's mother all lived with appellant and his girlfriend. Appellant argued that the trial court erred in admitting prior bad act evidence under Rule 414. The Court disagreed.

First, appellant argued that the trial court erred in allowing his younger sister, C. H., to testify about a prior bad act because it had occurred approximately 44 years earlier. C. H. testified that when she was approximately 13 years old, appellant pinned her against furniture or the floor in a "bear hug," pulled down his pants, and attempted to "put his private into [her]" before she managed to get away The Court found that although C. H.'s testimony was remote in time, the trial court did not clearly abuse its discretion in allowing C. H.'s testimony, as it was relevant to show appellant's lustful disposition with respect to preteen or teenaged girls and his pattern of molesting young girls with whom he was living.

Second, appellant argued that the trial court erred in allowing S. H. (C. H.'s daughter and appellant's niece) to testify under Rule 414. He contended that the prejudicial effect of her testimony substantially outweighed any probative value where she alleged only that he had kissed her, and did not allege any other inappropriate touching, and had made no outcry until approximately ten years later. The Court noted that S. H., who was twenty-two years old at the time of trial, testified that, when she was nine years old, appellant had approached her, given her a "long hug," and kissed her, trying to put his tongue in her mouth. This happened on two or three occasions. The Court found no clear abuse of discretion in the admission of S. H.'s testimony as it demonstrated appellant's lustful disposition toward girls of a similar age as the victim and his pattern of initiating sexual contact with young female family members.

Next, appellant argued that the trial court erred in allowing the prior bad acts testimony of J. W. Although 29 years old at the time of trial, she testified that she had lived across the street from appellant as a child and had visited his house when her uncle was dating appellant's sister, C. H. On one occasion when J. W. was 13 years old, she was at appellant's home when he cornered her in a bedroom, grabbed her, fondled her butt and breast, kissed her on the neck, and touched her private area. The Court found no clear abuse of discretion because this testimony demonstrated a pattern of molesting young girls of a certain age in his home.

Finally, appellant contended that the trial court abused its discretion in allowing the victim's mother to testify that she had observed him masturbating in his home, arguing that there was no link between the legal act of masturbation and the crimes charged. The mother testified that prior to the victim's outcry, she had seen appellant masturbating in his bedroom on three separate occasions during the time that she and her children lived in his home. The mother also testified that the door of appellant's bedroom had been open while he was masturbating and that her whole family was home on all three occasions. The Court found no abuse of discretion because the evidence was relevant to show a pattern of conduct because the victims reported that appellant had exposed himself to them on other occasions while his bedroom door was open, even though there were other people in the house.

Similar Transactions; USCR 31.1(B)

McCrory v. State, A16A1525 (3/16/17)

Appellant was convicted of possession of cocaine (O.C.G.A. § 16-13-30(a)) as a lesser included offense of possession of cocaine with intent to distribute, and acquitted of the charge of driving without a license. The evidence, briefly stated, showed that police responded to a call and found a vehicle parked diagonally in the middle of the road. Appellant was standing five feet from the vehicle with a baseball bat. Another man was standing 100 ft. away. Appellant was arrested and after searching the vehicle, discovered crack cocaine in the center console. The vehicle was not registered to appellant. At trial, the State presented evidence of a similar transaction that 10 days earlier, the police arrested appellant after crack cocaine was found in the center console of the same vehicle.

Appellant contended that the trial court erred in admitting the similar transaction evidence. The Court noted that the parties, as they did in the trial court, focused their arguments on the constitutionality of the search in the similar transaction without framing their arguments in the context of the mandatory test which the trial court was required to perform prior to admission of the similar transaction into evidence. And since this was a case tried in 2009, the three-part test of the old Evidence Code and USCR. 31.3 (B) applied. The State and the trial court bear the burden of ensuring compliance with Rule 31.3 (B) and a defendant's failure to object to non-compliance with the rule will not waive the issue on appeal. Furthermore, the Court found, although inartful, appellant's argument sufficiently challenged the State's ability to legally establish evidence that appellant committed the similar transaction.

Turning to the merits of the appeal, the Court found that the trial court did not enter a written order concerning admission of the similar transaction, and its oral order admitting the similar transaction did not include any of the requisite factual findings. Also, the parties never argued about whether the State possessed a proper purpose for admission of the evidence, or whether the two offenses were sufficiently connected or similar. Moreover, the State provided no testimony at the hearing concerning the facts of the case. Thus, because the record was devoid of the mandated factual findings, the trial court erred.

The Court also found that the error was not harmless because the only evidence offered by the State which linked appellant to the drugs, other than his proximity to them, was the similar transaction evidence. Consequently, the similar transaction evidence measurably contributed to the jury's verdict. The Court therefore vacated appellant's conviction and remanded the case for further proceedings. If the trial court determines that the evidence meets the standard to admit the similar transaction and enters these findings on the record, a new trial is not required and the trial court may re-enter its judgment of conviction. If, however, the trial court determines that the evidence did not meet the standard prescribed by the old Evidence Code, a new trial will be required and the trial court will need to determine whether the similar transaction is admissible in that trial pursuant to the new Evidence Code – O.C.G.A. § 24-4-404(b).

Records Restriction; O.C.G.A. § 35-3-37

Nasir v. Gwinnett County State Court, A16A1611 (3/16/17)

In 1999, appellant was charged with five counts of misdemeanor theft by taking. He entered a nolo contendere plea to one count and the state nolle prossed the remaining four counts. Subsequently, appellant unsuccessfully tried to get his criminal record expunged multiple times, with his most recent request in August 2013. Thereafter, he filed a complaint against the State Court, the Solicitor-General, and the County Police Department seeking restriction of access to his criminal record under O.C.G.A. § 35-3-37. The trial court dismissed the action for failure to state a claim. A divided whole Court affirmed.

Appellant argued that the trial court erred in finding that he was ineligible for restriction of his criminal records under O.C.G.A. § 35-3-37 which provides that, under certain circumstances, "the criminal history record information of an individual relating to a particular charge . . . shall not be disclosed or otherwise made available to any private persons or businesses pursuant to Code Section 35-3-34 or to governmental agencies or licensing and regulating agencies pursuant to Code Section 35-3-35." O.C.G.A. § 35-3-37(a)(6). The Court noted that the statute directs that access to "an individual's criminal history record information" shall be "restricted" for certain specified "types of dispositions." O.C.G.A. § 35-3-37(h). A disposition where "all charges were dismissed or nolle prossed" is one of those. O.C.G.A. § 35-3-37(h)(2)(A).

Here, the record showed that four of the five counts of theft by taking with which appellant was charged were dismissed. But, appellant pled nolo contendere to the fifth and was sentenced accordingly. And, the Court found, imposition of a sentence upon a plea of nolo contendere is not a dismissal or a nolle prosse. Therefore, O.C.G.A. § 35-3-37(h)(2)(A) is not applicable. And, because appellant is not entitled to restriction of his record under O.C.G.A. § 35-3-37(h)(2)(A) in the first instance, the Court determined that it need not consider the applicability of any of the exceptions to restriction set forth in O.C.G.A. § 35-3-37(i). Moreover, the Court determined, none of the other "types of dispositions" specified in O.C.G.A. § 35-3-37(h) apply to the facts of this case, as alleged in appellant's complaint.

Consequently, the Court held, the allegations of his complaint "disclose with certainty" that appellant would not be entitled to restriction of his criminal record under any state of provable facts asserted in support of his complaint; and the defendants established that appellant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of that relief. Accordingly, the trial court did not err in dismissing the complaint.