

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 22, 2018

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THIS WEEK:

- Sentencing; Split Sentences
- Bench Conferences; Right to be Present
- Character Evidence; Threats to Victims
- DUI; Rule 403
- Sufficiency of the Evidence; Sexual Exploitation of a Child
- Jury Instructions; Burden of Proof

Sentencing; Split Sentences

Brown v. State, A18A0655 (5/3/18)

In 2013, appellant entered a negotiated guilty plea to five counts of child molestation. The trial court sentenced him to ten years to serve on Count 1 and probation on the remaining counts, for a total sentence of forty years, with the first ten years to be served in confinement and the remainder to be served on probation. In 2017, appellant filed a motion to correct void sentence based on the trial court's alleged failure to follow the requirements of former OCGA § 17-10-6.2 (b) in sentencing him. The trial court denied the motion.

The Court found that under the version of the statute in effect in 2013 (former OCGA § 17-10-6.2 (b)) when appellant was sentenced, the trial court was required to sentence him to a "split-sentence" consisting of a minimum term of imprisonment, as specified in the Code section for the offense of child molestation, followed by an additional probated sentence of at least one year on each offense. Here, the trial court sentenced appellant to confinement only on Count 1 and to probation only on the remaining four counts. The State conceded that appellant was not sentenced as required by

former OCGA § 17-10-6.2 (b), but argued that the trial court had discretion under subsection (c) of the relevant version of that code section to deviate from the mandates of subsection (b) under certain circumstances. The State requested a remand to the trial court so that the trial court could make findings concerning whether it had reason to deviate in this case. However, the Court stated, subpart (2) of former OCGA § 17-10-6.2 (c) requires the trial court to issue a written order setting forth the reasons for any deviation in sentencing pursuant to this section, and the trial court did not enter such an order in this case. In the absence of anything in the record to indicate that the trial court intended to deviate from the mandatory minimum as allowed by the applicable version of OCGA § 17-10-6.2 (c), the proper remedy is to vacate the sentence and remand for resentencing.

Moreover, the Court stated, although appellant did not raise as error the probation only sentences for child molestation, former OCGA § 17-10-6.2 (b) required that the sentence for any person convicted of a sexual offense include the mandatory minimum term of imprisonment specified in the code section for that offense and "no portion of the mandatory minimum sentence imposed shall be suspended, stayed, or probated . . ." Since there was no indication that the trial court entered written findings necessary to deviate from the mandatory minimum, those sentences are void for this additional reason.

Accordingly, the Court vacated appellant's sentence and remanded to the trial court for entry of a new sentence on each count as required by former OCGA § 17-10-6.2 (b). In so holding, the Court noted that the State correctly pointed out that on its face it appeared

that appellant was seeking a harsher sentence but opined that appellant's motive was actually to withdraw his guilty plea, rather than be resentenced.

Bench Conferences; Right to be Present

Ramirez v. State, A18A0502 (5/3/18)

Appellant was convicted of multiple counts of child molestation and other related offenses. He contended that his constitutional right to be present at all critical stages of the trial proceedings was violated because he was not present at a bench conference during voir dire where the prosecutor's reasons for striking a potential juror were discussed. The Court disagreed.

The right to be present attaches at any stage of a criminal proceeding that is critical to its outcome if the defendant's presence would contribute to the fairness of the procedure. Also, it has long been established that proceedings at which the jury composition is selected or changed are critical stages at which the defendant is entitled to be present. A defendant therefore has the right to be present at a bench conference where, as in the present case, the topic of striking a potential juror is discussed.

However, the right to be present may be waived. And here, the Court found, the record supported the conclusion that defense counsel reached an agreement with appellant before trial that only counsel would attend the bench conferences and would then inform appellant of what had been discussed. To the extent that defense counsel did not specifically recollect reaching the agreement with appellant, his testimony concerning his standard practice and procedure authorized the trial court to conclude that such an agreement had been reached. Accordingly, the record reflected that defense counsel waived appellant's right to be present at bench conferences at the express direction of appellant, and appellant thus relinquished any constitutional right he had to attend the bench conference in which the prosecutor's reasons for striking the potential juror were discussed.

Character Evidence; Threats to Victims

Allen v. State, A18A0480 (5/3/18)

Appellant was convicted of incest, rape,

child molestation, and aggravated child molestation, stemming from his sexual abuse of two of his children, T.A. and L.A. Both victims testified that they were afraid of appellant and that he told each of them that if they told anyone about his behavior he would hurt them.

Appellant argued that the trial court erred by allowing the State to pursue cross-examination that elicited impermissible character evidence. The Court noted that during a pre-trial conference, the trial court ruled that if the State intended to introduce evidence regarding appellant's prior violent acts in the home, it would rule on admissibility if and when the issue was raised during trial. When appellant called his wife to testify in his defense, the prosecutor asked her whether appellant had ever been violent in the home, drawing an immediate objection from defense counsel. During the bench conference that followed, the State argued that it was eliciting such testimony because of appellant's threats to the victims, and to the extent that the violence occurred while the victims were living at home, the testimony was probative of whether the victims were intimidated by appellant and, resultantly, "went along with" the sexual abuse and delayed in disclosing it. The trial court deemed the evidence probative of appellant's ability to execute the threats to which the victims had testified, but then limited the State's questioning to "violent acts towards the children or [his wife] that took place in the presence of the children or in the home while the children were there." When appellant's wife subsequently testified that appellant had not been violent in the home after the victims were born, she was impeached with evidence of appellant's conviction for aggravated assault, involving an incident in which appellant had pointed a gun at her.

First, the Court noted that appellant was charged with two counts of rape against T.A. Force, as a constituent element of rape, may be inferred by evidence of intimidation arising from the familial relationship, and may be proved by direct or circumstantial evidence. Lack of resistance, induced by fear, is not legally cognizable consent. Thus, the Court found, in light of T.A.'s testimony, evidence of appellant's violent behavior in the home after she was born tended to make it more probable that she submitted to intercourse with appellant because she was intimidated by him.

Second, Georgia's appellate courts have

consistently held that evidence of a defendant's history of violence toward a victim, a victim's family, or even a witness, is admissible to explain a delay by the victim, her family, or another witness in reporting a crime. Here, appellant's wife testified that although she had repeatedly asked T.A. whether she had had sex with anyone, T.A. indicated that she had not. However, T.A. previously testified that the reason for these negative responses to her mother was that she was scared of appellant. She also insisted that she never physically fought off appellant during the assaults because of his threats to her, L.A., and her mother; that she had seen appellant hit her mother and throw things at her; that she had seen appellant whip L.A. when L.A. walked in on appellant having sex with T.A.; and that she had seen appellant with a gun in the home. Likewise, L.A. testified that he believed appellant would act on his threats towards him because he knew appellant had a gun.

The Court agreed with other jurisdictions that when the victim of an alleged sexual offense did not make a prompt complaint but instead disclosed the alleged incident only some time later, evidence of the facts and circumstances surrounding the delayed complaint also may be relevant to the jury's evaluation of the likelihood that the offense did or did not occur. Thus, admission of evidence of the circumstances surrounding a delayed sexual assault complaint, including those that might shed light upon the reason for the delay, will reduce the risk that the jury, perhaps influenced by outmoded myths regarding the "usual" or "natural" response of victims of sexual offenses, will arrive at an erroneous conclusion with regard to whether the offense occurred.

Therefore, the Court concluded that on the facts presented here, the State's questioning was also probative of whether appellant's behavior created a threatening atmosphere in the home, and would have consequently tended to explain the victims' reluctance to disclose the abuse. Accordingly, the Court rejected appellant's contention that his conduct would not have been relevant or probative. And, in light of the strong preference for admission of relevant evidence under OCGA § 24-4-401, the trial court also committed no error in determining that the prejudicial value of the evidence did not substantially outweigh its probative value.

DUI; Rule 403

State v. Voyles, A18A0771 (5/7/18)

Voyles was accused of DUI. The State sought to admit three prior DUIs as evidence of prior bad acts pursuant to OCGA § 24-4-417 and OCGA §§ 24-4-403 and 404 (b). The trial court found that although the evidence may be admissible under Rules 417 and 404 (b), the admission of such evidence is still limited by Rule 403. Applying Rule 403, the trial court then prohibited the proffered evidence because the danger of unfair prejudice substantially outweighed its probative value. The State appealed and the Court reversed.

The Court noted that in a footnote in *State v. Frost*, 297 Ga. 296, 301-02, (2015), the Supreme Court observed that “the extent to which Rule 403 applies to Rule 417 evidence” remained an open question. However, the Court stated, it has previously applied Rule 403 to OCGA §§ 24-4-413 and 24-4-414, which similarly provide that evidence of the accused’s commission of other similar offenses “shall be admissible” if relevant. Thus, the Court held, “We likewise find Rule 403 applicable to OCGA § 24-4-417 (a).”

The Court stated that Rule 403 is an extraordinary remedy which the courts should invoke sparingly, and the balance should be struck in favor of admissibility. Obviously, the reason for such caution is that relevant evidence in a criminal trial is inherently prejudicial, and, as a result, Rule 403 permits exclusion only when unfair prejudice substantially outweighs probative value. The primary function of Rule 403, then, is to exclude evidence of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.

Here, the trial court gave no explanation how the danger of unfair prejudice substantially outweighed the probative value of the proffered evidence in this case. This determination lies within the discretion of the trial court and calls for a common sense assessment of all the circumstances surrounding the extrinsic offense, including prosecutorial need, overall similarity between the extrinsic act and the charged offense, as well as temporal remoteness. At the motion hearing, the State demonstrated its prosecutorial need for the extrinsic act evidence, the close proximity in time between the three prior DUI arrests and the charged offense, and the overall similarity between the three prior arrests and the current

charge, especially with regard to Voyles’s experiences with the requested state administered tests. Under these circumstances, although some prejudice may result from admission of the prior DUI violations, there was nothing unfair about it. Accordingly, the Court held, the probative value of the evidence of Voyles’s previous DUI arrests substantially outweighed its prejudice, not the other way around, and the trial court abused its discretion in excluding that evidence.

Sufficiency of the Evidence; Sexual Exploitation of a Child

Lindley v. State, A18A0299 (5/8/18)

Appellant was convicted of fourteen counts of sexual exploitation of a child. The relevant evidence, briefly stated, showed that in August, 2016, Det. Faulkner identified a particular IP address at a residence was used to download and share known files or images related to child pornography. When the police executed a search warrant at the residence on August 29, Christy Thompson was at the residence alone. While the officers searched, Thompson made phone calls and two other residents arrived, her husband, Graham Thompson, and Samuel North. Faulkner testified that Thompson sent appellant instant messages because he did not have a cell phone, but he did not return to the residence while the warrant was being executed. Although not introduced as evidence, both parties stated in opening argument that appellant is Thompson’s son. Thompson, her husband, and North were all cooperative and surrendered their electronic devices to law enforcement. The following day, Thompson turned in a Samsung tablet, supplied the pass code for the tablet, and a search warrant was obtained so that its contents could be forensically examined. When called to testify as to her conduct throughout the investigation, however, Thompson invoked her Fifth Amendment right not to incriminate herself.

Officer Talley conducted a forensic examination of the tablet. He found approximately 100 videos and 100 photographs on the tablet. Fourteen of those images depicted minors engaged in sexually explicit conduct, and the others included images of appellant and regular pornography. Faulkner testified that the download of the images on the device was

initiated sometime between August 1 and 2.

Appellant contended that the evidence was insufficient to support his conviction based on OCGA § 16-12-100 (b) (8), which provides that “[i]t is unlawful for any person knowingly to possess or control any material which depicts a minor or a portion of a minor’s body engaged in any sexually explicit conduct.” The Court stated that it was “constrained to agree.”

The Court stated that a person who knowingly has direct physical control over a thing at a given time is in actual possession of it. A person who, though not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing is then in constructive possession of it. Here, there was no evidence that appellant knowingly had direct or constructive possession of the child pornography images on the tablet. Furthermore, there must be some evidence that the defendant, who had images of child pornography located in his computer’s cache, took some affirmative action to save or download those images to his computer or had knowledge that his computer automatically saved those files.” Here, there was no evidence that appellant owned the device, or that it was he who had searched for and saved the images to the tablet.

The Court also held that the circumstantial evidence was not sufficient to support the conviction. Talley testified that if the forensic software he used was able to determine when the images were created, the last time they were modified, or the last time the user changed it or viewed it, that information would show up in his report. However, the only such dates contained in the report were attached to one image of appellant, dated August 16, 2016, and an image of a child, dated October 27, 2015. Detective Faulkner testified that the images at issue were downloaded at the beginning of August. Thus, the Court found, even the one image of appellant that was dated does not tie him to the offenses charged.

Moreover, the Court found that the evidence showed Christy Thompson sent appellant instant messages while the search was conducted; that appellant did not return to the residence during the search; that Thompson turned in the tablet at issue to the police the next day and gave them the pass code to access the device; and that there were images of appellant on the tablet that he appeared to have taken of himself. The record was devoid of any

evidence demonstrating that appellant possessed the tablet or was at the residence where the child pornography was being downloaded or shared. Consequently, the Court found, the evidence did not exclude the reasonable hypothesis that someone else in the home could have owned the tablet or downloaded the images. Accordingly, because the State failed to establish that appellant ever possessed or controlled the pornographic images on the tablet, his conviction was reversed.

Jury Instructions; Burden of Proof

Williams v. State, A18A0206 (5/14/18)

Appellant was convicted of aggravated assault based on family violence and possession of a knife during the commission of a felony. He argued that the trial court erred in giving the pattern jury instruction on the State's burden of proof as it relates to reasonable doubt. The Court disagreed,

The Court found that the pattern charge's mention of jurors' "discovery of truth" does not, as appellant contended, urge, dilute or cause confusion over the State's burden of proof and the role of the jury by suggesting that the jurors embark on their own "intuitive search for [the] truth." In criminal cases, the factfinder does have the task of seeking the truth. But the jury is to determine the truth in view of the evidence, considered in light of the court's instructions. Here, the court's instruction properly focused the jurors on their consideration of the truth as proven by the evidence presented at trial. Thus, there was no error.