

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING APRIL 21, 2017

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State Prosecutor

## THIS WEEK:

- **Merger; Deliberate Intervals**
- **Prosecutorial Misconduct; False Testimony**
- **Motions for Mistrial; Defendant's Outbursts**
- **Prior Testimony; Prior Consistent Statements**

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### **Merger; Deliberate Intervals**

*Johnson v. State, S16A1514 (3/6/17)*

Appellant was convicted of malice murder, felony murder (two counts), aggravated assault, and false imprisonment. Appellant argued that his conviction for aggravated assault merged with his malice murder conviction. The Court agreed.

The Court stated that separate convictions for the malice murder and aggravated assault of a single victim may be permitted where there is evidence that a “deliberate interval” separated the infliction of an initial non-fatal injury from the infliction of a subsequent fatal injury. Here, the Court found, there was no evidence of an interval separating the infliction of the victim’s non-fatal wounds from the infliction of the wounds that killed her. The medical examiner testified that with regard to the sharp force and blunt force injuries, he could not state “in the scheme of things, what came first, second or third.” Thus, the Court concluded, in the absence of some evidence of a “deliberate interval” between the infliction of any of the wounds the victim suffered, it must vacate appellant’s aggravated assault conviction.

### **Prosecutorial Misconduct; False Testimony**

*Dinkins v. State, S16A1850 (3/6/17)*

Appellant was convicted of malice murder and related crimes. He contended that the prosecution engaged in misconduct by knowingly eliciting false testimony. At trial, Robbins testified he drove the victim to the apartment where the shooting took place at three o’clock or four o’clock in the afternoon. During the ride, Robbins testified, he let the victim use his phone and said the victim spoke to someone, telling that person he was on his way and would arrive in a few minutes. Phone records showed that Robbins’ phone number showed up at 4:27 p.m. as a missed call on a phone linked to appellant’s co-defendant. The dispatch records showed that the first 911 call reporting the shooting came in at 4:28 p.m. Appellant argued that Robbins could not have been telling the truth about the timeline of events because the shooting would have been taking place at the same time the victim was using Robbins’ phone to call someone. Also, because the call from Robbins’ phone was a missed call, appellant contended there was an implication that Robbins’ testimony that the victim spoke to someone while on Robbins’ phone was also untrue. Appellant contended that because the State had Robbins’ phone records, it must have known Robbins was being dishonest when he testified as a witness for the State.

However, the Court found, while Robbins’ testimony, the phone records, and the 911 dispatch records certainly created discrepancies, such discrepancies did not indicate the prosecution engaged in misconduct. Instead, such inconsistencies

and how they may impact the credibility or veracity of witnesses are for a jury to reconcile. Moreover, the Court found, since no objection was made at trial about any alleged prosecutorial misconduct, any purported error was waived. Accordingly, the Court concluded that appellant's argument was without merit.

## **Motions for Mistrial; Defendant's Outbursts**

*Green v. State, S16A1842 (3/6/17)*

Appellant was found guilty but mentally ill of malice murder and related crimes. The record showed that appellant was initially declared incompetent after his arrest in 2004. In 2009, a jury found him competent to stand trial. During jury selection at his subsequent criminal trial, after having been admonished several times for being disruptive, appellant began a rambling colloquy, and exclaimed that he had been "committed at Central State Hospital for the rest of my life" and that he "was too dangerous to live in society." Deputies escorted him from the courtroom, and the trial judge explained to the prospective jurors that appellant was being removed because of his outburst, but would be allowed to return when he had calmed down. Appellant's counsel moved for a mistrial, which was denied. At the conclusion of voir dire, as the selected jurors were being announced, appellant interrupted, telling the jurors that they could send him to prison, that he had been mistreated at the hospital, and that he was worried about other patients being mistreated in similar fashion. Appellant was again escorted from the courtroom, at which point the court told the jury, "I think it only fair, ladies and gentlemen, that you know we had a competency trial before a jury for Mr. Green about two weeks ago and he was found competent to stand trial. That's why he's here." There was no objection to this comment.

Appellant contended that the trial court erred in denying his motion for mistrial after the first of his outbursts before the jury. The Court disagreed. The Court noted that the trial court was walking the fine line of accommodating appellant's right to be present at all critical stages of his trial, while also attempting to maintain orderly and fair proceedings in his courtroom. Faced with appellant's disruptive conduct, the trial judge admonished appellant several times to stop,

warned him he would be removed if he did not, and was finally compelled to remove him when he began pronouncing that he was a danger to society. The judge then offered the jury a brief explanation for what had occurred. The Court concluded that this response to appellant's outburst was reasonable and within the trial court's discretion.

Nevertheless, appellant argued, the trial court erred when, in response to his subsequent outburst, it informed the jury that his competency to stand trial had been recently adjudicated, without simultaneously instructing the jury regarding the legal distinction between competency and sanity. As an initial matter, the Court found that the issue was not preserved for review because defense counsel failed to object. But, even assuming a timely objection, any comment from the trial court as to the distinction between sanity and competency would have been confusing and out of context at that early stage of the proceedings, where the parties had yet to even give their opening statements. Moreover, the Court found, even assuming the judge had erred in making this comment without, at the same time, distinguishing competency from sanity, there was no harm to appellant insofar as the jurors were educated on the distinction between these two concepts as the trial unfolded. Accordingly, the Court concluded, any initial misimpressions the jury may have had as a result of the trial court's comment would have been resolved during the course of the trial and would thus have been no cause for reversal.

## **Prior Testimony; Prior Consistent Statements**

*Bolling v. State, S16A1674 (3/6/17)*

Appellant was convicted of murder and other offenses after his first trial ended in a hung jury. The record showed that Eldridge was charged with multiple crimes in connection with his involvement in and concealment of the offenses, and he pleaded guilty under the First Offender Act to one count of theft by receiving stolen property. As part of his plea deal, Eldridge testified against appellant at appellant's first trial. After Eldridge testified, the State moved to admit Eldridge's videotaped statement to police, arguing that appellant had alleged that Eldridge had an improper motive for testifying against him. The trial

court granted the State's motion, and portions of the police interview were played to the jury. Eldridge disappeared before appellant's second trial, but the court allowed his prior testimony to be read to the jury.

Appellant argued that the trial court erred in admitting Eldridge's prior trial testimony under O.C.G.A. § 24-8-804. First, appellant argued that Eldridge was not an "unavailable witness", because the State did not show that it was unable to procure Eldridge's attendance. The Court disagreed. To establish that a witness is unavailable under Rule 804 (a) (5), the proponent must show that reasonable, good-faith efforts to locate the witness were made. Here, appellant acknowledged the State's substantial efforts in attempting to locate Eldridge, as evidenced by an investigator's testimony, and the Court rejected appellant's argument that the State's substantial efforts were nevertheless unreasonable because Eldridge's testimony was very important to the State's case. Instead, the evidence showed that the investigator exhausted all efforts to find Eldridge in Georgia. Appellant's claim that the State would have located Eldridge if the search had begun sooner was mere speculation, and he did not set forth what other reasonable efforts the State should have made to locate Eldridge. Thus, under these circumstances, the trial court did not abuse its discretion in admitting Eldridge's prior trial testimony after concluding that the State made a reasonable effort to locate him.

Appellant also argued that the prior testimony should have been excluded because he was not given an opportunity to explore fully Eldridge's motive and benefit for testifying against him since Eldridge had not been sentenced at the time of the first trial, and this lack of opportunity deprived him of his Sixth Amendment confrontation rights. But, the Court stated, regardless of whether Eldridge actually had been sentenced at the time of the first trial, appellant was given sufficient opportunity to explore Eldridge's motive and benefit for testifying against him, as he elicited testimony that Eldridge faced a maximum sentence of 20 years' imprisonment on his charges and, pursuant to his plea deal, was receiving a sentence of probation only.

Finally, appellant argued that the trial court erred in allowing the State to introduce Eldridge's videotaped statement concerning appellant's confession to him. Specifically, he

argued that his general attack on Eldridge's veracity during cross-examination did not permit the State to rehabilitate Eldridge's credibility with a prior consistent statement. The Court again disagreed.

A witness's prior consistent statement is admissible to rehabilitate a witness if the prior consistent statement logically rebuts an attack made on the witness's credibility, and the witness testifies at the trial and is subject to cross-examination. A prior consistent statement is not permitted to rehabilitate a general attack on a witness's credibility, but may be offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive if the statement was made before the alleged recent fabrication or improper influence or motive arose. And here, the Court found, Eldridge's videotaped statement satisfied this standard. Eldridge was present and available for cross-examination at the first trial. Contrary to appellant's argument, he implicitly argued that Eldridge had a motive to lie. By asking Eldridge about agreeing to testify as part of his plea deal in order to avoid facing 20 years in prison, appellant was clearly suggesting that Eldridge's motivation for testifying was to receive the benefit of the State's plea offer. Eldridge's videotaped statements predated the alleged improper motive, as he gave the statements before the State made the plea offer. Therefore, the trial court did not err in admitting the videotaped statement.