

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 19, 2018

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THIS WEEK:

- **Impeachment; First Offenders**
- **Right to be Present; Motions for New Trial**
- **Rule 403; Intrinsic Evidence**
- **Motions in Limine; Knowledge of Age of Victim**

Impeachment; First Offenders

Manner v. State, S17A1519 (12/11/17)

Appellant was convicted of malice murder and related offenses. At trial, Davis, an eyewitness, admitted that in his initial discussions with police, he lied about his involvement in the shooting, first stating that he did not know appellant, and then telling police that appellant and a fictitious person named “Jason” borrowed his car on the night the victim was killed. Davis also admitted that he was arrested for making those false statements, and was in custody on that charge when he finally confessed to his own involvement and named appellant as the shooter. Additionally, Davis testified that he could have received a sentence of five years’ imprisonment for the charge of making a false statement, but that he eventually entered a guilty plea as a first offender and received a sentence of probation, with his testimony at appellant’s trial being a condition of his sentence. In light of Davis’s guilty plea, appellant requested a jury instruction on impeachment by prior conviction. The trial court declined to give the charge, reasoning that the instruction was

unwarranted because Davis’s first offender guilty plea was not a “conviction.” Appellant argued that new OCGA § 24-6-609 (c) allows for the instruction. Specifically, that subsection states, in relevant part, that “[e]vidence of a final adjudication of guilt and subsequent discharge under any first offender statute shall not be used to impeach any witness.” Because Davis had just begun his five-year sentence of probation, appellant argued, his “subsequent discharge” had not yet occurred, meaning that the first offender plea was admissible as general impeachment evidence. The Court disagreed. The Court noted that it first held in 1997 that first offender pleas could not be used as general impeachment evidence because successful completion of a first offender sentence means that there has been no adjudication of guilt and thus no criminal “conviction.” The enactment of the new Evidence Code did not change this well-established rule. The general rule permitting admission of evidence of certain prior convictions as impeachment was carried over from OCGA § 24-9-84.1 into the new Evidence Code with no relevant substantive changes. The new rule provides for the admission of evidence that a witness “has been convicted of a crime,” just as the old one did. Thus, the first offender language included in Rule 609 with the adoption of the new Evidence Code does not change the longstanding rule that an adjudication of guilt is required for a conviction—and that a conviction is required to warrant a jury instruction on impeachment by prior conviction. Instead, it provides that, as for a pardoned or annulled conviction, any conviction subse-

quently discharged under a first offender statute may not be used as impeachment evidence on general grounds. Accordingly, because no adjudication of guilt had been entered in Davis's case, he had not been "convicted" of making a false statement, and his first offender guilty plea was not admissible for purposes of impeachment by prior conviction. Consequently, the requested jury instruction on impeachment by prior conviction was unwarranted, and the trial court properly declined to give it.

Right to be Present; Motions for New Trial

Bozzie v. State, S17A1539 (12/11/17)

Appellant was convicted of malice murder and other crimes. He argued that the trial court violated his due process rights by denying his request to be present at the motion for new trial hearing. The Court disagreed. The Court stated that a defendant has no unqualified right to be present at the motion for new trial hearing. Nevertheless, citing case law from our Court of Appeals, which in turn relies on case law from the Eleventh Circuit considering federal due process concerns, appellant argued that due process required his presence because he would have offered testimony that was relevant to the issues presented in his motion. First, appellant contended that his presence was required to authenticate a letter and to testify about it. However, the Court found, the State stipulated to its admission, and thus, the trial court was aware of its contents. Furthermore, appellate counsel was more than capable of making an argument as to the significance of the letter without appellant's testimony. Next, appellant argued that his presence was necessary as to his ineffective assistance of counsel claims. Specifically, he argued that his testimony would have been relevant to trial counsel's failure to discuss strategic decisions with him, and that counsel's failure to consult with him reflected that counsel's actions were not strategic. However, the Court found, appellant did not raise a claim below that counsel was ineffective for failing to consult with him, and he may not now argue grounds on appeal that he

did not argue below. Moreover, the Court found, to the extent appellant argued that counsel's failure to consult showed that counsel did not actually think about certain issues and, thus, his decisions were not strategic, the determination of counsel's performance is based on the objective reasonableness of his actions, not his subjective state of mind. Therefore, even if appellant's testimony was relevant toward a determination of counsel's state of mind, appellant's testimony was not relevant to the task before the trial court: assessing the objective reasonableness of counsel's actions. Accordingly, the Court concluded, appellant failed to establish that his due process rights were violated because he was not present at the motion for new trial hearing.

Rule 403; Intrinsic Evidence

Smith v. State, S17A1757 (12/11/17)

Appellant was convicted of felony murder while in the commission of aggravated assault, aggravated assault with a deadly weapon and other offenses. He argued that the trial court erred in admitting an audio recording of a five-minute phone call that he made from jail to a friend. During the phone call, appellant made derogatory references to Caucasians ("crackers"), women ("bitches"), and police officers ("pigs"). At trial, appellant objected under Rule 403. Specifically, that the prejudicial effect substantially outweighed the probative value of the audio recording, as the only arguably relevant portions of the phone call were his denials that he committed any crimes, and those denials were cumulative of his initial statement to police and thus barely probative at best. After reviewing the audio recording, the Court noted that appellant said he "didn't do it," that he denied the existence of any evidence against him, and that he did not claim self-defense at that time. Thus, the Court found, the recording showed that he made statements which were not consistent with either his statements at his second police interview or the defense theory of justification presented at trial. Also, the statements at issue were not needlessly

cumulative, as they showed that appellant's denials of the crimes were made not only in his first statement to investigators, but also to a friend at a later time, and that he again did not mention self-defense. Furthermore, the Court noted, as for the claimed unfair prejudice, the question is not whether the telephone call containing the derogatory language was prejudicial, but rather whether the danger of unfair prejudice substantially outweighed the probative value of the recording. The Court noted that unfortunate though it may be, the words that appellant used "have lost much of their shock value in contemporary culture" and were unlikely to induce the jury to return a conviction based on a generalized assessment of character. Accordingly, the Court found, it could not say that the derogatory terms used by appellant created a risk of unfair prejudice that substantially outweighed the recording's probative value. Therefore, the trial court did not abuse its discretion when it performed the balancing required by OCGA § 24-4-403 and admitted the audio recording of appellant's phone call from jail. Appellant also argued that the trial court erred by denying his motion to redact his first statement to police to exclude portions that mention his illicit drug use because those portions involved unrelated criminal acts that constituted irrelevant character evidence. The Court noted that the limitations and prohibition on "other acts" evidence set out in OCGA § 24-4-404 (b) do not apply to "intrinsic evidence." Evidence is admissible as intrinsic evidence when it is (1) an uncharged offense arising from the same transaction or series of transactions as the charged offense; (2) necessary to complete the story of the crime; or (3) inextricably intertwined with the evidence regarding the charged offense. Here, the Court found, appellant used his consumption of drugs to explain his condition on the night of the murder, to excuse his partial lack of recollection, and to deny his involvement in the shooting. Therefore, the Court found, the portions of appellant's initial statement to police that admit his illicit drug use were inextricably intertwined with evidence regarding the charged offenses. Specifically those portions formed an integral and natural

part of his account of the circumstances surrounding the offenses for which he was indicted, and the same portions of his first statement were relevant to his defense of justification. Accordingly, the Court concluded, although appellant's character may have been incidentally placed into evidence, the trial court did not abuse its discretion in admitting the portions of his statement at issue as intrinsic evidence.

Motions in Limine; Knowledge of Age of Victim

West v. State, A17A2020 (12/12/17)

Appellant was indicted on two counts each of child molestation and statutory rape. The evidence showed that appellant made a Mirandized statement admitting to having sex with the victim on multiple occasions, but claimed that he thought she was 17 years of age and only learned later that she was 15 years old. The State filed a motion in limine seeking to prohibit any testimony or evidence regarding appellant's belief that the victim was over the age of consent. The trial court granted the State's motion in limine and granted appellant a certificate of immediate review. The Court granted appellant's application for interlocutory appeal. The Court noted that in *Haywood v. State*, 283 Ga. App. 568 (2007) it held that the trial court did not abuse its discretion in granting the State's motion in limine seeking to exclude evidence of the defendant's knowledge of the victim's age in a case where defendant was convicted of child molestation and statutory rape. The *Haywood* Court reasoned that knowledge of the victim's age is not an element of either statutory rape or child molestation and, thus, was not relevant information in the trial. The *Haywood* Court also concluded that evidence regarding the victim's contradictory statements about her age would not be admissible even for impeachment purposes. Appellant argued that *Haywood* is no longer binding because Georgia case law subsequent to *Haywood* has allowed evidence of a defendant's belief regarding the victim's age to be introduced in similar cases. In support of his argument, he cited *Davis v. State*, 329 Ga. App. 17 (2014)

and *Castaneira v. State*, 321 Ga. App. 418 (2013). However, the Court found, to the extent these cases conflict with the holding in *Haywood*, they do so only in dicta. They have not altered the clear-cut rule set forth by the Court in *Haywood*. Accordingly, because *Haywood* is controlling, the Court concluded that the trial court did not err in granting the State's motion in limine to exclude evidence and testimony regarding appellant's belief of the victim's age at the time of the sexual act.