Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 19, 2016

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THIS WEEK:

Rule 404(b); Not Guilty Pleas

Silvey v. State, A15A1139 (11/20/15)

Appellant was convicted of two counts of burglary. He contended that the trial court erred in allowing in evidence of a third burglary under O.C.G.A. § 24-4-404(b). The record showed that the trial court admitted the evidence to show intent and identity. The Court stated that a defendant who enters a not guilty plea makes intent a material issue which imposes a substantial burden on the government to prove intent, which it may prove by qualifying Rule 404 (b) evidence absent affirmative steps by the defendant to remove intent as an issue. Where the extrinsic offense is offered to prove intent, its relevance is determined by comparing the defendant's state of mind in perpetrating both the extrinsic and charged offenses. And here, the Court noted, appellant pled not guilty and thus, made intent a material issue.

However, appellant contended, his defense was a denial that he was involved in the burglaries. Therefore, he argued, he took affirmative steps to remove the element of intent from the case. The Court disagreed. Citing *United States v. Cardenas*, 895 F.2d 1338, 1342 (II) (A) (11th Cir. 1990), *United States v. Nahoom*, 791 F.2d 841, 845 (II) (11th Cir. 1986), and *United States v. Russo*, 717 F.2d 545, 552 (C) (11th Cir. 1983), the Court found that the Eleventh Circuit has consistently rejected such an argument. Thus, because appellant's actions of committing the third burglary involved the same mental state as burglarizing the two homes at issue in this case, the evidence from the third burglary was relevant to establish intent.

Statements; Opinion Evidence

Dority v. State, A15A1192 (11/20/15)

With regard to two victims, appellant was convicted of aggravated sodomy, aggravated child molestation, child molestation and three counts of enticing a child for indecent purposes. He contended that the trial court erred by admitting unredacted portions of the investigator's interview of him. Specifically, the investigator said to appellant as follows: "The description that she was giving was not of somebody that had been coached, it was that of somebody that had experienced it. Okay? Some of the things that she talked about you can tell weren't coached, weren't told to her, because she used words in a child's version of how to describe things. For example, in her description of when something was being inserted into her … she described as … 'it felt like a ball.' That's her imagination processing what she's feeling, not being able to see it. Something's happened to this little girl. And so getting down to the truth is protecting that girl. I'm going to tell you, if she doesn't have some closure she's going to have to deal

with this the rest of her life." Then later, the investigator stated as follows: "Without a doubt something happened to this little girl. Was she molested? Without a doubt in my mind she experienced what she was talking about. In my experience and my training and that of the forensic examiner, and she has done hundreds and thousands of these interviews. She was concerned with the details. You can coach a child but you can't coach a child in terms of 9-year-old's talk; you know what I'm saying, something happened to this girl."

The Court stated that generally, a sworn witness should not be permitted to opine from the stand about whether another witness is truthful. But, the Court stated, this rule was inapplicable here because comments made during a law enforcement interrogation and designed to elicit a response from a suspect do not amount to opinion testimony, even when a recording of the comments is admitted at trial. Law enforcement interrogations are, by their very nature, attempts to determine the ultimate issue and the credibility of witnesses. Yet, like any other evidence, testimony reflecting comments made by an officer in the course of an interview ought not be admitted if the probative value of the testimony is substantially outweighed by its tendency to unduly arouse emotions of prejudice, hostility, or sympathy.

As to the first quoted statement of the investigator, the Court found that, pretermitting whether the comments had any probative value, they had little if any prejudicial effect. First, the comments were not a direct comment on the child's credibility; they only went to whether the child's statements revealed evidence of coaching. And, a witness does not improperly bolster a victim's credibility by testifying that the witness saw no evidence of coaching. Thus, the comments did not impermissibly bolster the victim's testimony or invade the province of the jury. Second, the State presented other evidence from which the jury could assess the child's credibility, including the consistency of her trial testimony, her forensic interview, and the testimony of the outcry witnesses, as well as appellant's reactions during his interrogation and items found in appellant's house that the child mentioned in her testimony. Accordingly, the Court concluded, appellant failed to show that the probative value of the first of the officer's comments was substantially outweighed by the danger of unfair prejudice, and, therefore, the trial court did not breach its discretion by denying appellant's request to redact those comments.

As to the second statement of the investigator, the Court noted that the investigator stated that based on his experience as an officer and relying on the expertise of the forensic examiner as well, something definitely happened to the child. Thus, this comment had some probative value given that it was followed by appellant stating that he was willing to believe that something happened to the child. Also, the Court noted, the comments may have had some prejudicial effect given that there was no physical evidence of the crime. But, a reasonable juror would understand that the only reason an officer was interrogating the suspect was that the officer believed the account of the victim and thought the defendant was a suspect. Therefore, given these factors and the totality of the State's evidence, the Court found that the trial court did not abuse its discretion by determining that the probative value of the questioning exceeded any possible prejudicial effect.

Victim's Level of Certainty

Houston v. State, A15A1828 (1/14/16)

Appellant was convicted of armed robbery. At trial, the prosecutor asked the victim "How certain were you at the time . . . . How certain were you that this is the young man that robbed you that night?" The victim responded, "Very certain." Defense counsel objected, but the trial court allowed the question and answer. The trial court did not instruct the jury regarding the victim's level of certainty in violation of *Brodes v. State*, 279 Ga. 435, 442-443 (2005).

Nevertheless, appellant argued, a *Brodes* violation occurred because of the victim's testimony regarding her level of certainty coupled with the trial court's instruction to the jury that the evidence includes all of the testimony of the witness and that "identity is a question of fact for you to determine." The Court disagreed. It stated that it found no authority for concluding that this combination constitutes a violation of *Brodes*, and it declined to hold so in this case. Instead, the Court held, the *Brodes* decision does not prohibit an identification witness from testifying about his or her level of certainty, or restrict the State from inquiring about the same. A defendant may challenge such testimony through cross-examination, expert testimony, or presentation of testimony from other eye witnesses.

Habit Evidence; O.C.G.A. § 24-4-406

Evans-Glodowski v. State, A15A2035 (1/14/16)

Appellant was convicted of first degree homicide by vehicle, second degree homicide by vehicle, reckless driving, and failing to maintain her lane. The evidence showed that appellant drove her car around a curve at excess speed, veered into the oncoming lane, and collided with the vehicle approaching in the opposing lane, killing the driver. The record showed that prior to trial, she made a proffer that two family members who had been passengers in her car for a number of years were available to testify regarding her habit of driving around the particular curve involved in this case. The trial court found that such testimony was prejudicial and granted the State's motion in limine.

O.C.G.A. § 24-4-406 governs the use of habit evidence. According to that statute, "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with such habit or routine practice." The Court noted that since our appellate courts have not previously addressed habit evidence, it must turn to federal law for guidance. Federal law provides that habit evidence must occur so often that it permits an inference of systemic conduct. Citing Milich, the Court stated that the federal courts have construed "habit" narrowly, requiring that the conduct be almost automatic, a stimulus-response situation, and that the conduct be highly particularized and not involve general or complex behaviors such as drunkenness or reckless driving.

Here, the Court found, the proffered evidence was not the particular type of conduct that O.C.G.A. § 24-4-406 contemplates. How an individual drives, even on a specific curve, is subject to countless variables each time an individual faces the situation: whether the road is wet or dry, whether it is night or day, whether the driver is following another vehicle or driving with an open road, whether the driver is the sole occupant or carting passengers, whether

the driver is running late or early, or whether the driver is preoccupied, happy or sad, just to name a few. Thus, testimony that appellant drove in a certain manner around the particular curve on previous occasions was not evidence of habit. Therefore, the trial court correctly excluded the testimony.

In-Court Identifications; Allen Charges

Jackson v. State, A15A1883 (1/25/16)

Appellant was convicted of four counts of aggravated assault, two counts of armed robbery, and one count of burglary. He argued that the trial court erred in letting the victim make an in-court identification because the victim was unable to get a good look at his assailants and he identified another individual as his attacker in a police photo lineup that took place four days after the incident. The Court disagreed.

The Court stated that the admission of pretrial identification procedures like police photo lineups is subject to court review for reliability, considering factors such as the witness's opportunity to view the defendant at the time of the crime. However, appellate courts do not review in-court identifications in this manner, as they occur under the immediate supervision of the trial court. Instead, challenges to in-court identifications must be made through cross-examination. Appellant's challenges to the victim's in-court identification, including the inconsistency in his in-court and pre-trial identifications, went to the weight and credibility of the victim's testimony, not to its admissibility. Thus, given that appellant's counsel had the opportunity to cross-examine—and, indeed, did cross-examine—the victim about his in-court identification of appellant and his failure to identify him in the pretrial photo lineup, the admission of the in-court identification was not cause for reversal.

Appellant also contended that the trial court erred in the *Allen* charge it gave the jury when the jury stated that it was deadlocked 11-1 on 5 of the counts. Specifically, while giving the *Allen* charge, the trial court stated, "I want you to take a look at it, because we spent a day and a half trying it. These cases, the case will not go away with a hung verdict. There are many ways it can go away, jury verdict is one and there are many other ways." Appellant argued that the trial court's comment that the case would not "go away" placed undue pressure on the hold-out juror. He argued that the extra comment conveyed the judge's opinion that there was enough evidence to retry the case and possibly implied that a guilty verdict was inevitable.

The Court again found no error. In looking at all of the charge, the Court found that the charge, when taken as a whole, urged jurors to follow their consciences and assured them that a hung verdict was an acceptable outcome. Most importantly, the Court noted, far from indicating that a guilty verdict was inevitable, the judge immediately clarified what he meant when he said the case would not "go away" with a hung verdict, explaining that a jury verdict was just one of the ways a case could "go away."

Juror Removal; Social Media

Smith v. State, A15A1664 (1/25/16)

Appellant was convicted of burglary and theft by taking. The record showed that during jury deliberations, the State moved to replace Juror 4 because it had discovered that Juror 4 appeared as a friend on appellant's Facebook page. The State argued that Juror 4 should be dismissed because she did not respond affirmatively when asked during jury selection whether she knew appellant. During the trial court's inquiry, Juror 4 initially stated that she rarely used Facebook and did not believe she was friends with appellant on Facebook, but she later confirmed that her profile appeared on appellant's Facebook page as a friend. Based on Juror 4's answers, the trial court replaced her with an alternate. The jury subsequently returned a guilty verdict on the counts of burglary and theft by taking.

Appellant argued that the trial court erred in dismissing Juror 4 during jury deliberations because it failed to make a sufficient inquiry to establish any misconduct to warrant her removal. The Court disagreed. Regardless of Juror 4's reasons for failing to disclose her connection to appellant, the depth of her relationship, and whether her failure to disclose constituted misconduct, Juror 4 was connected to appellant in some fashion and her veracity on the issue was in question. Consequently, the trial court did not abuse its discretion in replacing Juror 4.

Appellant also contended that the trial court erred at the motion for new trial hearing by excluding as irrelevant the testimony of Sharon Lunsford, who he sought to testify regarding her general experience using Facebook. Appellant argued that Lunsford's testimony would establish that Facebook users may not actually know people listed as their Facebook friends and would thus tend to show that Juror 4 may not have actually known appellant. But, the Court stated, appellant argued only that Lunsford's testimony about her own personal Facebook experience supported the possibility that Juror 4 may have appeared on appellant's Facebook page without having known him. But, even if true, this is not enough. No matter what Lunsford's personal style of using Facebook might be, her testimony regarding that style was not relevant to Juror 4's personal style, and appellant did not attempt to elicit relevant testimony on that subject from the only person able to give it — Juror 4. Consequently, the trial court did not abuse its discretion in excluding the testimony as irrelevant.

Out-of-time Appeals; Mutually Exclusive Offenses

Smith v. State, A15A2110 (1/25/16)

The Court granted an out-of-time appeal to appellant from the judgment of conviction entered on his non-negotiated guilty pleas to the offenses of aggravated assault, robbery, and theft by receiving stolen property. Appellant contended that the robbery and theft by receiving stolen property counts to which he pled guilty were mutually exclusive. The Court agreed.

The Court noted that in separate counts of the indictment, appellant was charged with: (1) robbery in violation of O.C.G.A. 16-8-40(a)(1) by using force to take a vehicle owned by the victim from the person and immediate presence of the victim; and (2) theft by receiving stolen property in violation of O.C.G.A. § 16-8-7 by receiving and retaining the same stolen vehicle which he knew or should have known was stolen. The Court stated, and the State conceded, that there is no doubt that one cannot be convicted of both robbery of a vehicle and theft by receiving that vehicle. The offense of theft by receiving is intended to catch the person who buys or receives stolen goods, as distinct

from the principal thief. An essential element of the crime of theft by receiving is that the goods had been stolen by some person other than the accused. Accordingly, the Court held, appellant's guilty pleas for robbery and theft by receiving must be vacated, the convictions based on those pleas are likewise vacated, and the case remanded for further proceedings as to those counts of the indictment. However, because all of appellant's guilty pleas resulted from a non-negotiated plea agreement, the Court found no basis to conclude that its ruling with respect to the guilty pleas on the robbery and theft by receiving charges undermined the validity of the guilty plea and conviction on the charge of aggravated assault, which the Court affirmed.

Motions to Modify Sentence

Pendleton v. State, A15A2240 (1/6/16)

Appellant entered a non-negotiated plea to multiple counts of attempt to commit armed robbery, kidnapping with intent to rob and aggravated assault with intent to rob. Approximately ten months later, he filed a motion to modify his sentence. The trial court denied the motion, finding it to be untimely because it was filed out-of-term.

The Court reversed. Notwithstanding the expiration of the term of court in which the sentence was imposed, the provisions of O.C.G.A. § 17-10-1(f) vested the trial court with jurisdiction to consider and rule upon the merits of appellant's motion within one year of the date upon which the sentence was imposed. Thus, because appellant filed his motion approximately ten months after his sentence was imposed, the trial court erred by denying the motion as untimely. Accordingly, the Court remanded the case for consideration of appellant's motion on the merits.