

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 7, 2018

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State Prosecutor

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SAKI Prosecutor

THIS WEEK:

- **Garza; Asportation**
- **Sixth Amendment Right to Counsel; Continuances**
- **Olevik; Plain Error**
- **Ineffective Assistance of Appellate Counsel; Eleventh Circuit Directives**
- **False Imprisonment; Sufficiency of the Evidence**
- **Motion for Documents and Records at Government Expense**
- **Closing Arguments; Ineffective Assistance of Counsel**
- **Recalling Witnesses; In-Court Identification**
- **Jury Instructions; Facebook Messages**

Garza; Asportation

Mercer v. Johnson, S18A0748 (8/14/18)

Appellant was convicted in 2004 of two counts of kidnapping, armed robbery and aggravated assault. The evidence, briefly stated, showed that appellant and his co-defendants committed a home invasion at the residence of Mr. and Mrs. Love. Appellant and his accomplices encountered the Loves in the master bedroom. Mr. Love remained in the bedroom at all times; Mrs. Love was dragged out of the bedroom into the hallway to open a safe, but then immediately returned to the bedroom.

In 2016, appellant filed a habeas petition alleging that the evidence was insufficient to support either of his kidnapping convictions under the new standard for determining asportation set forth in *Garza v. State*, 284 Ga. 696 (2008). The habeas court denied the petition and the Court granted appellant's application

for a certificate of probable cause.

The Court noted that under *Garza*, a court must consider four factors in determining whether the movement of the victim constitutes asportation sufficient to sustain a kidnapping conviction: (1) the duration of the movement; (2) whether the movement occurred during the commission of a separate offense; (3) whether such movement was an inherent part of that separate offense; and (4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense.

As to the asportation of Mr. Love, the Court found that his movement consisted only of moving him from a standing position to the floor. His movement, which took place soon after the intruders entered the couple's bedroom, was of an extremely short duration and occurred during the ongoing armed robbery. Moreover, his movement did not present a significant danger to the victim independent of the danger posed by the armed robbery, during which the intruders were constantly pointing their handguns at the Loves, and did not serve to substantially isolate the victim from protection or rescue. Accordingly, the Court held, this movement did not constitute the asportation necessary to support appellant's conviction for kidnapping Mr. Love.

As to the movements of Mrs. Love, the Court found that the intruders' placing Mrs. Love on the floor and then pulling her up and pushing her against an aquarium in the bedroom in order to have her turn off the house alarm, was insufficient to constitute asportation. Also, her movement to the safe and back to the bedroom was stronger evidence of asportation, but nevertheless insufficient. First, that movement was of short duration.

Second, there was no evidence that the armed robbery was completed before Mrs. Love was moved to the safe and back to the bedroom. In fact, nothing of value was in the safe, and Mr. Love testified that the intruders did not leave until some point after Mrs. Love was back in the bedroom. Finally, although the movement may not have been an inherent part of either the aggravated assaults or armed robbery, the fourth *Garza* factor did not support asportation. Specifically, when appellant dragged Mrs. Love from the bedroom to the safe and then back to the bedroom, it could not reasonably be said that the movement placed her in more danger than if she had stayed in the bedroom. Consequently, the Court held, there was insufficient evidence of asportation to support appellant's convictions for kidnapping Mr. and Mrs. Love and thus, the habeas court erred in denying his petition.

Sixth Amendment Right to Counsel; Continuances

McCullough v. State, S18A0855 (8/20/18)

Appellant was convicted of malice murder and related crimes. The record, briefly stated, showed that in July 2012, appellant was indicted and the State gave notice of its intent to seek the death penalty. Gardner, a capital defender, was appointed to represent appellant. In November, 2014, Thompson, another capital defender, was also appointed. Ten days before trial, in August 2015, appellant sought and was granted a continuance because Gardner was on medical leave. Word, the head of the capital defenders, appointed himself as a member of appellant's trial team on Aug. 31, 2015. Trial was reset for February 1, 2016.

Gardner returned to work in the fall of 2015. In December 2015 he filed a conflict notice that he had an older death penalty case going to trial in February of 2016. After a hearing on the matter in January 2016, the court ordered that appellant's trial would occur as scheduled and denied appellant's motion for a continuance. Appellant's trial began as scheduled on February 1 with Word, Thompson, and Baker, another experienced capital defender, who entered an appearance that day. Appellant was convicted, but was sentenced to life without parole.

Appellant contended that his Sixth Amendment right to counsel was violated when the trial court denied his request for

another continuance of his trial to allow him to be represented by one of his lawyers who was scheduled to try another case at the same time. The Court disagreed. The Court noted that in full accord with the Sixth Amendment's "essential aim" of guaranteeing an effective advocate for each criminal defendant, appellant was represented at trial by three well-qualified and competent capital defenders, and he indicated at the January hearing that he had good relationships with Thompson and Word. All three lawyers were selected to represent appellant by the capital defender division, not the trial court. One of them (Thompson) had worked on appellant's case for over a year. Another (Word) was the director of the capital defender division, had practiced law for over 40 years, and had served as lead counsel in many death penalty cases. The third (Baker), who played a smaller role at trial, had served as lead counsel in over 30 death penalty cases. Although appellant told the trial court that he wanted Gardner to be his lead counsel, he offered no specific reason for that preference, and he did not indicate concern about his relationship with any of his lawyers; the trial court specifically found that Thompson and Word, like Gardner, had appellant's trust and confidence.

Moreover, these lawyers were prepared to try appellant's case. In obtaining a continuance of more than five months in August 2015 — at a time when Gardner was on medical leave with no indication if or when he would return to the defense team — Thompson had assured the trial court that the defense team, with Word selecting a lawyer (himself) to replace Gardner, would be prepared for trial by January 2016. At the January 2016 motions hearing, Word again promised the court that the defense team would be ready to go to trial in February. No member of the defense team — including Gardner in his December 2015 conflict notice — told the court that appellant lacked counsel who were competent and prepared to try his case. And appellant, the Court noted, had new counsel on appeal, raised no claim of ineffective assistance by his trial lawyers, who managed to convince the jury to spare him the death penalty for the premeditated, financially motivated, and brutal murder of his father — whom he had previously rendered paraplegic — and the additional murder of his great-aunt.

The Court found that the trial court

also had a significant interest in bringing appellant's case to trial without further delay. In December 2014, the court specially set appellant's trial more than seven months in advance; in June 2015, the court denied appellant's request to continue that trial date to accommodate Gardner's schedule, but the court then granted a continuance of another five months, which appellant requested just ten days before trial with the express assurance that the defense team would be prepared for trial by the start of 2016 — with or without Gardner. By January 2016, appellant's case had been pending for more than three years and eight months, and the trial court could reasonably require that appellant proceed to trial with his team of qualified and competent counsel rather than awaiting whatever further claims for delay might arise.

Thus, the Court found, this case was considerably different from those in which the trial court sought to impose an entirely new set of attorneys on a capital defendant in place of counsel with whom the defendant had a longstanding relationship and who had deep familiarity with the defendant's case, often from trying the case previously, and in which there was no issue of delay presented. Thus, the Court concluded, under the circumstances, there was no abuse of discretion in the trial court's denial of appellant's request for another continuance of his trial, and no violation of appellant's Sixth Amendment right to counsel.

Olevik; Plain Error

State v. Herrera-Bustamante, S18A0703 (8/20/18)

Herrera-Bustamante was convicted after a jury found him guilty of DUI and having an open container of alcohol. About a year later, while his motion for new trial was pending, the Supreme Court decided *Olevik v. State*, 302 Ga. 228 (2017), which held that under the compelled self-incrimination clause of the Georgia Constitution, individuals have the right to refuse to take a breathalyzer test. Herrera-Bustamante then amended his motion for new trial to argue for the first time that evidence that he refused to consent to a breathalyzer test should not have been admitted against him at his DUI trial. The trial court agreed and granted him a new trial on this ground. The State appealed.

The Court first held that Herrera-Busta-

mante was not entitled to ordinary appellate review of his claims that the breathalyzer refusal evidence was inadmissible or that the statutes directing its admissibility are unconstitutional (OCGA §§ 40-6-392 (d) and 40-5-67.1 (b)), because he did not properly preserve those claims for review. Nevertheless, Herrera-Bustamante argued, he was entitled to benefit from the holding in *Olevik* even though that decision was issued after his trial, because under the so-called "pipeline" rule, Georgia appellate courts will apply a new rule of criminal procedure to all cases then on direct review or not yet final.

But, the Court stated, even assuming that *Olevik* announced such a new rule, it will apply a new procedural rule only if the issue to which it pertains was properly preserved for appellate review. In other words, the pipeline rule does not alter the general rule that objections to the admission of evidence must be raised in a timely fashion at trial for the objection to be preserved for ordinary appellate review. Also challenges to the constitutionality of a statute must be made at the first available opportunity and cannot be withheld until a motion for new trial, much less an appeal. And here, the Court found, Herrera-Bustamante did nothing before or during his trial to preserve his claims regarding the admission of the breathalyzer refusal evidence or the constitutionality of the statutes providing for its admissibility. Accordingly, ordinary appellate review of either claim was precluded.

Nevertheless, the Court stated, under Georgia's new Evidence Code, the rulings related to this evidence are subject to review on appeal for plain error. To show plain error, the error must not have been affirmatively waived, the error must have been clear and not open to reasonable dispute, the error must have affected his substantial rights, and the error must have seriously affected the fairness, integrity or public reputation of judicial proceedings. And here, the Court found, Herrera-Bustamante failed to show that the trial court's admission of the breathalyzer refusal evidence was clear error.

Specifically, the Court noted, Herrera-Bustamante's claim that it is obvious that the admission of evidence of his refusal to take a breath test was unconstitutional hinges on whether evidence that a defendant exercised his right to refuse to take a breath test (a right protected only by the Georgia Constitution)

must be treated the same as evidence that a defendant exercised his right to refuse to answer questions (a right protected by both the Georgia and United States Constitutions). But, the Court stated, endorsement of his argument would require it to *extend Olevik*. *Olevik* held that a breathalyzer test involves an act that cannot be compelled under the Georgia Constitution, so the defendant has the right to refuse to take the test; *Olevik* did not decide anything about how such a refusal can or should be treated as evidence at trial. Indeed, the *Olevik* decision could not hold anything about the proper treatment of refusal evidence, because Mr. Olevik took the breathalyzer test rather than refusing to take it. Thus, the Court concluded, whatever questions *Olevik* may raise regarding the admission of evidence of a defendant's refusal to take a breathalyzer test, a holding that such evidence is inadmissible would require the extension of precedent — indeed, its extension to strike down two statutory provisions — and this was fatal to Herrera-Bustamante's claim under plain-error review. Accordingly, the trial court erred in granting Herrera-Bustamante a new trial on the ground that evidence that he refused to take a breathalyzer test was improperly admitted.

Ineffective Assistance of Appellate Counsel; Eleventh Circuit Directives

Hall v. State, S18A0827 (8/20/18)

Appellant was convicted of malice murder and family violence aggravated assault. Her convictions were affirmed in her first direct appeal, where she was represented by counsel. *Hall v. State*, 287 Ga. 755 (2010). Thereafter, a state court granted her habeas relief, but the Supreme Court reversed in *Seabolt v. Hall*, 292 Ga. 311 (2013). Appellant then filed a federal habeas petition which was denied, but the Eleventh Circuit, finding fault with the holding in *Seabolt* on the issue of ineffective assistance of appellant's appellate counsel — remanded the case to the district court with direction to "order the State to grant Ms. Hall a new direct appeal." *Hall v. Warden*, 686 Fed. Appx. 671, 685 (IV) (11th Cir. 2017). On remand, the district court entered an order adopting the mandate of the Eleventh Circuit, granting the writ of habeas corpus, and "order[ing] that the State grant [Hall] a

new appeal." The district court ruling provided the purported basis for appellant's appeal to the Georgia Supreme Court.

The Court noted that while it is in no position to dictate the parameters of relief granted by the Eleventh Circuit, the relief granted by the Eleventh Circuit in this case is not available. In Georgia, the normal remedy for ineffective assistance of appellate counsel in a situation where the defendant has not suffered a complete denial of counsel in his or her first direct appeal is a new trial, not just a new appeal. Thus, the Eleventh Circuit fashioned a remedy in this case that would require the State to create a procedure unknown to our courts — a second direct appeal — rather than mandating that a writ of habeas corpus releasing appellant be granted unless the State provides an adequate remedy for the ineffective assistance of her appellate counsel. The trial court could have provided such an adequate remedy by granting appellant a new trial. In this regard, a new trial is actually a more comprehensive remedy for appellant than a second direct appeal, as a new trial would provide appellant with an opportunity to present her case anew to a jury, whereas a second appeal would only provide her with the opportunity to seek a new trial. But appellant has not yet provided the district court's mandate to the trial court and requested that the judgment against appellant be set aside. At that point, the State could either dismiss the indictment or proceed with a new trial.

Nevertheless, the Court stated, it could address this case based on only the procedural posture in which it arrived, and it is the duty of the Court to inquire into its jurisdiction with respect to that procedural posture. Here, appellant was represented by counsel in her first direct appeal, the fact that she was granted habeas relief based on the alleged ineffectiveness of her appellate counsel in that appeal would not entitle her to a second direct appeal. Indeed, the Court found, it is without jurisdiction to consider such a second direct appeal. Accordingly, the Court held, because it is without authority to entertain a second direct appeal by appellant, her appeal must be dismissed.

False Imprisonment; Sufficiency of the Evidence

Harris v. State, S18A0826 (8/20/18)

Appellant was convicted of malice murder, burglary, aggravated assault, three counts of false imprisonment, two counts of child cruelty and other offenses. Although appellant did not argue that the evidence was insufficient to support his convictions, the Court nevertheless, as is their “general practice” in murder cases, reviewed the evidence anyway.

The evidence showed that Ashley Gay and David Rucker had just put their children to bed when they heard banging on the balcony door of their second floor apartment. Soon thereafter, they heard the sound of someone climbing through their closed window blinds. Rucker and Gay barricaded themselves and their two screaming, scared children in the back bedroom of the apartment. Appellant and his accomplice kicked in one bedroom door before proceeding to the back bedroom where the family was hiding. After the men succeeded in kicking down that door, Rucker pushed the men out of the room and down the hallway, shouting, “No bro, no bro, my kids in here.” Gay heard a gunshot, then the apartment fell silent. Appellant and his accomplice left the apartment. Rucker died from the gunshot wound.

The Court found the evidence insufficient to support appellant’s three convictions for false imprisonment. OCGA § 16-5-41 (a) provides that “[a] person commits the offense of false imprisonment when, in violation of the personal liberty of another, he arrests, confines, or detains such person without legal authority.” Here, there was no evidence that appellant arrested, confined, or detained any of the victims. Indeed, the victims chose to barricade themselves and their children in their back bedroom and tried to stop appellant and his accomplice from entering. Consequently, the evidence was insufficient to establish appellant’s guilt beyond a reasonable doubt regarding the three counts of false imprisonment, and his convictions and sentences for the same were reversed.

Closing Arguments; Ineffective Assistance of Counsel

Schoicket v. State, S18A0632 (8/20/18)

Appellant pled guilty to felony murder in 2015. She did not appeal. In June 2017, she filed a “Motion for Documents and Records

at Government Expense,” wherein she sought a copy of the transcript of her guilty plea, any audio- and video-recorded interviews, and various documents that, she said, were necessary for “post-conviction relief.” The trial court denied the motion.

Appellant argued that because she is indigent, she is entitled to a transcript and various documents at government expense for the purpose of pursuing post-conviction relief. The Court disagreed. It is true that an indigent, on appeal, is entitled as a matter of right to a free copy of the transcript of trial court proceedings in which he has been a party. However, while an indigent is entitled to a copy of his trial transcript for a direct appeal of his conviction, such is not the case in collateral post-conviction proceedings. After the time for appeal has expired there is no due process or equal protection right to a free copy of one’s court records absent a showing of necessity or justification. And here, the Court found,

the time for filing a direct appeal had long since ended, and appellant failed to make any showing of necessity or justification. Accordingly, the Court concluded, appellant’s untimely motion was a nullity, which should have been dismissed by the trial court, and cannot sustain an appeal. The appeal, therefore, was dismissed.

Closing Arguments; Ineffective Assistance of Counsel

Kennedy v. State, S18A0845 (8/20/18)

Appellant was convicted of malice murder and other crimes. The evidence, briefly stated, showed that the two victims, Archible and Woods, drove to appellant’s residence in a condominium complex to buy a car from appellant. When the victims refused to show the money before seeing the car, appellant pulled a gun. As the victims tried to drive away, appellant shot and killed Archible and wounded Woods.

At trial, the State presented evidence of appellant’s participation in two other armed robberies as other acts evidence under Rule 404 (b) for the purpose of establishing intent and identity. Appellant testified in his own behalf. He claimed the victims tried to rob him during a drug deal and he shot the victims in self-defense.

During closing argument, the prosecutor

stated: “Now let’s talk about corroboration. Corroboration is where we do our best, ladies and gentlemen, to put everything together. To put it all together. Let’s talk about the timeline. 2007 [appellant] robs Rori Williams. May 24, 2012, early in the morning he robs Freddie Buffington. May 24, 2012, he attempts to rob Mr. Archible and Mr. Woods and ends up killing Mr. Archible in the process. Ladies and gentlemen, what you have witnessed in this courtroom over the past two to three days is *the graduation of a criminal. He is graduating.* He started off with robbery. He stepped it up to armed robbery. And then he goes out and does an armed robbery or attempts to do one and kills someone. You all just saw *the evolution* of a criminal all in about two days. That, ladies and gentlemen, is corroboration.” (Emphasis supplied).

Appellant contended that the prosecutor’s statements about the “graduation” and “evolution” of a criminal were an improper argument that his prior criminal acts reflected his propensity for committing crimes, and that his trial counsel was ineffective for failing to object to the prosecutor’s statements. The Court disagreed. The Court noted that although trial counsel testified at the motion for new trial hearing that she should have objected to the prosecutor’s argument, trial counsel’s own hindsight assessment of her performance does not control. Instead, to establish that trial counsel was deficient, appellant had to show that no reasonable attorney would have failed to object to the prosecutor’s argument.

The Court stated that because the line between propensity and intent is sometimes difficult to recognize, it is often difficult to discern the distinction between the permissible purpose of proving intent and the impermissible purpose of showing a propensity to commit crimes. Since the other acts evidence was admitted to prove intent, the State was allowed to argue it. The other acts evidence made it more probable that appellant intended to rob Woods and Archible and shot them during the robbery, as Woods claimed, rather than that Woods tried to rob appellant, as appellant claimed. Thus, when viewing the prosecutor’s statements in context, it was not obvious that the prosecutor was making a propensity argument. Although one could reasonably interpret the prosecutor’s statements as making that argument, it was also reasonable to interpret those statements as an argument that the

other acts evidence was relevant to establish that appellant intended to rob the victims. Consequently, the Court concluded, because the prosecutor's statements, in context, did not constitute a clear propensity argument, appellant did not demonstrate that no reasonable attorney would have failed to object to those statements. As a result, his ineffective assistance claim failed.

Recalling Witnesses; In-Court Identifications

Thorpe v. State, S18A0732 (8/20/18)

Appellant was convicted of felony murder and related crimes. The evidence, briefly stated, showed that the victim robbed appellant and his co-defendant, Mosely, during a drug deal. Later that day, Mosely learned where the victim resided. Appellant and Mosely went to that apartment complex. When the victim drove by them, Mosely shot at the moving car. The vehicle crashed and the victim tried to run away. Appellant pursued him and shot him three times, killing him.

Appellant contended that the trial court erred when it allowed the State to recall a witness for the purposes of making an in-court identification, arguing that the circumstances of the identification were improperly suggestive and violated his right to due process. The Court disagreed.

The record showed that Brittian, an eyewitness to the shooting, testified that, on the day of the shooting, she was looking out the window of her first floor apartment waiting for the victim to return her car. Shortly after seeing the victim drive into the apartment complex, Brittian saw the victim pull into a parking space, exit the vehicle and attempt to run away. Chasing the victim was a tall, African-American male with a low haircut, wearing a white shirt and dark pants. The man had a gun and pursued the victim through the breezeway in front of Brittian's building. She did not identify appellant as the shooter prior to trial, and the State did not ask her to identify appellant as the shooter during her initial trial testimony.

During a brief recess immediately after Brittian's testimony, she approached an investigator and informed him that she recognized appellant as the person she saw chasing the victim. The State requested to recall Brittian for the purpose of identifying appellant, to which

appellant objected, arguing that an in-court identification would be unduly suggestive and highly prejudicial under the circumstances. After hearing arguments from the parties, the court allowed the in-court identification.

The Court found that the trial court did not abuse its discretion. Also, appellant's claim that Brittian's in-court identification was improperly suggestive under the "totality of the circumstances" also failed because such a test only applies to extra-judicial pretrial identification procedures, not in-court identifications. Here, defense counsel conducted a thorough and sifting cross-examination of Brittian in an attempt to discredit her identification, and the jury was aware that Brittian had the opportunity to see appellant in the courtroom and could consider this fact when determining how much credibility to give her testimony.

Jury Instructions; Facebook Messages

Hawkins v. State, S18A0886 (8/20/18)

Appellant was convicted of malice murder and other offenses in connection with the shooting death of Brooks. The evidence, briefly stated, showed that while in a club, appellant and his group of friends, which included Rogers, Jr., got into a heated argument with Brooks and his group of friends. The two groups decided to take their fight outside. Appellant and his group got into Roger Jr.'s car and told Brooks and his group to come over to their vehicle. Brooks and his group moved in the opposite direction. Rogers, Jr. then drove his vehicle towards Brooks and his group. Shots from that vehicle hit Brooks, killing him.

Appellant argued that the trial court committed plain error by failing, sua sponte, to give a jury charge on accomplice corroboration. Relying on *Stanbury v. State*, 299 Ga. 125 (2016), appellant contended that because Rogers, Jr., was his alleged accomplice and was the only witness to directly connect him to the actual shooting, and because the trial court gave jury charges on parties to a crime and the fact that the testimony of a single witness is generally sufficient to establish a fact, the failure to give a charge on accomplice corroboration constituted plain error. The Court agreed that the failure to give a jury charge on accomplice corroboration constituted a clear or obvious error. However, unlike the situation in *Stanbury*, here there was significant and consistent evidence

outside of the testimony provided by the accomplice to specifically connect appellant to Brooks' murder both at the scene of the crime and after the crime had been committed. In light of this substantial and consistent evidence corroborating Rogers Jr.'s testimony, the Court found it was not likely that the failure to give a charge on accomplice corroboration affected the outcome of the trial.

Appellant also argued that the trial court erred in denying his motion in limine to exclude from trial evidence of screenshots of Facebook messages between Rogers, Jr., and an "OG Sosa Snap" account that Rogers, Jr. identified as belonging to appellant. Specifically, he contended that (a) the evidence should have been excluded because it was not properly authenticated, and (b) the evidence should have been excluded because it was provided to defense counsel only four days prior to trial.

First, the Court stated that documents from electronic sources such as the printouts from a website like Facebook are subject to the same rules of authentication as other more traditional documentary evidence and may be authenticated through circumstantial evidence. Here, the Facebook messages involved threats that Rogers, Jr., received during message exchanges that he had with a user identified as OG Sosa Snap. Rogers, Jr., testified that he recognized the messages as coming from appellant's account, as he recognized a photo of appellant associated with the user account; that he was already familiar with the fact that the OG Sosa Snap Facebook page belonged to appellant even before the messages were sent to him; and that the messages depicted in the screenshots were in fact from a conversation that Rogers, Jr., participated in with OG Sosa Snap. Thus, the Court concluded, there was no abuse of discretion in the trial court finding that this testimony was sufficient to properly authenticate the Facebook messages and allow for their admission into evidence at trial.

With respect to the disclosure of the Facebook messages to defense counsel four days before trial, appellant contended that "the late disclosure violated OCGA § 17-16-4, which generally requires the prosecutor to make available to the defense no later than ten days before trial all tangible evidence that the State intends to use at trial." The Court noted that if the State fails to comply with its statutory discovery obligations, the trial court has discretion under OCGA § 17-16-6 to fashion

an appropriate remedy. Although the exclusion of evidence is among the potential remedies, that harsh remedy should be imposed only where there is a showing of both bad faith by the State and prejudice to the defense.

Here, the trial court concluded that “there was no showing of bad faith made that would prohibit the [admission at trial of the screenshot] evidence based on a notice violation in discovery.” Also, the Court noted, despite the fact that appellant’s counsel did not receive the actual screenshot evidence until four days before trial, defense counsel conceded at the hearing on the motion in limine that the State reviewed the evidence with him eight days before trial, which was as soon as the State had received it from Rogers, Jr. Thus, the Court found, the record supported the trial court’s conclusion that there was no showing of bad faith.

Furthermore, the Court found, appellant failed to show how he was prejudiced from the disclosure of the screenshot evidence less than ten days before trial. Indeed, the evidence in question was largely cumulative of testimony from another witness, who stated that she overheard appellant say that he “and some other guys [were] coming up with some money to put a price on [Rogers, Jr.’s] head to have him killed because [appellant thought] that [Rogers, Jr.,] told Atlanta [police] about the shooting and who did it and where to find [appellant.]” Nor did the timing of the disclosure change appellant’s theory of defense at trial. To the extent that defense counsel argued that appellant could not properly defend himself because counsel did not have sufficient time to investigate the legitimacy of the Facebook messages, appellant did not move for a continuance before trial to conduct any such investigation; he still argued to the jury that the messages may have been generated by someone other than appellant; and his theory at trial remained that another person in the vehicle was the actual shooter and that appellant only intended to be involved in the fight with Brooks’ group without wanting to be involved in any shooting. Thus, the Court concluded, there was no abuse of discretion in the trial court’s decision to allow the Facebook screenshots to be admitted into evidence at trial.