**RANDOM LAW UPDATES – PROCEDURAL ISSUES- EPISODE NOTES**

We recently attended the summer conference for Superior Court judges and had very informative presentations by a bunch a talented speakers

We also have received some follow-up e-mails from very smart people who have identified some case law that you may find valuable relating to jury charges and trial procedure (shout out to FOP Ben Studdard)

Although this episode may appear to be organized a bit randomly, we thought we would share some of the new law brought to our attention.

This episode will be dedicated to procedural issues and we hope to have another episode dealing with evidence issues.

We will do our best to separate out the topics as we proceed today

**WILL A WRITTEN JURY CHARGE HELP “COVER” AN OMISSION OR MISSTATEMENT IN THE VERBAL JURY CHARGE?**

A few episodes ago, we discussed the fact that we both use written jury charges. During the episode, we questioned whether a correct written jury charge would help cure any misstatements or oversights contained within the reading of the charges to the jury. FOP Ben Studdard helped us identify a couple of cases.

The cases we are about to discuss were examined under the “plain error” analysis – meaning that no timely objection was raised during the trial. If an objection is made, of course the judge should recharge the jury if an omission or misstatement is made during the verbal charge.

In *Oates v, State*, 355 Ga. App. 301 (2020), the trial judge tried a rape and child molestation case. In the verbal reading of the charge, the judge omitted the requirement that the defendant be proven to have committed an “indecent” act against the child as required under the child molestation statute. However, that word was in the indictment and in the written jury charges that were sent out with the jury. “The trial court instructed the jury that the State had the burden of proving every material allegation of the indictment, and that the court would be providing copies of the indictment and instructions to the jury for use during deliberations. **The trial court’s written and oral instructions as a whole adequately informed the jury of the charges.”**

*State v. Crist*, 341 Ga. App. 411 (2017) – sexual battery trial. **No plain error in omitting elements of offense from oral charge where the elements were included in written charge provided to the jury, “and the definition of sexual battery had been underlined by one of the jurors during deliberation.”** “It is, of course, well established that **‘the charge to the jury is to be taken as a whole and not out of context when making determinations as to its correctness.’** [Cits.’] **And for purposes of plain-error analysis, the ‘charge’ includes ‘not only ... instructions given orally to the jury, but necessarily must apply to any written instructions given to the jury.’***Cheddersingh v. State*, 290 Ga. 680, 683(2) (724 S.E.2d 366) (2012); *see Murray v. State*, 295 Ga. 289, 294(3) (759 S.E.2d 525) (2014) (considering court’s oral and written instructions). In this regard, at the start of Crist’s trial, the trial court read the indictment to the jury, including the three charges of sexual battery. … Furthermore, the jury was told at the outset of the closing charge that it need not remember all of the court’s instructions, which were 17 pages in length, and was given a complete set of written instructions, including the sexual-battery instruction, in the jury room. [Cit.] To be sure, the better practice would have been to include all instructions in the oral charge following closing arguments. Nevertheless, **the trial court’s written and oral instructions, as a whole, adequately informed the jury of the charges.** [Cit.] Moreover, the elements of both child molestation and sexual battery were underlined on the written jury instructions that went out with the jury. Thus, while the trial court found that the notations on the written instructions were ‘unsubstantiated’ evidence that the error did not affect the proceedings and declared that it would not ‘assume’ that the jury read the instructions, [fn] its reasoning was misguided. **The burden was on Crist, not the State, to show that the error likely affected the outcome of the trial.****[fn] And here, we can find no evidence that the jury misunderstood the instructions on sexual battery or any other topic.**Rather, the record, including the acquittal of Crist on charges of child molestation, shows that the jury understood the law and the evidence before it.” *Accord, Forte v. State*, 302 Ga. 726, 808 S.E.2d 658 (December 11, 2017) (no plain error where trial court omitted to read paragraph in definition of malice murder defining malice aforethought, but gave the jury a complete written charge); *Oates (June 3, 2020), above (word omitted in oral charge supplied by written charge).*

**PROBATION REVOCATION HEARINGS – WHERE’S THE BEEF? (best evidence rule)**

*Glasper v. State*, \_\_ Ga. App. \_\_, 2022 WL 2338455 (June 29, 2022) – In this case, the defendant was on probation and, during the probation period, it was alleged that the defendant committed additional crimes. Those alleged crimes led to a probation revocation hearing. At the revocation hearing, the arresting officer was the only witness. The officer testified to what appeared on a surveillance video but there was no effort made to have the video recording admitted into evidence. The sentence was revoked and, on appeal, the defendant alleged that there was no competent evidence that he committed the new crimes because, under § 24-10-1002, the original recording was not produced at the revocation hearing. **JUDGMENT REVERSED.**

Under Rule 1002, “to prove the contents of a … recording, …the original … recording shall be required.” The officer testified that he secured the recording and entered it into the evidence collection room but it was not brought to trial and the record did not suggest that the original had been “lost, destroyed, or [was] otherwise unavailable” for use at the revocation hearing. And there was a timely objection raised at the time of the revocation hearing.

**ACCOMPLICE CORROBORATION CHARGE REQUIRED – CRIMINAL JURY CHARGES**

*Palencia v. State*, 313 Ga. 625 (2022) – In *Palencia*, there was no objection to the jury charge as given and, therefore, this is a “plain error” case. This was a burglary and rape case where the two indicted co-defendants testified that Palencia was involved with the burglary that they pled guilty to. However, they testified that it was Palencia that committed the rape. “But in order to credit an accomplice's testimony under Georgia statutory law, the jury had to find at least slight evidence that was ‘independent of the accomplice testimony and [that] directly connect[ed] the defendant with the crime, or [led] to the inference that he is guilty.’” *Palencia v. State*, 313 Ga. 625, 628 (2022), citing *Stanbury v. State*, 299 Ga. 125, 128 (2016). “Even if there was such evidence in the record, the trial court's failure to also charge the jury on the necessity of accomplice corroboration when charging it that the testimony of a single witness is sufficient to establish a fact was clear and obvious error in light of *Stanbury*.” *Palencia*, at 628-629. **REVERSED AND REMANDED TO COURT OF APPEALS.**

This case underscores the problems with giving the charge that tells the jury that the testimony of a single witness, if believed, is sufficient to establish a fact.

(other cites) It is error for a trial court to refuse to give a requested charge on accomplice corroboration where evidence includes testimony from accomplice (and probably plain error if only evidence that connects defendant to crime is testimony of accomplice);**[[1]](#endnote-1)**

(other cites) If it could be argued that a witness was an accomplice, give the “accomplice corroboration” charge.**[[2]](#endnote-2)** Even when no such charge is requested, if the court gives the charge “the testimony of a single witness, if believed, is sufficient to establish a fact” and there is even arguably accomplice testimony, reversible error to fail to also give the accomplice corroboration charge.**[[3]](#endnote-3)**

**ALLOWING JURORS TO HAVE CELL PHONES IS DANGEROUS – REMINDER #8,412**

To be fair, this case involved jurors use of cell phones outside of the jury room (I think) but the principles remain the same….

*Harris v. State*, \_\_ Ga. \_\_, 2022 WL 2230337 (June 22, 2022) – Defendant convicted of homicide by vehicle 1st degree – During deliberations, jurors testified (post-trial) they had Googled the difference between 1st degree and 2nd degree vehicular homicide and at least one juror conveyed that information to other jurors.

*HOLD ON,* you are thinking – the new evidence code does not allow for jurors to testify post-trial. That’s “sort of” correct – Rule 606(b) does not allow jurors to testify about how their verdict was reached but it does allow for testimony as to whether extraneous prejudicial information was improperly brought to the juror’s attention, whether there was outside influence or whether there was a mistake in entering the verdict onto the verdict form. Therefore, in this case, all 12 jurors testified post-trial. *Back to the case---*

On appeal, the Supreme Court held there is categorical bar to juror testimony with only three well-defined exceptions (referenced above). The jurors cannot be asked how the extraneous information impacted their verdict, only whether it occurred. “[I]f the trial court determines that extraneous information was provided to the jury, it will have to evaluate prejudice without the benefit of evidence of internal jury deliberations.” When misconduct is found to exist, a presumption of harm exists and the state bears the “heavy burden” to prove beyond a reasonable doubt that the misconduct was harmless. (lots of citations in the case not repeated here). The Supreme Court noted that the standard for evaluating non-constitution errors and prejudice is “no reasonable probability” but that the standard for constitutional errors is “beyond a reasonable doubt.” **REVERSED AND REMANED TO TRIAL COURT**.

So, that’s all for our episode dealing with some recent developments involving procedural issues.

To recap, we addressed written jury charges, the accomplice corroboration jury charge requirement, the fact that tangible recordings must be produced if relied upon at trial, and jurors’ use of cell phones is dangerous!

The outline is full of statutory and case citations and that outline can be found at **goodjudgepod.com**.

Reach out to us on goodjudgepod@gmail.com with all of your podcast topic ideas

**I’m Wade Padgett**

*And I’m Tain Kell… [insert funny thing]*

1. *Ross v. State*, 343 Ga. App. 810 (2017) [↑](#endnote-ref-1)
2. *Caldwell v. State*, 313 Ga. 640, 643-644 (2022). “Where the evidence presented at trial could support a finding that a witness acted as an accomplice, it is for the jury to determine whether the witness acted in that capacity.” *Caldwell*, at 643, citing *Doyle v. State*, 307 Ga. 609, 612 (2020). This principle of law is predicated on the legal theory codified at O.C.G.A. § 24-14-8 which provides that the testimony of a single witness, if that witness was an accomplice, is NOT sufficient to sustain a verdict. Such testimony requires corroboration. HOWEVER, a special verdict form with an interrogatory to the jury asking whether they find the witness was proven to be an accomplice is NOT required. *Caldwell*, at 645. See *Ash v. State*, 312 Ga. 771, 795-796 (2021). The “accomplice corroboration” charge is founded in O.C.G.A. § 24-14-8 which provides, “the testimony of a single witness is generally sufficient to establish a fact” but in “felony cases where the only witness is an accomplice, the testimony of a single witness shall not be sufficient” to support a defendant’s conviction but instead requires corroboration.” *Caldwell*, at 643. See Pattern Charge 1.31.92. [↑](#endnote-ref-2)
3. *Palencia v. State*, 313 Ga. 625, 627-628 (2022), citing *Stanbury v. State*, 299 Ga. 125, 129-130 (2016). [↑](#endnote-ref-3)