Supreme Court of Georgia
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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Wednesday, May 8, 2019

10:00 A.M. Session

PENNINGTON V. THE STATE (S18G1495)
MCCLURE V. THE STATE (S18G1599)

The appeals in these two cases involve different crimes but raise the same legal issue. In both cases, the men who were convicted say the Georgia Court of Appeals was wrong to uphold their convictions, arguing the trial courts erred by failing to instruct jurors about an "affirmative defense" before they began deliberating. An affirmative defense is a set of facts that justifies or excuses otherwise wrongful actions and if proven true, mitigates the legal consequences of the defendant's otherwise illegal conduct. An example of an affirmative defense is self-defense. At issue here is whether a defendant is entitled to an affirmative defense if he does not admit to having committed the offense.

FACTS PENNINGTON: Following a jury trial, **Charles Lee Pennington, Jr.**, was found guilty in **Richmond County** of trafficking in methamphetamine and possession with the intent to distribute a controlled substance near a school. Under Georgia Code § 16-13-32.4, "It shall be unlawful for any person to manufacture, distribute, dispense or possess with intent to distribute a controlled substance…within 1,000 feet of any real property owned by or leased to any public or private elementary school…." The evidence produced by the State showed that on Sept. 25, 2014, law enforcement officers, based on a tip, went to a shed that Pennington was

using as his residence; the shed was less than 100 feet from an elementary school. With Pennington's consent, the officers searched the shed, which the State contended appeared to be an active meth lab. Pennington showed the officers a vessel of a type used for manufacturing meth. The officers also found numerous empty, unused plastic baggies of a type used in the distribution or storage of drugs, a used plastic baggie containing methamphetamine residue, and a glass pipe with meth residue on it.

Following his convictions, Pennington appealed to the Georgia Court of Appeals, the state's intermediate appellate court. Among other things, Pennington argued that the trial court erred by failing to instruct the jury on the affirmative defense found in Georgia Code § 16-13-32.4 (g), which states: "It is an affirmative defense to prosecution for a violation of this Code section that the prohibited conduct took place entirely within a private residence, that no person 17 years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct was not carried on for purposes of financial gain." In its ruling, the Court of Appeals quoted the Georgia Supreme Court's 2015 ruling in *McLean v. State*, which states that "to assert an affirmative defense, a defendant must admit the act, or he is not entitled to a charge on that defense." The appellate court ruled that, "Because Pennington did not admit that he possessed with intent to distribute methamphetamine near a school, he was not entitled to the affirmative defense set forth in OCGA § 16-13-32.4 (g)." Pennington now appeals to the Georgia Supreme Court, which agreed to review the case to determine what, if anything, a criminal defendant must admit to raise an affirmative defense.

ARGUMENTS PENNINGTON: Pennington's attorney argues that based on Georgia Code § 16-1-3 (1), the defendant bears the burden of proof for an affirmative defense, "unless the state's evidence raises the issue invoking the alleged defense." The Court of Appeals erred in affirming the trial court's ruling not to instruct the jury on the affirmative defense because the State's evidence fairly raised the issue invoking the alleged defense. Specifically, investigators found only a minimal amount of meth in Pennington's private residence (residue in the vessel and in the pipe); they found no evidence that Pennington possessed the drug outside his private evidence or that anyone 17 or younger was in his private residence at the time; and they found no digital scales, cash, or finished meth product – all of which are associated with the distribution of drugs. Under the Georgia Supreme Court's 2011 decision in *McNeal v. State*, a jury instruction on a subject is authorized if there is at least slight evidence supporting the theory of the charge.

The State, represented by the Augusta District Attorney's office, argues that "the requirement that the defendant 'admit the doing of the act' should be abolished if other evidence properly raises the affirmative defense." Requiring the defendant to admit to the act "while simultaneously asking the jury to excuse such criminal conduct, in some circumstances, may be relaxed or even eliminated – so long as either the state's or the defense evidence properly raises the affirmative defense," the State argues. Even if the evidence supporting a defense is incomplete, giving a jury instruction on the defense makes it less likely that a jury will reach the wrong result. However, "the State would urge this Honorable Court to adopt a rule that a defendant cannot raise an affirmative defense by presenting his or her own self-serving out-of-court statement unless such statements fall into a recognized hearsay exception. Otherwise, the admission of such statements could deprive the state of the opportunity to cross-examine the defendant regarding the statement. Although it is unclear whether the prohibition against self-serving evidence survives the adoption of the 'new' Evidence Code, several recent decisions

have maintained that the State has a right to confront a defendant when the defendant takes the stand. Whether a defendant's self-serving, out-of-court statement is hearsay or original evidence merely reflecting on the defendant's state-of-mind, introduction of such a statement would unfairly permit a defendant to 'testify' without subjecting himself or herself to cross-examination. The State submits that the admission of such statements reduces the State's chances at a fair trial, as it permits the jury to consider the defendant's unsworn statement, despite the fact that it is untested by cross-examination." The State also argues that the multiple small plastic baggies found in Pennington's shed suggests he was distributing the drug for financial gain.
Attorneys for Appellant (Pennington): Jeffrey Peil
Attorneys for Appellee (State): Natalie Paine, District Attorney, Joshua, Asst. D.A.

FACTS MCCLURE: Following a jury trial, **Carlos Richard McClure** was found guilty in **Spalding County** of two counts of aggravated assault and two counts of reckless conduct. The State's evidence showed that on the night of April 2, 2015, the two victims, a man and a woman, drove to McClure's residence to pick up a friend. When they arrived, their friend was arguing with McClure outside, and when she got into the car, she was upset. The female victim saw McClure disappear and then come back carrying something. It was dark outside, but the female victim told the male victim that she thought McClure was carrying a long gun similar to something used for hunting. When McClure pointed the barrel of the gun toward the victims, they immediately drove away and called 911. They met the responding officer at a nearby food store before the officer went to McClure's residence to speak with him. McClure told the officer that he did not point a gun at anyone. He showed the officer a gun that looked like a small caliber rifle but that was actually a BB gun. At trial, McClure testified that during the incident, he had grabbed the BB gun to use as a club because the woman who was being picked up had threatened to have the male victim "get [McClure]." However, McClure denied ever pointing the gun, maintaining that he had the gun over his shoulder throughout the entire incident.

Following his convictions, McClure appealed to the Court of Appeals. Among other things, McClure contended that the trial court erred by failing to instruct the jury on the affirmative defense of "justification in defense of self" and "justification in defense of habitation" – or one's home. The Court of Appeals reasoned that these defenses "require a defendant to admit all of the elements of the crime except intent." "Thus, to assert a defense of justification, like self-defense, a defendant must admit the act, or he is not entitled to a charge on that defense," the Court of Appeals ruled, quoting its 2009 decision in *Lightning v. State.* "McClure did not admit to aiming the BB rifle at the victims, an element of aggravated assault as charged. Therefore, the trial court did not err in refusing to give a charge on the affirmative defense of justification," the Court of Appeals ruled. McClure now appeals to the state Supreme Court.

ARGUMENTS MCCLURE: McClure's attorney argues that the long-standing rule in this Court and many others is that a defendant is entitled to a jury instruction as long as slight evidence supports the instruction, and requiring a defendant to admit the crime as charged in the indictment to obtain a jury instruction for an affirmative defense upends this long-standing principle. Georgia Code § 16-1-3 (1), by its plain language, does not require any specific admission from the defendant. If some form of admission were required, an admission to all of the elements of the offense is overly restrictive and does not logically apply to all affirmative defenses. If the defendant makes an admission, it may be for a limited purpose, and inconsistent

defenses are allowed in the civil context and particularly in the criminal context, the attorney argues. The attorney also argues that the Court of Appeals in its ruling has improperly expanded the affirmative defense rule as recited in *McClean* by requiring that a defendant admit to the act as specifically charged in the indictment in order to receive a jury charge on an affirmative defense.

The State, represented by the Spalding County District Attorney's office, argues that to raise an affirmative defense, "a defendant has to admit the offense, which may require the defendant to testify depending on the evidence presented to the jury. This also requires that the defendant's admission of the offense be for all purposes, rather than just a limited purpose," the State argues in briefs. "To suggest that a defendant is never required to make an admission on the stand is an incorrect application of the statute and the common law. It depends on the facts presented in evidence whether an actual admission by the defendant is required." If there is no evidence supporting the affirmative defense presented in the State's case (as in McClure's case, the State contends) and there is no evidence presented by the defense, "then the defendant is required to make an admission to receive an affirmative defense jury charge." "The defendant admitting the act is an acknowledgement that the facts are true and is a necessary step before one can make an excuse justifying the act," the State argues. Jury instructions must be tailored to the indictment and adjusted to the evidence admitted. A jury instruction on an affirmative defense may be supported by evidence from the State's case, evidence such as a defendant's statements (an admission), or evidence such as other witness testimony. While a defendant may not necessarily have to take the stand and testify, by using an affirmative defense, he is admitting through his defense that he committed the act. In this case, because McClure did not admit to committing any act that constituted aggravated assault, "he failed to establish the evidentiary foundation for an affirmative defense jury charge," the State contends.

Attorney for Appellant (McClure): Cara Clark

Attorneys for Appellee (State): Benjamin Coker, District Attorney, E. Morgan Kendrick, Asst. D.A.

GEORGIACARRY.ORG., INC. ET AL. V. ATLANTA BOTANICAL GARDEN, INC. (S18G1149)

A man is appealing rulings by the Georgia Court of Appeals and **Fulton County** Superior Court, both of which concluded that the Atlanta Botanical Garden is located on private property and under the law, has the right to ban people from carrying guns while on the premises. This is the second time this case has been before the state's highest court.

FACTS: Atlanta Botanical Garden, Inc. is a private, non-profit corporation that operates a botanical garden complex on property it leases from the City of Atlanta. Phillip Evans is a member of the Garden who lives in Gwinnett County. He also is a member of **GeorgiaCarry.Org**, a gun-rights organization, and he holds a Georgia weapons carry license. In October 2014, Evans twice visited the Garden with his wife and children, openly carrying a handgun in a holster on his waistband. No Garden employee objected to him doing so on his first visit to the Garden, but during his second visit, a Garden employee stopped him and informed him that weapons were prohibited on the Garden premises for everyone other than law enforcement officers. A Garden security officer eventually detained Evans, and he was escorted from the Garden by an officer from the Atlanta Police Department.

In November 2014, Evans and GeorgiaCarry.Org sued Atlanta Botanical Garden, Inc. in Fulton County Superior Court, seeking a declaration from the court that the Garden could not prohibit people from carrying guns on the property and an injunction preventing the weapons ban. They argued that Georgia Code § 16-11-127 (c) authorized individuals to carry a weapon in the Garden. The statute, as amended by the Georgia legislature in 2014, states that, "private property owners or persons in control of private property through a lease…shall have the right to exclude or eject a person who is in possession of a weapon…." The legislature amended the statute by adding the word "private" three times. The trial court dismissed the lawsuit after concluding that the issues presented in the lawsuit were not appropriate for the relief sought. Evans and GeorgiaCarry.Org appealed, and in 2016, this Court reversed the trial court ruling in part and sent it back to Fulton County Superior Court. On remand, the trial court again ruled in favor of the Garden, finding that the Garden's property was considered private under Georgia law and that the Garden could therefore exclude weapons from its premises. Evans and GeorgiaCarry.Org ultimately appealed that ruling to the Court of Appeals, arguing that the trial court erred in its determination that the property the Garden leases from the City of Atlanta is private property. But the Court of Appeals upheld the trial court's ruling. Evans and GeorgiaCarry.Org now again appeal to the state Supreme Court, which has agreed to review the case to determine whether Georgia Code § 16-11-127 (c) permits a private organization that leases property owned by a municipality to prohibit the carrying of firearms on the leased premises.

ARGUMENTS: The attorney for Evans and GeorgiaCarry.Org argues the trial court erred in its interpretation of the statute, § 16-11-127 (c), improperly applying tax-law principles in a non-tax context and ignoring the language and historical development of the statute. The trial court and appellate court erred in concluding that the property leased by the Garden from the City was "private property" within the meaning of § 16-11-127 (c). Both courts ignored the fact that the City lacks the power to prohibit the carrying of firearms on property that it owns and that it could not transfer such a power to the Garden through a lease. The meaning of "private property" in this statute is the core issue in this case. The legislature's purpose for making the 2014 changes to the statute was to prohibit private entities that lease property from a public entity from regulating the carrying of firearms on the leased property. The superior court and the Court of Appeals each ignored the distinction drawn by the General Assembly in this statute between public and private property. Had the legislature intended the meaning found by the lower courts, it would not have needed to insert the word "private" into the statute multiple times as it did in 2014 or made a distinction between "private property owners" and "persons in control of private property through a lease." The only way to interpret the two phrases so that they are not redundant is to conclude that "a private property owner" does not include a "person in control of private property through a lease" when the lessee is an individual or private entity. The 2014 changes to OCGA § 16-11-127 (c) had to mean *something*, the attorney argues in briefs, as a legislature's addition of language to an existing statute is presumed to make some change to the existing law. The only way to give effect to each word in the statute, including each instance in which the word "private" was added, is to conclude that the General Assembly intended to remove the right to regulate and prohibit the carrying of firearms from those who choose to lease property from public entities.

Attorneys for the Garden argue that under the Georgia Supreme Court's 1963 decision in *Delta Air Lines Inc. v. Coleman*, when a municipality conveys to a private organization a leasehold interest in land, it completely disposes of a distinct estate in its land, and the private organization holds the property as a private owner. Acting against this legal backdrop, when the General Assembly passed a new law in 2014 expanding the places where firearms could be legally carried by license holders, it ensured that the new law did not trump the rights of landowners, as Georgia Code § 16-11-127 (c) gave private property owners and persons in legal control of private property through a lease the right to exclude persons in possession of firearms from their property, the attorneys argue. In doing so, it acted in the shadow of this Court's prior interpretations of the term "private property" – namely that, for the duration of a lease, public property becomes private property when leased to a private entity. Evans and GeorgiaCarry.Org have cited no case law that contradicts the ruling in *Delta Air Lines Inc. v. Coleman*. Consequently, § 16-11-127 (c) permits a private organization such as the Garden, which leases property from a municipality, to prohibit the carrying of firearms on the leased premises. The Garden's attorneys urge this Court to avoid an interpretation of § 16-11-127 (c) that places its constitutionality in doubt. This case not only implicates the rights of gun owners but also of those who hold private property interests. Because denying property holders the right to prohibit the carrying of firearms on their property may implicate their rights under the Takings Clauses and Due Process Clauses of both the United States and Georgia constitutions, this Court should avoid an interpretation of the statute that would limit those rights. In addition to infringing on property owners' rights to exclude others from the property, if the Court accepts the interpretation of the statute offered by Evans and GeorgiaCarry.Org, there will be a significant adverse economic impact on the Garden and other entities that lease property from public entities, the Garden's attorneys contend.

Attorney for Appellants (GeorgiaCarry.Org): John Monroe
Attorneys for Appellee (Garden): James Grant

2:00 P.M. Session

DERRICO V. THE STATE (S19A0665)

A man accused of road rage is appealing his convictions for aggressive driving, reckless conduct, and failure to signal lane change. He argues that the statutes under which he was charged are unconstitutional.

FACTS: On Aug. 29, 2014, a **Forsyth County** Sheriff's Deputy responded to a 911 call from a man who said he had just witnessed a road rage incident that had resulted in a car wreck on Georgia 400 going north. While on the scene, the Deputy interviewed both drivers. Felix Ambrosetti, who was driving a blue Honda, said he was traveling northbound on Georgia 400 when he entered the highway from a ramp and moved from the right to the left lane. Apparently his lane change upset **Mark Derrico**, Ambrosetti told the Deputy, because the man moved into the right lane next to Ambrosetti, then deliberately struck Ambrosetti's car. Disputing that account, Derrico, who was driving a Nissan, told the Deputy that he was cut off by Ambrosetti and simply went around the Honda, but that Ambrosetti pulled into the median and struck his car when he returned to the left lane.

During the trial, Derrico, Ambrosetti, and the 911 caller – Timothy Inglis – all testified. Inglis said that while he was traveling in the left lane on Georgia 400, he observed Derrico's Nissan attempt to overtake Ambrosetti's Honda and in doing so, the Nissan struck the Honda on its passenger side. He said the Nissan then pulled back behind the Honda before entering the left-hand emergency lane and striking the Honda on its driver side. Inglis testified that he felt the driver of the Nissan had become "annoyed" when the Honda merged into traffic from the entrance ramp onto 400 and "overreacted" to the car merging in front of him.

Ambrosetti gave a similar account, testifying that he had entered 400 at exit 12 and merged over until he got into the far left lane. He noticed a Nissan on his tail and tapped his brakes, but the Nissan did not back off. As the Nissan passed him on his right, it moved left into Ambrosetti's lane, forcing him to swerve into the left emergency lane to avoid impact. After he re-entered his lane of travel, Derrico hit Ambrosetti's Honda on the passenger side. Derrico then fell behind Ambrosetti's car before entering the left emergency lane, pulling beside Ambrosetti and striking his vehicle on the driver side.

Derrico, however, testified that he was traveling north when Ambrosetti's Honda drove across the median from the entrance ramp and across lanes to the far-left lane in front of him, almost causing Derrico to make an emergency stop. Derrico said he then attempted to pull into the right lane and pass the Honda. After passing Ambrosetti, Derrico said Ambrosetti began blowing his horn and flashing his lights, causing Derrico to believe he would be struck from behind. Derrico said the Honda then pulled into the median on the left side of his vehicle and smashed his driver side, breaking his mirror. Derrico further testified that after he slowed down to pull off into the median, the Honda dropped back behind him before striking the passenger side rear of his vehicle.

Following a 2015 trial, the jury found Derrico guilty of aggressive driving, reckless conduct, and failure to signal lane change. Derrico now appeals to the state Supreme Court.

ARGUMENTS: Derrico's attorney argues the trial court made a number of errors, including by denying his motion to dismiss the charges of aggressive driving and reckless conduct as unconstitutionally vague. "A law may be unconstitutionally vague if it fails to provide the kind of notice that will enable ordinary people to conform their conduct to the law," the attorney argues in briefs, quoting the Georgia Supreme Court's 2009 decision in *Raber v. The State*. "Derrico was placed in an impossible situation and did not have clear notice of what the aggressive driving statute prohibited him from doing. He was also arbitrarily selected for prosecution instead of Ambrosetti, who even alluded to his own guilt." The second error was that the evidence was insufficient to prove Derrico's guilt beyond a reasonable doubt. Here, "no rational trier of fact could have found guilt beyond a reasonable doubt in this case on any of its counts," the attorney argues. The trial court also erred in failing to allow in evidence of Ambrosetti's driving history, "which would have supported Defendant's theory of defense that it was in fact Ambrosetti who was driving dangerously." And the trial court failed to direct a verdict of acquittal after the close of the State's case, and it failed to grant Derrico's motion requesting a new trial, his attorney argues.

The Solicitor General, representing the State, argues that the statutes governing aggressive driving and reckless conduct are not unconstitutionally vague. Derrico had argued they were because he was unable to know what conduct was prohibited as alleged. "Moving into another's lane of travel and intentionally striking their vehicle for the purpose of intimidating

that person is obviously prohibited conduct," the State argues in briefs. Derrico possessed fair notice that his actions were forbidden, therefore Georgia Code § 40-6-397 and § 16-5-60 should not be held unconstitutional. Second, the trial court did not err in finding sufficient evidence to support Derrico's convictions. "While Petitioner asserts his account of the incident did not support his conviction, testimony from Ambrosetti and Inglis proved that Petitioner intentionally struck Ambrosetti's vehicle twice," the State argues. The trial court did not abuse its discretion in deeming portions of the victim's driving history irrelevant or by limiting cross-examination. Based on a Georgia statute, evidence deemed irrelevant by the trial court is not admissible at trial. Furthermore, "while the right to a cross-examination, thorough and sifting, shall belong to every party as to the witnesses called against him, the scope of the cross-examination rests largely within the discretion of the trial judge to control this right within reasonable bounds…." Also, the trial court did not err in denying Derrico's motion for a directed verdict of acquittal as the record contains competent evidence to support the elements of the prosecution's case. And the trial court did not abuse its discretion in denying Derrico's motion for new trial, the State contends.

Attorney for Appellant (Derrico): Andrew Mosley, II
Attorneys for Appellee (State): William Finch, Solicitor General, Jenna Murphy, Asst. S.G.

DADDARIO V. THE STATE (S19A0684)

A man convicted of having sex with his daughter and impregnating her when she was 14 years old is appealing his conviction for aggravated child molestation, arguing that pregnancy does not qualify as the "physical injury" required to prove the crime.

FACTS: In February 2016, a **Hall County** grand jury indicted **Lawrence Daddario** with aggravated child molestation, incest, statutory rape and two counts of cruelty to children in the second degree. The primary allegation was that Daddario had sex with his 14-year-old daughter, "S.D.," and she became pregnant, giving birth to a boy when she was 15. The indictment stated Daddario had committed aggravated child molestation by engaging in sexual intercourse with S.D., "resulting in physical injury to said child by impregnating her causing said child to endure childbirth…." Georgia Code § 16-6-4 (c) states that, "A person commits the offense of aggravated child molestation when such person commits an offense of child molestation which act physically injures the child or involves an act of sodomy." Prior to trial, Daddario's attorney filed a motion to dismiss the aggravated child molestation count, arguing that the description of the "physical injury" in the indictment did not fit the statutory definition in Georgia Code § 16-6-4 (c). The defense also argued that the statute was "unconstitutionally vague" as applied to Daddario. The trial court denied the motion, ruling that the statute was not unconstitutionally vague and that the court was bound by the 2015 decision by the Georgia Court of Appeals in *Kendrick v. State*, which stated that a defendant who impregnates his victim has physically injured her.

The case proceeded to trial in August 2016, where S.D., then 16, testified that her father had been having sex with her daily for what seemed like her entire life. After she missed several periods in 2014 when she was 14, she told her father and he made an appointment with a local pregnancy center. She told the people at the center, and later police, that someone named "Ricky" was the father. She later said she had lied because she loved her father and did not want him to go to jail. She said she worried if she lost him, she would have no one. She also relayed

that her father had threatened to hurt and even kill her if she told anyone that he was the father of her baby. S.D. was placed in a foster care home where she delivered a baby boy while on a recliner at the house. S.D. also testified that her father made her have sex with her older brother, M.D., who was 17 at the time of their father's trial. She said she did not have sex with her younger brother, J.D., who was 14 at the time of the trial. Both boys had physical impairments and difficulty walking when they came into the custody of the Department of Family and Children Services. According to the Georgia Bureau of Investigation, DNA samples were taken from S.D., her brothers, Daddario, and the baby. The GBI's test determined that the probability that her younger brother, J.D., was the father of the baby was 99.9999 percent, and the probability that Daddario was the father was 99.9998 percent. The GBI recommended further testing by a private lab used by the State. According to that lab, the ultimate conclusion from the testing was that J.D. was excluded as the father, and the probability that Daddario was the father was 99.99998 percent.

Following the trial, the jury found Daddario guilty on all counts, and he was sentenced to life plus 20 years in prison. Daddario now appeals to the Georgia Supreme Court.

ARGUMENTS: Daddario's attorneys argue that causing pregnancy does not constitute aggravated child molestation, and the Court of Appeals "went a step too far" in ruling in *Kendrick* that a defendant who impregnates his victim has physically injured her. "This Court should overrule *Kendrick* and let the legislature decide whether causing pregnancy should result in significantly enhanced punishment," Daddario's attorneys from the Public Defender's office argue in briefs. "Our legislature has thus far remained silent on the issue." Even if pregnancy could constitute a "physical injury," the application of § 16-6-4 to this case is unconstitutionally vague, because the statute does not define "physical injury," and the *Kendrick* decision came out after Daddario allegedly committed the crime. Finally, the attorneys argue, the trial court erred by admitting Daddario's incriminating statements that he made to a Court Appointed Special Advocate (CASA), admitting that he had had sex with his daughter, because the CASA did not first read him his *Miranda* rights.

The State, represented by the District Attorney's office, argues that under *Kendrick*, causing pregnancy and childbirth satisfies the element of physical injury required to prove aggravated child molestation. "The plain language of the aggravated child molestation statute requiring injury is met when a child is impregnated during an act of child molestation," the State's attorneys argue in briefs. "The element of physical injury is satisfied by evidence that the child experienced pain." And childbirth causes pain. Daddario "not only had sex with his daughter, not only committed an immoral and indecent act, he also impregnated her; then he talked her out of having an abortion and caused her to give birth," the State argues. "The injury and pain associated with the pregnancy and birth is evidence supporting a different and additional element over and above that of child molestation." The State also argues that the legislature does not need to determine whether pregnancy subjects a person to the punishment for aggravated child molestation, as Daddario's attorneys contend. "As with many other statutes that don't define what type of specific injuries qualify, such as Cruelty to Children, Simple Assault, Simple Battery, Aggravated Battery, Aggravated Assault, etc., the method and type of injury that must be proven is left up to the courts to resolve…." "Statutes are not intended to outline every possible method of violating the statute and every possible scenario…." The State also points out that "no state in the nation, at least that the State is aware of or that either party has pointed out,

has ever determined through the courts or the legislature that pregnancy and childbirth is not an injury to a child." The aggravated child molestation statute is not unconstitutional as applied to Daddario's case, and the trial court properly concluded that Daddario's statements to a CASA volunteer were admissible because the volunteer was not a state actor. "*Miranda* warnings are required only when a person is interviewed by law enforcement while in custody," the State contends. "*Miranda* does not govern questioning by private citizens who are not acting at the behest of law enforcement."

Attorneys for Appellant (Daddario): H. Bradford Morris, Circuit Public Defender, Mathhew Leipold, Asst. P.D., Brett Willis, Asst. P.D.

Attorneys for Appellee (State): Lee Darragh, District Attorney, Wanda Vance, Asst. D.A.

THE STATE V. JACKSON (S19A0646)

The State is appealing a **Dougherty County** judge's dismissal of murder charges against a man on the ground that during the trial, the District Attorney made an improper statement in his closing argument.

FACTS: In April 2015, **Monquez Jackson** was indicted with his wife, Sade Britt, her brother Dwayne Britt, and Tomeka Porter for various crimes, including the murder of Anthony Westbrook. Jackson alone was charged with malice murder, while Sade and Dwayne Britt were charged with felony murder. Prior to Jackson's trial, his three co-defendants all entered into agreements with the State, with the Britts pleading guilty to less serious crimes in exchange for their testimony. The State agreed to dismiss all the charges against Porter if she testified. Sade Britt, Jackson's wife, testified at trial that Jackson shot Westbrook after the couple held him at gunpoint and she used his ATM card to steal money. Sade testified that her brother, Dwayne Britt, was present when she made the ATM withdrawals and nearby when Westbrook was shot. She said that Porter and Jackson dropped her off near Westbrook's van a few days later so she could attempt to clean the vehicle of any incriminating evidence. Dwayne Britt also testified for the State, although his testimony differed from his sister's in several respects. He said he was high on drugs that night and did not see Jackson with a gun. Porter, who stated in advance of trial that Sade Britt had confessed to killing Westbrook, never did testify.

The appeal in this case concerns the State's handling of Porter's failure to testify at Jackson's trial. The elected district attorney served as lead counsel for the State at the trial, which began on July 31, 2017. At trial, the defense made multiple hearsay objections as to statements allegedly made by Porter. During the direct testimony of the State's lead investigator, the State attempted to introduce prior statements by Porter, but a hearsay objection was sustained by the trial court. At that point, the District Attorney left open the possibility of calling Porter to the stand, but he never did so. After the close of evidence, the State made an oral motion seeking to preclude the defense from making any reference to Porter during its closing arguments, adding that the D.A. would say nothing about her other than that "the State elected not to call her." The trial court agreed with the defense that the defense could mention Porter to the extent that the State had mentioned her in its opening, by saying that the charges against Porter had been resolved and the State planned to call her to testify. In her closing argument, defense counsel noted that the State had not called Porter to testify, adding, "I wonder what she would have had to say." In his closing, the District Attorney stated the following: "Everything is not needed to be proven. Every witness doesn't need to be called. You have got direct evidence. There is other

evidence through testimony that has told you what happened. Even Tomeka Porter, all she could tell you is, 'Yeah, we went back to the car to clean it up.' You have got the evidence to support that already that that happened. That is corroborated. Tomeka Porter wasn't needed. All she can do is say, 'Yeah, I went back and I saw her clean up the car.'"

The defense attorney promptly objected on the basis that the D.A. was arguing facts not in evidence. The trial court agreed with the D.A. that his argument was a reasonable inference from Sade Britt's testimony, but the judge ruled that he would instruct the jury that it could not consider any suggestion about what Porter would have said had she testified. After a short recess, the defense moved for a mistrial based on prosecutorial misconduct. The trial judge granted the motion, saying a "curative" instruction to jurors would have been insufficient.

Jackson then filed a Plea of Double Jeopardy and a Motion to Dismiss, arguing that a retrial would constitute double jeopardy because the D.A.'s closing argument was an attempt to goad defense counsel into seeking a mistrial so the D.A. could retry the case. The trial court held a hearing on the motion, at which the D.A. testified that he "did not intentionally goad counsel into trying to ask for a mistrial" and in fact thought he was "winning the case." The trial court granted the defendant's motion, citing the D.A.'s "shifting and conflicting explanations" as to his closing argument and the "certainly not overwhelming" evidence presented against Jackson. The trial court also cited the D.A.'s considerable experience and noted he would have been well aware that his comments would lead to a mistrial, including the fact that he was the District Attorney when this Court in 2013 reversed an aggravated assault conviction after another prosecutor addressed matters outside of the record during closing argument. The State, represented by the District Attorney's office, now appeals to the state Supreme Court.

ARGUMENTS: The State argues that the trial court's order of a mistrial was erroneous because the comment at issue in the State's closing was an "invited response." Under the "invited response" doctrine, inappropriate comments by a prosecutor ordinarily do not amount to error if they are invited by the defense. Here, the comment at issue in the State's closing was in response to the defense comment in closing about the State's failure to call Porter to testify. The defendant has abandoned any argument to the contrary, the State contends. Also, there is no evidence in the record supporting the trial court's inference that the D.A. made the comment with the intent to trigger a mistrial. The D.A. opposed a mistrial immediately upon Jackson's motion. He specifically denied attempting to goad the defense into seeking a mistrial and denied ever having won or lost a case by such a tactic. The trial court noted no history on the part of the D.A. of intentionally terminating a trial in order to subvert the protections of the Double Jeopardy Clause, and there is no such example in his lengthy trial experience. Finally, the trial court applied the wrong legal standard, the State argues. Although the trial court focused on what it considered the egregious nature of the prosecutor's behavior, prosecutorial misconduct alone, absent proof of intent on the part of the prosecutor, is insufficient to bar a retrial. As this Court stated in its 2018 decision in *Yarbrough v. State,* "Unless a prosecutor was trying to abort the trial, his or her misconduct will not prohibit a retrial." And the Court ruled, "to determine whether the prosecutor intended to goad the defendant into moving for a mistrial, a trial court must make a finding of fact by inferring the existence or nonexistence of intent from objective facts and circumstances." Here, the D.A.'s intent in making the comment at issue was to gain a conviction, not a mistrial. This is evident from the State's argument on appeal, the case record and transcripts, and the D.A.'s exemplary history of service and reputation, the State contends.

Jackson's attorney argues the trial court's decision should be upheld. When the trial court sits as the fact finder, its resolution of factual issues must be upheld by the appellate court unless it is clearly erroneous. A trial court's findings of fact are not clearly erroneous if there is any evidence to support them, even where such findings are based on circumstantial evidence. Here, there are objective facts and circumstances from which the trial court was authorized to find that the prosecutor intended to cause a mistrial. For one, the prosecutor gave shifting explanations as to why he referred to Porter's statement in his summation to the jury. At trial, the D.A. claimed that Porter's involvement in the clean-up was clear from the indictment, that the comment was a reasonable inference from Sade Britt's testimony, that the comment wasn't prejudicial to the defense, and that he did not intend to "inject other testimony." On appeal, the State now asserts that the comment was an "invited response" and that there was no order prohibiting the comment. These inconsistent explanations can be reasonably construed as circumstantial evidence of a guilty state of mind, Jackson's attorney argues. Therefore, the trial court as fact finder is authorized to conclude that the prosecutor's testimony that he was not trying to cause a mistrial is not credible. The trial court also was authorized to infer that the prosecutor intended to cause a mistrial from the fact that the record establishes that the prosecutor is competent. The D.A. was well aware there was a high probability that his action would result in an immediate motion for mistrial. The record also indicates that the State stood to gain from aborting the trial. The trial court noted that defense counsel effectively pointed out the lack of physical and forensic evidence and highlighted the inconsistent, incredible, and uncorroborated testimony of two accomplices. Even the D.A. acknowledged that there was no physical evidence to connect Jackson to the victim's vehicle or the crime and that the police were unable to corroborate any of Sade Britt's statements regarding Jackson's involvement. He also acknowledged that the only witnesses who provided testimony about Jackson's involvement were co-defendant siblings Sade Britt and Dwayne Britt and that there were several instances during the trial where the testimony of Sade was opposed to that of Dwayne. "The trial court found that the District Attorney acted with specific and deliberate intent to subvert the protections afforded by the Double Jeopardy Clause by goading the defendant into moving for a mistrial," Jackson's attorney argues, and "its conclusion concerning the intent of the prosecutor is not clearly erroneous."
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