

THIS WEEK:

- **Rule 404 (b); Intent and Motive**
- **Miranda; Invocation of Right to Remain Silent**
- **Judicial Comments; Plain Error**
- **Obstruction of an Officer; OCGA § 37-3-41**
- **Search & Seizure; *Kazmierczak***

Rule 404 (b); Intent and Motive

Kirby v. State, S18A0936 (9/24/18)

Appellant was convicted of the stabbing death of Emily Mason. The evidence, briefly stated, showed that in 2002, appellant, with the intent to commit a theft, entered the home of the victim, confronted her, and began chasing her with a knife. The victim's husband came home later and found her lying dead face down in a pool of blood in the kitchen hallway. Her shirt had been pulled above her breasts, her pants and underwear had been pulled off her and were tangled under her left leg, and it appeared that blood had been wiped off her lower body, although later examination of the victim's body found no signs of vaginal or rectal trauma. Appellant's DNA and a wedding ring that appellant lost during the struggle with the victim were found at the scene. The State also offered evidence under OCGA § 24-4-404 (b) showing that appellant committed robbery, aggravated assault with the intent to rape, and attempted rape in 1990 and armed robbery and aggravated assault with a deadly weapon in 2003. Appellant did not testify at trial. The main defense theory was that the victim's husband killed her because she wanted a divorce; there was evidence that they had argued frequently leading up to the murder.

Appellant contended that the trial court erred in admitting the Rule 404 (b) evidence to prove intent and motive. The Court noted that the party offering evidence under § 24-4-404 (b) must show three things: (1) the evidence is relevant to an issue in the case other than the defendant's character; (2) the probative value of the evidence is not substantially outweighed by its undue prejudice; and (3) there is sufficient proof for a jury to find by a preponderance of the evidence that the defendant committed the other act. Appellant did not dispute that the State satisfied the third part of the § 24-4-404 (b) test as to both the 1990 and 2003 incidents, only that the State did not satisfy the first two parts.

The Court first looked at the 1990 incident. The evidence showed that appellant entered a convenience store in Emanuel County with a gun. He pointed the gun at the pregnant cashier and ordered her to give him all of the money in the cash register. After he took the money, he made the cashier go into the bathroom at gunpoint. He then pulled down her underwear, but when she pretended to go into labor, he fled. Appellant pled guilty to robbery, aggravated assault with intent to rape, and attempted rape. The Court stated that the evidence (without the 1990 incident) was legally sufficient to prove an aggravated assault with intent to rape, but it was thin: The victim's shirt had been pulled up and her pants and underwear pulled off, the blood on her lower body appeared to be somewhat wiped off, and appellant had

told his co-worker two weeks before the murder that the victim "looked good to him and he had to go back and see her." The State had to counter evidence that the victim's body showed no signs of vaginal or rectal trauma and that appellant told his cellmate that he planned to steal from the house believing no one was home and never mentioned anything about wanting or trying to rape the victim. Moreover, appellant took no steps to remove the issue of intent to rape from the case; to the contrary, his counsel argued that the victim had not been sexually assaulted but rather someone other than appellant (likely the husband) had killed the victim and staged the scene to look like an attempted rape. The high prosecutorial need for the evidence of the 1990 incident greatly increases its probative value.

The Court noted that if the 1990 incident had been admitted to prove *identity*, the dissimilarities between the two crimes would have been fatal to admissibility, as other act evidence offered for that purpose must be so similar as to demonstrate that the other act and the charged offense were "signature" crimes" with the defendant using a modus operandi that is uniquely his. When other act evidence is introduced to prove *intent*, however, a lesser degree of similarity between the charged crime and the extrinsic evidence is required. Thus, the trial court here had discretion to consider the similarities and differences and conclude that the evidence of the 1990 incident retained substantial probative value. Also, the Court found although more than 11 years passed between the 1990 crimes and the victim's murder in 2002, the prior acts were not so remote as to be lacking in evidentiary value, particularly since it was likely that appellant was incarcerated for a significant portion of the intervening years.

Finally, the Court found that with regard to prejudice (1) appellant was already presented to the jury as an accused attempted rapist; (2) when the evidence of the 1990 incident was presented, the jury learned that appellant had already admitted his guilt and been convicted and served a prison sentence for his 1990 conduct, making it less likely that the jury would want to punish appellant for this past conduct rather than the charged crimes; and (3) the robbery aspect of the 1990 incident was not substantially prejudicial, given the attempted rape and armed assault aspects of that incident as well as the evidence that appellant planned to commit a theft from the victim's house and used a deadly weapon against her. And the 1990 evidence had much more than scant or cumulative probative force. Therefore, the Court concluded, the trial court did not abuse its discretion in admitting the 1990 evidence.

However, as to the 2003 crimes, the evidence showed that appellant brought a knife to another convenience store in Emanuel County, threatened the cashier, and left after she gave him the money in the cash register. Appellant pled guilty to armed robbery and aggravated assault with a deadly weapon. The Court found that the probative value of the 2003 incident was minimal. Unlike the high prosecutorial need to use the 1990 incident to supplement the limited intrinsic evidence of appellant's intent to rape the victim, there was overwhelming evidence that the victim was assaulted with a deadly weapon, and thus little if any prosecutorial need for extrinsic evidence to bolster that proof. Also unlike the 1990 incident, the 2003 incident did not share any major similarities with the crimes charged in this case, but the differences were substantial. The only real similarity was appellant's use of a knife in the assault, but the aggravated assaults were committed under very different circumstances. Also, while the 2003 incident and the victim's murder were separated by only a little over a year, this temporal proximity alone did not make the 2003 incident more appreciably probative. For these reasons, the probative value of the 2003 incident was quite low.

Next, the Court weighed this minimal probative value against the prejudicial effect of the evidence. The prejudice was reduced because the jury was properly presented with evidence that appellant used a deadly weapon to assault and rob a

convenience store cashier in 1990. But the 2003 evidence still had some prejudicial force, because it suggested that appellant was not only an armed robber, but a serial armed robber — and indeed a violent criminal who kept committing dangerous crimes even after killing someone. Because this prejudice substantially outweighed the scant probative value of the 2003 incident, the trial court abused its discretion in admitting this evidence to prove intent.

As to the use of the evidence to prove motive, the State argued that the fact that appellant committed other violent crimes against women showed his "inclination" to use violence to obtain money and sex as he did in his crimes against the victim. The Court state that this was "a classic improper propensity argument," focusing on appellant's violent, greedy, and lustful character and identifying his motive to act in far too generic a fashion. The State failed to show a logical and necessary link between appellant's motive to commit the charged crimes against the victim and his commission of a convenience store robbery about a year later. Because the 2003 incident was not relevant to prove appellant's motive, the trial court abused its discretion in admitting evidence of his 2003 acts for this purpose.

Nevertheless, the Court found that the admission of the 2003 incident was harmless. The properly admitted evidence included the evidence of the 1990 incident and appellant's subsequent robbery, aggravated assault, and attempted rape convictions, so the jury was already aware that he had committed other violent crimes. And any prejudice from the evidence that he had committed two other sets of violent crimes rather than one other set was easily offset by the other compelling evidence against appellant in the instant case. Therefore, the Court concluded, it was highly unlikely that the erroneous admission of evidence about the 2003 incident affected the jury's verdict.

Miranda; Invocation of Right to Remain Silent

Davidson v. State, S18A0933, S18A0934 (9/24/18)

Appellant was convicted of murder and unlawful possession of a firearm during the commission of a felony. The evidence showed that appellant and Davidson first saw the victim at a Taco Bell, where appellant stated to the victim that he liked the necklace the victim was wearing. Thereafter, appellant, Davidson and Goins followed the victim in their car as the victim drove home from the Taco Bell. When the victim reached his home, Davison got out of the car, attempted to rob and then fatally shot the victim.

Appellant contended that the trial court erred when it admitted the statement in which he attempted to exonerate Goins, arguably incriminating himself along the way. The statement was "[Goins] didn't know we was doing none of that; he didn't know we was going to do that; he didn't know we planned on doing nothing; he was just trying to get home" The Court noted that the statement was the product of a custodial interrogation, and prior to trial, appellant filed a motion to suppress it, asserting that he repeatedly and unequivocally invoked his right to remain silent before giving the statement, but the investigators nonetheless pressed forward with their interrogation. Following a pretrial hearing, the trial court denied the motion, reasoning that appellant's repeated invocations of the right to remain silent were equivocal and ineffectual because appellant attempted to invoke the right *before* he was advised of his rights under *Miranda v. Arizona*, 384 U. S. 436, 473-474 (III) (86 SCt 1602, 16 LE2d 694) (1966).

The Court noted that the right to remain silent that is described in the *Miranda* warnings derives from the Fifth Amendment itself, not the decision in *Miranda*. A person in the custody of law enforcement officers has a constitutional

right to remain silent in response to their questions, regardless of whether he fully understands that right or has been advised of it under *Miranda*. Nothing in *Miranda* suggests, however, that the right to remain silent in response to a custodial interrogation attaches only if, and when, law enforcement officers have read the *Miranda* warnings.

Moreover, the Court stated, the law is clear that, when a person in the custody of law enforcement officers unambiguously and unequivocally invokes his right to remain silent in connection with their interrogation, the interrogation must cease immediately. Whether an invocation is unambiguous and unequivocal depends on whether the accused articulated a desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent. Here, at the outset of the interview, the investigators brought up the subject of “*Miranda* rights.” Immediately, appellant said that he knew about his “*Miranda* rights,” that he did not want to waive those rights, that he did not want “to talk about this at all,” and that he had “nothing to say.” When the investigators finally got around to reading the *Miranda* warnings to appellant, his response was: “If I’m already under arrest, then I’ve got nothing to say about nothing.” The investigators nevertheless pressed forward with their interview. Appellant yielded to a few questions and then again announced that “I ain’t got nothing to say. I don’t got nothing to say.” The Court found that no reasonable officer could have understood these repeated statements as anything other than clear assertions of the right to remain silent. The custodial interrogation should have ceased at the point of these unequivocal invocations of the right to remain silent, well before appellant agreed to speak with one investigator alone and made the arguably incriminating statement now at issue. The statement that was elicited thereafter should have been suppressed, and the admission of that statement was error.

Nevertheless, the State argued, any error in admitting the statement at issue was harmless. The Court disagreed. Although the error is one of constitutional magnitude, it can be harmless error if the State can prove beyond a reasonable doubt that the error did not contribute to the verdict, such as when the evidence at issue is cumulative of other properly-admitted evidence or when the evidence against the defendant is overwhelming. But here, the Court found, the case against appellant was, although legally sufficient, not strong. There was evidence putting appellant in the company of Davidson, the shooter, at the Taco Bell, and some evidence that he accompanied Davidson to the scene of the shooting. But mere presence is not enough to prove guilt, and apart from his arguably incriminating (and erroneously admitted) statement, there was little evidence to suggest that appellant was a voluntary participant or accomplice in the crimes. Indeed, perhaps in an acknowledgment of their weak case, the prosecuting attorneys pointed to the statement at issue repeatedly in their closing arguments, telling the jury that appellant’s use of the word “we” when describing what Davidson had done was proof that Davidson and appellant shared a common criminal intent and did those things together. Moreover, soon after the jury began its deliberations, it sent a note to the court, asking to see again the video recording of appellant’s statement and asking for a recharge on the concept of “parties to a crime.” Finally, the Court noted that Goins — whose culpability seemed no more doubtful than appellant’s, apart from appellant’s statement exonerating Goins and arguably incriminating himself — was acquitted of all charges by the same jury that found appellant guilty. Therefore, the Court found, the State failed to prove beyond a reasonable doubt that the erroneous admission of appellant’s custodial statement did not contribute to the guilty verdicts, and appellant was entitled to a new trial.

In so holding, the Court stated that “[W]e also remind prosecuting attorneys of their solemn obligation to seek justice in every case. See *Berger v. United States*, 295 U. S. 78, 84-88 (2) (55 SCt 629, 79 LE2d 1314) (1935). Sometimes, when a

trial court has clearly gotten it wrong (even when it was the prosecution that originally led the trial court into that error), seeking justice on appeal means conceding the obvious error, and in those instances, that is the duty of the Attorney General and the district attorney. “[The offices of prosecuting attorneys] are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done.” Robert H. Jackson, Address to the Second Annual Conference of United States Attorneys: “The Federal Prosecutor” (Apr. 1, 1940).”

Judicial Comments; Plain Error

Felton v. State, S18A0627 (9/24/18)

Appellant was convicted of murder and other related charges. The evidence, briefly stated, showed that the victim and his girlfriend drove to a car wash in order for the victim to meet someone to purchase an audio component for his car. She testified that a man (appellant) was already at the car wash when she and the victim arrived. The victim got out and spoke to appellant. Appellant shot the victim and drove away. The girlfriend did not know appellant, but told the officers that she could recognize him. The police used the cell phone of the victim to track his calls. Eventually, after showing the girlfriend a number of photo lineups in which she did not see appellant, she was shown one and immediately recognized him as the shooter.

Appellant contended that the trial court erred when it made comments allegedly in violation of former OCGA § 17-8-57. The Court disagreed. First, the Court noted that even though the trial occurred prior to the amendment of OCGA § 17-8-57 (2015), the 2015 standard of appellate review applies. And, because appellant did not object to any of the alleged improper judicial comments, the standard of appellate review is limited to whether there was plain error.

Second, the Court stated that OCGA § 17-8-57 does not generally apply to colloquies between the trial court and counsel that concern the admissibility of evidence. Here, when viewed in the full context of the trial proceedings, several of the comments at issue arose during colloquies with counsel and within the context of the trial court's ruling on an evidentiary objection. Remarks of a judge assigning a reason for his ruling are neither an expression of opinion nor a comment on the evidence. Thus, insofar as the trial court was explaining its rulings on evidentiary objections, appellant could not meet the first prong of the plain error test that there was a deviation from any rule. For example, in describing defense counsel's questioning as a “fishing expedition” and “beyond the realm,” the Court found that it appeared from the entire context of the colloquies that the trial court was emphasizing to defense counsel that it was inappropriate to posit questions that would elicit hearsay. Furthermore, the trial court did not make any statements about the credibility of either witness and so appellant's assertion of improper bolstering was without merit. Accordingly, in the absence of the violation of a clear rule, appellant could not establish the first prong of the plain error test.

The Court also found that appellant could not establish the third prong of the test—that the outcome of the proceedings would have been different. For example, although the trial court may have unnecessarily speculated as to the content of a phone call received by the victim's girlfriend, her actual testimony was unequivocal that she did not recall the specific details of the call. Also, there was no evidence presented to the jury that any anonymous calls made to the investigators led to the identification of a perpetrator. Indeed, the trial record showed the police presented the victim's girlfriend six different lineups which included photographs of various persons either connected to the victim's cell phone or connected

to anonymous information received during the investigation. The victim's girlfriend did not identify anyone as the shooter until police presented the last lineup which contained appellant's photograph. Appellant's name became known to investigators because his phone number appeared in the phone records of D.J., whose phone had been stolen and whose phone number appeared in the victim's cell phone in the 20 minutes prior to the shooting. Given this evidence, it was doubtful that the outcome of the trial was affected by any of the trial court's comments singled out by appellant. Accordingly, the Court found that there was no plain error.

Obstruction of an Officer; OCGA § 37-3-41

Appellant v. State, A18A1280 (9/17/18)

Appellant was convicted of one count of misdemeanor obstruction and one count of felony obstruction. The evidence showed that police officers responded to a 911 call from appellant's parents. Appellant, who resided with her parents, was threatening to kill herself. After arriving at the house, several officers entered a bedroom where appellant could be heard screaming. The officers attempted to calm appellant, who was screaming, cursing, and attempting to find a way to kill herself. Appellant ultimately grabbed a pill bottle that did not have a lid and "shot it like a glass of liquor." Officers, who were unfamiliar with the contents of the bottle, attempted to grab appellant's hand and the bottle and detained appellant on the bed. Appellant then spat a large quantity of spit into the mouth, eyes, and face of one of the officers and screamed "[H]ow does that f[**]king taste, pig?" Another officer then told appellant that she was under arrest and instructed her to stop resisting and to place her hands behind her back. Appellant, however, continued to resist and attempted to spit on officers once more. Finally, officers were able to handcuff and secure appellant, who was then transported to a medical facility.

Appellant contended that the evidence was insufficient to show that she obstructed a law enforcement officer in the lawful discharge of his duties. The Court disagreed. A law enforcement officer has a duty to maintain the peace, and the officer is lawfully discharging his or her official duties when attempting to defuse what could become a violent confrontation. Here, police were responding to a 911 call in which appellant's mother reported that appellant was suicidal, was behaving erratically, had a knife, and required medical assistance. Clearly, the situation had the potential to become a violent confrontation, and police were in the process of managing it when they attempted to stop appellant from swallowing the contents of a pill bottle and detained her on the bed. The evidence was therefore sufficient to support the verdict.

Appellant also contended that the trial court erred in denying her motion for immunity because the police did not comply with OCGA § 37-3-41, which sets forth provisions for taking an individual into custody for involuntary mental health treatment. However, the Court stated, the provisions of OCGA § 37-3-41 did not apply here. Police were not attempting to place appellant into civil protective custody pursuant to this statute. Rather, appellant was arrested because of the two criminal offenses she committed. Due to her suicidal state, appellant was taken to a hospital by police before later being transferred to jail. Appellant's argument therefore failed.

Search & Seizure; *Kazmierczak*

Wingate v. State, A18A1144 (9/19/18)

Appellant was convicted of multiple counts of VGCSA based on evidence found during the search of two locations. He contended that the trial court erred in denying his motion to suppress. Specifically, he argued that the affidavit in support of the first warrant lacked probable cause and the second warrant, which was based on evidence obtained as a result of the first warrant, was also tainted. The Court agreed and reversed appellant's convictions.

The evidence showed that a sheriff's narcotics investigator stated in his affidavit in support of the search warrant as follows: "The affiant was contacted by FBI Agent [M. S.] in reference to a possible marijuana grow at the residence of 501 Long Branch Road. Agent [M. S.] relayed the information to the affiant via telephone. Affiant then traveled to the residence and met with Agent [M. S.] along with agents [J. H.], [M. P.], and [G. M.] who are agents with the FBI Task Force. Agents explained to affiant that they had come to the residence to make contact with Tad Wingate. Upon arrival they attempted to go to the front door but were unable to because of several boards missing from the deck. As they went around the back of the house they heard a radio playing in the out building behind the house. As they approached the out building they smelled a strong odor of marijuana coming from the building. The door to the out building was padlocked from the outside and they heard the noise of a fan. They then made contact with the affiant by telephone. Affiant verified everything they had said and left the agents and [two investigators] to secure the residence while affiant typed [a] search warrant for the property."

Citing *State v. Kazmierczak*, 331 Ga. App. 817 (2015), the Court agreed with appellant that the warrant affidavit for the Long Branch Road location did not establish probable cause because the only relevant information it contained was the officers' detection of the odor of marijuana, but the affidavit failed to include information about the officers' qualifications to identify the odor. The State argued that the magistrate could have concluded that the affiants and the FBI agents had the necessary training and experience to identify the odor of marijuana because the magistrate could have inferred that federal law enforcement officers and investigators with sheriffs' offices have such training and experience. However, the Court stated, such an inference would render the holding in *Kazmierczak* meaningless.

Next, the State argued that even without the odor of marijuana, the magistrate could have found probable cause to issue the Long Branch Road search warrant because the affidavit "noted that FBI agents believed there to be a marijuana grow operation at the location, [and] the affiant observed that the outbuilding was padlocked from the outside and that there was the sound of a fan blowing within the building." But, the Court found, the statement in the affidavit that an FBI agent contacted the affiant "in reference to a possible marijuana grow at the residence of 501 Long Branch Road," contained no information to support such conclusion. And the affidavit contained no information that would allow the magistrate to determine that the presence of a padlock and the sound of a fan blowing are indicative of a criminal offense.

Thus, the Court concluded, the search warrant affidavit for the Long Branch Road property failed to establish probable cause. And without the evidence obtained in the search of the Long Branch Road property, the search warrant affidavit for the second property also failed to establish probable cause. Accordingly, the trial court erred by denying the motion to suppress.