

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 19, 2008

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THIS WEEK:

- **Character Evidence**
- **Similar Transaction**
- **Search & Seizure**

Character Evidence

Burrell v. State; A08A1303

Appellant was convicted on one count each of kidnapping, aggravated assault, criminal trespass, and on two counts of making terroristic threats. On appeal, appellant contends that the admission of certain evidence improperly placed his character in issue. The record shows that appellant kidnapped his former girlfriend and held her captive for several days. During that time, appellant drove the two of them to a Wal-Mart, where the victim attempted to escape. Appellant subdued the victim and forced her back into her car at knife point. The victim escaped from the car and fled to the protection of store security officers. At trial, appellant's former wife testified on direct examination that she had seen the victim and appellant together in public during the time of the commission of the crimes and that appellant did not seem to be forcing the victim to do anything. During cross-examination, the prosecutor asked her whether she was afraid of appellant. When she answered that she was not, the prosecutor asked whether it was true that he had beaten her on prior occasions. Defense counsel objected and moved for a mistrial because the testimony sought to be elicited from the witness improperly placed appellant's character in issue. The court allowed the witness to testify that although

appellant had beaten her in the past, she was no longer afraid of him.

The Court of Appeals held that a defendant's character is not placed in evidence in the sense that doing so is proscribed where the evidence, offered for another purpose, may tend incidentally to do so. Further, it is proper for the State, in cross-examining a witness for the accused, to bring out the relationship existing between the witness and the accused for the purpose of showing bias or prejudice, or for the purpose of showing the probability that the witness is testifying on behalf of the accused by reason of fear or duress for the consideration of the jury. Thus, the testimony elicited from the witness was admissible and provided no cause for declaration of a mistrial. Judgment affirmed.

Similar Transaction

Kent v. State; A08A0822

A jury found appellant guilty of rape and burglary. On appeal, appellant alleges that the trial court erred in admitting similar transaction evidence because (i) the existence of the prior transaction was established solely through hearsay; (ii) the transaction was not sufficiently similar to the crime being prosecuted in this case; and (iii) the prejudice against admitting the evidence significantly outweighed the probative value. The record reveals a 27-year-old mentally retarded victim, having the mental age of a 10-year-old, was raped by appellant. Two years prior to the incident, a detective investigated appellant for offenses against an eight and an 11-year-old girl. During that investigation, appellant admitted to the detective that he had engaged in a sexual conversation with the girls and had played a sexual truth-or-dare game with the older girl.

At trial, the detective who investigated and arrested appellant for the prior offenses testified about that investigation and what appellant had told him. The trial court ruled that the evidence was admissible to show appellant's lustful disposition toward persons of limited mental capacity.

The Court of Appeals found that the Georgia Supreme Court in *Inman v. State*, 281 Ga. 67; 635 SE 2d 125 (2006), had previously ruled that what an investigating officer saw while investigating a prior offense and what the defendant told him during that investigation is not hearsay and is admissible at trial. The Court also held that the sexual offenses against the eleven-year-old demonstrated appellant's tendency to sexually assault individuals of limited mental capacity. And, contrary to appellant's argument, the relevancy of the similar transaction evidence outweighed any prejudice that its admission may have occasioned since such evidence was particularly relevant and needed where the victim of the sexual abuse is mentally retarded. Judgment affirmed.

Search & Seizure

Richbow v. State; A08A1297

Appellant appeals his conviction for trafficking in marijuana, contending that the trial court erred in denying his motion to suppress. On appeal, appellant contends that the trial court should have granted his motion to suppress because he was detained beyond the time necessary to complete the traffic stop, and that the officers had no objectively reasonable suspicions to justify his continued detention. The record shows that appellant was driving north on Interstate 75. When he passed two police officers in a patrol car, his speed dropped from 70 mph to 50 mph. The officers saw that appellant's tag light was not working and stopped him. As the arresting officer approached appellant's car he smelled a strong odor of air freshener and saw a one bag-type air freshener on the rear deck and another bag stuffed into the interior vent. As the officer asked for appellant's license, appellant was visibly shaken, breathing deep and rapid, and his lips were white in color. There were also three cell phones visible in the car. While the first officer was writing the warning ticket, the second officer returned to his patrol car and gave appellant's tag and license information to

an immigration customs enforcement database intelligence center. Based on the information he received and the other factors described, the officer called for a drug dog to come to the scene. The first officer finished writing the warning and the dog arrived within two minutes of being called. The dog gave a positive response while circling the car, which gave the officers probable cause to search it. The officers found more than 100 pounds of marijuana in the trunk of appellant's car.

The Court of Appeals found that the elements of nervousness, cell phones, and air freshener alone is not enough to create a reasonable suspicion of criminal activity that permits further inquiry. However, the strength of the evidence-- the degree of nervousness, the number of phones, the thickness of the masking scent—and the length of continued detention must be considered together to determine whether a trial court's decision to grant or deny a motion to suppress passes constitutional muster. Here, the Court found, considering the totality of the circumstances, the trial court did not err in concluding that appellant's minimal delay was justified. Judgment affirmed.