Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 6, 2010

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THIS WEEK:

Mistrial; Double Jeopardy

Bryant v. State, A10A0789

Appellant was charged with multiple counts of child molestation of his step-sister. He appealed from the denial of his plea in bar based on double jeopardy. At trial, the victim's mother testified on cross-examination that the victim had seen a psychologist the day before trial. The mother also expressed her opinion that based on this visit, she believed the victim. Neither the prosecutor nor the defense attorney was aware of this psychologist before this testimony. The trial court asked defense counsel if he wanted a mistrial and granted counsel's request. Thereafter, the State reindicted, adding a rape charge and extending the charging period in which the crimes took place based on new information received from the mother. Appellant contended that the State goaded the defense into requesting a mistrial. Specifically, he contended that the State wanted a new trial so that it could extend the charging period and undermine his effort to present an alibi. He also contended that the State intentionally caused the mistrial by not instructing the victim's mother about proper testimony and by failing to keep abreast of the victim's counseling sessions.

The trial court denied the motion and the Court affirmed. A defendant who requests a mistrial generally waives any claim of double jeopardy. But when the prosecution goads the defense into seeking a mistrial to avoid reversal of the conviction because of prosecutorial or judicial error or to otherwise obtain a more favorable chance for a guilty verdict on retrial, the Double Jeopardy Clause will stand as a bar to retrial. Here, the Court stated "[p]erhaps… the prosecutor should have done more to prevent improper testimony and should have kept abreast of the victim's therapy sessions," but this conduct was not so blatant and so contrary to the most basic rules of prosecutorial procedure and conduct that it demanded a finding of intent. The prosecutor did not elicit the opinion statement, which came out on cross-examination; he did not specifically instruct the mother on appropriate testimony, but advised her to tell the truth; and he denied any knowledge that the victim had attended a therapy session the day before trial. Given these circumstances, the Court found, the evidence did not demand a finding that the prosecutor goaded the defense into moving for a mistrial or tried to terminate the trial.

Crimes Against the Elderly Act

Ware v. State, A10A0503

Appellant was convicted of numerous theft crimes and a violation of the Disabled

Adults and Elder Persons Protection Act, OCGA § 30-5-1et seq. He contended that the evidence was insufficient to prove he violated the Act under OCGA § 30-5-8 (a) (1), because the evidence reflected that the victim, an 80 year old, was not an "elder person" as defined by OCGA § 30-5-3 (7.1). The indictment alleged that on March 10, 2005, appellant "did unlawfully exploit [the victim], an elder person, by illegally and improperly using [the victim's] resources, to wit: real property . . . in violation of OCGA § 30-5-8 (a) (1), which provides that "[i]n addition to any other provision of law, the abuse, neglect, or exploitation of any disabled adult or elder person shall be unlawful." "Elder person" pursuant to OCGA § 30-5-3 (7.1) "means a person 65 years of age or older who is not a resident of a long-term care facility." For purposes of that statute, "disabled adult" includes a resident of a long-term care facility. OCGA § 30-5-8 (A) (2) (a).

Appellant argued that the victim was not an "elder person" as charged in the indictment, but presumably a "disabled adult," because at the time alleged in the indictment, the victim was at a long-term care facility. The evidence showed that after he was discharged from the hospital, the victim was transferred temporarily to long term care facility in February, 2005, and on March 2, 2005, to the hospital's nursing facility for continued care. The geriatric physician in charge of the victim's care testified that he was transferred to the nursing facility for observation and continued care to determine if he "would recover to [his] prior baseline. . . ." He testified that the stay could have lasted one week, two weeks or up to "the full hundred days" covered by Medicare. The victim was discharged from the facility and moved to Virginia on March 14, 2005. Under these circumstances, the victim was not a *resident* of a long-term care facility, but was an "elder person", and thus the evidence was sufficient.

Speedy Trial

Jones v. State, A10A1570

Appellant appealed from the denial of his statutory motion for discharge and acquittal under OCGA § 17-7-170, arguing that the trial court erred in holding that there was no jury impaneled and qualified to try him during the term of court in which he filed his demand for a speedy trial. The record showed that he was charged with DUI in state court. He filed his demand at 12:28 p.m. on Wednesday, November 1, 2006, two days before the end of the court's September term. When the case was called for trial during the state court's January term, appellant moved for discharge and acquittal, citing the State's failure to try him during either the September or November terms of court.

Appellant contends that the trial court erred in holding that there was no jury impaneled and qualified to try him during the term of court in which he filed his demand for a speedy trial. The record showed that while jurors were available up until 11:45 a.m. on November 1, they were not available by that afternoon, when appellant filed his motion. Although there were two groups of potential jurors who had been summoned for Thursday, November 2, only one group was told to report, based upon the number of jurors requested by judges as of the close of business on November 1. Of the 71 jurors summoned and told to report for November 2, only 37 came to court. Thirty-two of those jurors were called to court rooms for other trials, leaving only five jurors available for any previously unscheduled trial. And, because the county does not call jurors on Fridays, no jurors had been summoned for Friday, November 3.

The Court found that the jury clerk's office closes at 4:30 p.m. and, at that time, the office leaves a recorded message instructing jurors summoned for the next day whether they are to appear. To have the jury clerk call in the second group of jurors summoned for November 2, therefore, either the prosecutor or the trial court needed to be aware of appellant's speedy trial request sometime before 4:30 p.m. The record showed that the demand was filed on Nov. 1, but no evidence that the judge or the prosecutor were aware of the demand with sufficient time to act upon it. The burden of proof in such regard was on appellant. "To hold otherwise would allow a defendant to trigger the running of the time period for a statutory speedy trial demand by serving that demand at 4:25 p.m. on the next to last day of a court term. The purpose of OCGA § 17-7-170, however, is not to serve as a tactical tool for defense counsel. Rather, its purpose is 'to prevent the uncertainty, emotional stress, and the economic strain of a pending prosecution indefinitely' while at the same time 'afford[ing] the State a reasonable time frame in which to prepare and try its case against the accused.'" Thus, the Court rejected appellant's argument that the mere fact that he served the trial judge and prosecutor with his speedy trial demand on November 1 supported the conclusion that the State could have requested jurors for the next day. And given that the minimum number of jurors for a criminal trial in state court is six, there were not sufficient jurors impaneled and available to try appellant that day. Therefore, the trial court did not err in denying appellant's motion.

Burglary

Keathley v. State, A10A1597

Appellant was convicted of burglary and harassing phone calls. He contended that the evidence was insufficient to support his conviction. The Court stated that it was "constrained to agree." The evidence showed that appellant and the victim were married, but separated. Appellant went to the victim's separate residence, broke in, destroyed some property and stole numerous items belonging to his estranged spouse. Citing *State v. Kennedy*, 266 Ga. 195, 195-196 (1996) and *Calloway v. State*, 176 Ga. App. 674, 677 (4) (1985), the Court held that burglary involves entry with intent to commit a felony or theft. OCGA § 16-7-1. The indictment charged the latter. The object of the theft must be "property of another[.]" OCGA § 16-8-2. By definition, "property of another" under Georgia law excludes property belonging to the spouse of an accused or to them jointly. OCGA § 16-8-1. Accordingly, if the defendant and the victim were married at the time of the entry, the defendant could not have had the "intent to commit a theft" alleged in the burglary count. Thus, our theft statutes do not include the unauthorized taking of the property of one's spouse or the property owned jointly by the spouses. OCGA § 16-8-1. Therefore, if a married defendant enters the property of his or her estranged spouse, without authority, and with the intent to take property belonging to the estranged spouse, the defendant has not formed the intent to commit theft, and accordingly cannot be guilty of burglary. The Court noted that while the *Kennedy* Court in 1996 invited the legislature to change the law, it has not chosen to do so.

Theft By Conversion

State v. Benton, A10A1489

The State appealed after the trial court rejected Benton's guilty plea and dismissed the

accusation. The record showed that Benton was charged with theft by conversion in that "after having lawfully obtained property, to wit: [a] 1991 Toyota pickup truck, with a value in excess of $100.00, under an agreement to make a specified application of said vehicle, did knowingly convert said property to [his] own use in violation of such agreement by failing to pay as directed by the agreement and reporting the property stolen[.]" As a basis for the plea, the prosecutor told the court that Benton bought the truck from his employer, never made a payment and refused his employer's demand that he return the truck. The trial court rejected the plea, stating that the State had failed to identify any legal obligation to make a specified disposition of the truck and, therefore, the State was seeking to impose criminal sanctions for Benton's failure to pay a debt, which is forbidden by Georgia's Constitution.

The Court held that a security interest in a motor vehicle does not arise merely from the fact that a buyer agrees to make periodic payments after taking possession. To prove that Benton was under a legal obligation to make a specified disposition of the truck, the State was required to prove that Benton *explicitly* agreed to return the truck to his employer if he could not make the payments. The prosecutor's recitation of the expected evidence, however, failed to show that when Benton obtained the pickup truck from the seller, he explicitly agreed to return the truck to the seller if he failed to pay as agreed. Therefore, the trial court was correct in rejecting the plea for lack of a factual basis. However, "[a]lthough the State failed to satisfy the trial court that there was a factual basis for a guilty plea, and the trial court may have doubted that the State would ultimately be able to carry its burden of proving Benton's guilt beyond a reasonable doubt, the court abridged the State's right to prosecute in dismissing the accusation when the State had never been put to its proof. The case was reversed to the extent that it dismissed the accusation.

Mistake of Fact vs. Law; Similar Transactions

Duvall v. State, A10A1767

Appellant was convicted of possession of a controlled substance and possession of drugs not in its original container. He challenged the sufficiency of the evidence, arguing that the State failed to prove that he knew that the drugs were a controlled substance. The evidence showed that when appellant was arrested, he had three sleeping pills in his pocket. He testified that he willingly received them from his aunt (who had a prescription for them) but he believed they were over-the-counter medication. The Court first held that it is true that as with any crime (other than those involving criminal negligence), the State must show the defendant acted with criminal intent. However, the fact that appellant was ignorant of the fact that he was violating the law does not relieve him of criminal intent if he intended to do the act which the legislature has prohibited. Since he willingly possessed the drugs, the evidence was sufficient. His sole defense that he did not know that the pills were a controlled substance was not a valid defense, as the question of whether the pills, which contained Zolpidem, were a controlled substance was a question of law governed by statute.

The Court also held that the trial court did not err in refusing to give his requested instruction regarding mistake of fact under OCGA § 16-3-5. The only alleged "mistake of fact" was that he did not know that the pills were a controlled substance, which was a mistake of law. The failure to give a charge on mistake of fact is not error where the evidence shows that a party has made a mistake of law.

Appellant also argued that the trial court erred in allowing the State to present similar transaction evidence. The State presented evidence that eleven years earlier, appellant fled from a vehicle in which a small bag of cocaine was found. Appellant later pled to the charge of possession of cocaine. The Court agreed that the evidence was inadmissible, finding no similarity between appellant's possession of a small package of cocaine while in a vehicle and his receiving three loose prescription sleeping pills from his aunt some eleven years later. However, given that the evidence against him was overwhelming, the admission was harmless error.

Expert Witnesses

Frazier v. State, A10A0304

Appellant was convicted of armed robbery. He argued that the trial court erred in excluding the testimony of his expert witness on eyewitness identification testimony. A divided Court upheld the trial court. Admission of expert testimony regarding eyewitness identification is in the discretion of the trial court. Where eyewitness identification of the defendant is a key element of the State's case and there is no substantial corroboration of that identification by other evidence, trial courts may not exclude expert testimony without carefully weighing whether the evidence would assist the jury in assessing the reliability of eyewitness testimony and whether expert eyewitness testimony is the only effective way to reveal any weakness in an eyewitness identification.

Here, the Court found, the record reflected substantial evidence corroborating the victim's identification of appellant as the gunman. The victim called police immediately after the armed robbery, identifying to police the male gender of her attackers, their minority race, their approximate ages (16 to 18 years old), their approximate relative heights, their shirts (the gunman wore a black long-sleeve t-shirt with something in the middle of the shirt and the lookout wore a similarly-marked black short-sleeve t-shirt), the hairstyle of the gunman (short), the hairstyle of the lookout ("twisties"), the pants worn by the men (the lookout wore jean shorts and the gunman wore jean pants), and the long-barreled gun used by the gunman. She further gave the location where she was robbed and the direction in which the attackers were traveling on foot when they left her. Therefore, the trial court did not abuse its discretion in excluding the expert testimony on eyewitness identification.

Possession by a Convicted Felon; Jury Charges

Mubarak v. State, A10A0194

Appellant was convicted of aggravated assault, aggravated battery, possession of a firearm during the commission of a felony, and by bifurcated trial, possession of a firearm by a convicted felon. He contended that the evidence was insufficient to prove possession by a convicted felon. The Court agreed and reversed. At trial, the State tendered an exhibit which showed a "Derrick Beck" had been convicted of armed robbery. The assistant district attorney stated, "Judge, this is State's exhibit number 26. State's certified copy of the defendant's conviction for armed robbery." However, nothing was presented to the jury to establish that Derrick Beck was appellant, Rauf Mubarak. Two years after the verdict and sentence, and after his

motion for new trial was argued, appellant stipulated that Derrick Beck changed his name to Ra'uf Abdul-Nafi Mubarak.

The Court held that in a prosecution under OCGA § 16-11-133, proof of a prior felony is an absolute prerequisite to obtaining any conviction. Here, no evidence was presented at trial that "Beck" was appellant. The stipulation after trial does not change the fact that the evidence at trial was insufficient. Therefore, the conviction must be reversed.

Appellant also contended that the trial court erred in defining "maliciously" for the jury. The record showed that the jury sent out a note asking for a definition of the term "maliciously." The trial court instructed the jury using the definition from Black's Law Dictionary, which defines "malicious," as "substantially certain to cause injury without just cause or excuse." Appellant objected and requested that the jury either not be given a definition or that the court give the definition used in the homicide statute, that "defined malicious as an abandoned and malignant heart or with ill will or ill intent." Pretermitting whether the use of the definition of "maliciously" from Black's Law Dictionary was error, the Court, looking at the entirety of the jury instructions, found that no harm was committed, as the record reflected that the trial court charged the jury quite extensively on the element of intent as it related to the crimes charged and properly advised the jury of the State's requisite burden of proof. Thus, the additional charge on the definition of maliciously, did not, in the context of the charge as a whole, prejudice appellant, and thus did not constitute reversible error.

Hearsay

Hart v. State, A10A0337

Appellant was convicted of aggravated assault, by shooting a customer; armed robbery of a store clerk; aggravated assault, by pointing the handgun at the store clerk and shooting in her direction; possession of a firearm during the commission of a felony; and possession of a firearm by a convicted felon. The evidence showed that a masked gunman committed armed robbery at a Bay Station, and then took off on foot. Evidence showed that he then went to a trailer located in a trailer park near the Bay Station. Evidence was developed that eventually lead to appellant's arrest.

Appellant contended that the trial court erred by allowing one of the two residents of the trailer to give hearsay testimony. The resident testified that, when he arrived home on the night in question, a visitor who was already at his trailer, Latrell Gaines, warned him to be careful because appellant and someone known as "Swick" had just robbed the Bay Station store. Appellant argued that the resident's testimony about Gaines's out-of-court statement was not only impermissible hearsay, but extremely prejudicial because it was the only direct "evidence" that he was the perpetrator of the underlying crimes. The State argued that the trial court properly admitted the trailer resident's testimony as a prior inconsistent statement by Gaines. The evidence showed that earlier during the trial, the State asked Gaines if he remembered making a statement about appellant. When the witness said he did not remember, the State specifically asked if he remembered "telling them to be careful because [appellant] had just robbed the Bay Station?" Gaines stated "No."

The State argued that because Gaines gave testimony it had not expected, it was entitled to impeach him. OCGA § 24-9-83 provides that "[a] witness may be impeached by contradictory statements previously made by him as to matters relevant to his testimony and to the case." But, the Court determined, OCGA § 24-9-83 was not properly invoked because the proponent of the evidence (the State) failed to show that the witness it sought to impeach (Gaines) had any personal knowledge of the truth of his alleged previous out-of-court statement (that appellant had committed the robbery at the Bay Station store). The record did not show how Gaines acquired his information; he could merely have been repeating rumors, or he might have acquired information second or third hand. It would have been error to allow Gaines personally to testify over objection about a crime of which he had neither personal knowledge nor information directly from . . . the defendant himself. Therefore, the testimony of the resident of the trailer was no more admissible than Gaines's would have been, and the trial court erred by admitting it in evidence over objection. Moreover, because this was the only direct "evidence" identifying appellant as the masked robber and shooter, the Court could not conclude that it was highly probable that the error did not contribute to the judgment. Consequently, appellant's convictions were reversed.