

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 24, 2017

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THIS WEEK:

- **Miranda; Voluntariness**
- **Identifications; Cell Phone Records**
- **Sufficiency of the Evidence; Sentencing**
- **Rule 404 (b); Intent and Motive**
- **Indictments; Demurrers**
- **Rule 404 (b); Jury Panels**
- **Juveniles; Competency**

Miranda; Voluntariness

State v. Troutman, S16A1858 (2/27/17)

Troutman was indicted for murder. The evidence showed that investigators learned that Troutman may have met the victim on the day of the murder. They picked up Troutman from his home on a Thursday morning and, over the course of nine hours, interviewed him three times; at the end of the third interview, Troutman admitted killing the victim. Troutman moved to suppress his incriminating statement. After conducting a hearing – at which the trial court received as evidence testimony from various witnesses, including Troutman, and the recorded and transcribed interview – the trial court concluded that the statement was inadmissible because it was a custodial statement elicited without the benefit of *Miranda* warnings and, further, that the statement was involuntary. The State appealed.

The State argued that *Miranda* warnings were not necessary because Troutman was not in custody. The Court disagreed. A person is considered to be in custody and *Miranda* warnings are required when a person is (1) formally arrested or (2) restrained to the degree associated with a formal arrest. Thus, the

proper inquiry is how a reasonable person in Troutman's shoes would have perceived his situation. And here, the Court found, the record showed that: (1) Troutman was kept at the police station over the course of nearly nine hours in a non-public area, during which he was interviewed three times; (2) he was never advised of his *Miranda* rights; (3) investigators never advised Troutman that he was free to leave; and (4) Troutman was explicitly told that he was not allowed to leave. Under these circumstances, the Court found, the trial court did not err in its determination that a reasonable person in Troutman's position would have believed that he was in custody before the start of the third interview and, thus, that Troutman's unwarned statement given during that third interview was due to be suppressed.

The State also contended that the trial court erred in determining that the statements were not voluntary under traditional due process standards. The trial court found, in addition to the facts set forth above, that Troutman was 21 years old and still in high school, was dyslexic and told detectives he had not slept in three days. The Court stated that coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause. However, the investigators' mere failure to administer *Miranda* warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised. Thus, because the *Miranda* presumption does not necessarily constitute a finding that the statement was coerced, statements obtained in violation of the procedural requirements of *Miranda* may be found otherwise voluntary under due

process standards.

Here, the Court found, even accepting the trial court's findings of fact, the circumstances of the investigation and arrest revealed none of the extreme tactics identified as the hallmarks of coercive police activity offensive to fundamental notions of due process such as lengthy interrogation, physical deprivation, brutality, or deception. The findings of the trial court regarding the conduct of investigators – isolating Troutman, taking his shoes and phone, holding him incommunicado, and advising him that he could not leave – are hallmarks that Troutman was in custody and that his freedom was restrained, but they do not rise to techniques and methods offensive to due process or create circumstances in which the suspect clearly had no opportunity to exercise a free and unconstrained will. While Troutman was kept at police headquarters for approximately nine hours, the trial court recognized that only a fraction of that time was spent in interrogation. Likewise, though Troutman's mental state and intellectual disabilities are factors to be considered, those factors, without more – i.e., deliberate tactics calculated to break the will of the suspect – are insufficient to support a conclusion of coercive police activity. Accordingly, the Court concluded, the trial court's findings of fact regarding the conduct of investigators were insufficient to support the legal conclusion that Troutman's statement was a result of coercive police activity and, thus, involuntary.

Identifications; Cell Phone Records

Wise v. State, S16A1661 (2/27/17)

Appellant was indicted on 90 counts relating to a crime spree including murder and armed robbery. He was convicted of murder and 51 other counts. The record showed that while cross-examining Craven, the victim of an armed robbery by appellant and others, a co-defendant's attorney began to question Craven about his assailants and asked if appellant "looked a little bit like" one of them. Appellant immediately objected, and Craven was subjected to voir dire questioning. Outside the presence of the jury, Craven testified that he had never previously been able to identify any of his assailants. Craven did, however, indicate that he remembered enough about the robbery that he would be able to testify

whether appellant was similar in height to his assailant. The co-defendant's attorney stated during voir dire that he did not intend to ask for a one-on-one identification. Instead, he merely wanted to ask whether appellant was similar in height to one of the robbers. Over appellant's objection, the trial court allowed this line of questioning. Thereafter, the jury was brought back into the courtroom, appellant was asked to stand, and Craven testified that he was similar in height to his assailant.

Appellant argued that this line of questioning amounted to an inherently suggestive one-on-one identification of appellant by the witness. However, the Court found, appellant's arguments were based on precedent that does not control his situation because Craven neither participated in a one-on-one showup nor made any identification of his assailant. To the contrary, Craven admitted that he could not identify who actually robbed him. Moreover, a review of the full transcript showed that this line of questioning allowed appellant, on cross-examination, to get Craven to admit that appellant was much taller than the height of the assailant that he had previously reported to police. In fact, appellant was able to elicit Craven's admission that he had made a bad approximation of height, drawing his credibility largely into question. Ultimately, then, the testimony which appellant challenged benefitted his defense. Therefore, the Court concluded, there was neither error nor harm.

Appellant also contended that the trial court erred by admitting certain cell phone records that indicated the location of his cell phone at the time of some of the crimes. Specifically, he contended that the documents were inadmissible hearsay pursuant to *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (129S.Ct 2527, 174 LE2d 314) (2009). But, the Court found, *Melendez-Diaz* is not applicable to the present case for several reasons. First and foremost, the person who compiled the documents in question and was custodian of the records they included, was present at trial and subject to cross-examination. Therefore, the concerns in *Melendez-Diaz*, all of which centered around the absence at trial of the affiant, are not present here. Moreover, the witness testified that he was custodian of the records at MetroPCS, that he pulled the information, and that he was capable of assessing the information to determine the location of cell towers off of which the cell phones pinged.

Thus, the Court found, this was not a case in which the State simply offered an incriminating conclusion in the form of an affidavit. To the contrary, the individual who formed the conclusion was present, available at trial, and thoroughly cross-examined. Accordingly, the Court concluded, appellant's arguments premised on *Melendez-Diaz* had no merit.

Sufficiency of the Evidence; Sentencing

Harrington v. State, S16A1545 (2/27/17)

Appellant was convicted of the malice murder and armed robbery of Wright, a 72-year-old woman, as well as other related crimes. The evidence, briefly stated, showed that at 10:43 a.m., Wright called 911 to report an intruder when she arrived home from grocery shopping and that he shot her and fled. Surveillance video from the housing complex where appellant lived showed him walking through the complex from the direction of Wright's home carrying two armloads of items at 9:51 a.m. He walked into his house at 9:52 a.m. At 10:25 a.m., he left the house in a dark-colored SUV, returning at 10:41 a.m., two minutes before Wright's 911 call.

Appellant contended that the evidence presented at trial was legally insufficient to support his conviction for armed robbery. The Court agreed. The indictment alleged that appellant committed armed robbery in violation of OCGA § 16-8-41 by "unlawfully tak[ing] a . . . cell phone . . . from the immediate presence of . . . Wright, by the use of a handgun." The State therefore was required to prove beyond a reasonable doubt that appellant's use of the handgun occurred prior to or contemporaneously with the taking of the cell phone. Moreover, the "taking" of property is not a continuing transaction which ends only when the defendant leaves the presence of the victim. Instead, the taking is complete once control of the property is transferred involuntarily from the victim to the defendant, even if only briefly.

Here, the evidence showed that Wright found appellant inside her trailer when she came home from the grocery store. But there was no direct evidence that appellant took the cell phone from Wright after she arrived, and it is at least equally possible to infer from the evidence that appellant took possession of the phone before Wright interrupted his burglary during his second entry into her home. In par-

ticular, the evidence showed that Wright had deactivated the cell phone several weeks earlier, making it unlikely that she was carrying the phone around with her; that appellant walked to his house from Wright's trailer carrying two armloads of items and then drove back to the trailer several minutes before Wright discovered him; and that appellant fled the trailer immediately after shooting Wright, making it less likely that he paused to steal more items after confronting her. Because it is at least equally likely that appellant took the cell phone before rather than after encountering the victim, the evidence was insufficient to support a finding beyond a reasonable doubt that appellant used a handgun to take the cell phone from Wright. Accordingly, the Court concluded, appellant's armed robbery conviction must be reversed.

The Court also agreed with the Stated that the trial court erred in merging appellant's guilty verdict for burglary into the verdict for felony murder based on burglary. Because that felony murder count was actually vacated by operation of law, the burglary count could not merge into it, and burglary also does not merge into a malice murder conviction. Therefore, the Court vacated the judgment in part and remanded the case to the trial court with direction to enter a conviction and impose a sentence on the burglary count.

Rule 404 (b); Intent and Motive

Olds v. State, A15A0136 (2/28/17)

Appellant was convicted of false imprisonment and battery of a woman with whom he previously had a romantic relationship. He contended on appeal that the trial court erred in allowing Rule 404 (b) evidence to be admitted at trial. The Court of Appeals affirmed in *Olds v. State*, 332 Ga. App. 612 (*Olds I*). In *Olds v. State*, 299 Ga. 65 (*Olds II*), the Supreme Court vacated the judgment of the Court in *Olds I* and remanded with direction for the Court to consider the admissibility of the extrinsic acts evidence in light of *Olds II*.

The record showed that the crimes for which appellant was convicted occurred in February, 2009. The trial court admitted evidence of appellant's prior extrinsic acts, which occurred in June 1999 and August 2012, to show appellant's intent, plan, and motive under Rule 404 (b). The Court first addressed the issue of intent. The Court stated that a plea of

not guilty puts the prosecution to its burden of proving every element of the crime – including intent – and evidence of other acts that tends to make the requisite intent more or less probable to any extent is relevant. And here, appellant not only pled not guilty, but also argued at trial that the victim lied about the crimes. Furthermore, appellant requested a jury charge on sexual battery as a lesser included offense of the aggravated assault with intent to rape charge. In so doing, he effectively disputed the specific intent element of that charged offense which also placed his intent at issue in this case. Moreover, the charged offenses included aggravated assault, and the offense of aggravated assault as charged was very similar to both the 1999 and 2012 extrinsic acts. The crimes in this case and the extrinsic acts victims all involved violent assaults on female acquaintances whom appellant attacked from behind. And, the 2012 extrinsic act involved sexual assault charges, which was relevant to show appellant's intent to commit a sexual assault in this case. Consequently, the Court held, the extrinsic acts evidence was plainly relevant to the issue of his intent, and the first prong of the admissibility test was satisfied.

Next, the Court addressed motive. The Court found that the extrinsic acts evidence was also relevant to help the jury understand why appellant violently attacked the victim in this case. Specifically, the evidence showed that, even though the victim had informed appellant that they would not be resuming their prior romantic relationship, appellant still considered the victim to be "his lady," and he committed the crimes in this case when the victim told him that she tried to leave the trailer that they shared. Similarly, appellant attacked the 1999 victim after their relationship ended and he told her that "if he could not have her, then nobody else would." And, although appellant was not romantically involved with the 2012 victim, he knew her, drove her to his home, told her she had to come inside and forcibly attacked and sexually assaulted her when she tried to leave.

As to the second prong of the admissibility test, the Court found that the trial court properly determined that the probative value of the extrinsic acts evidence was not substantially outweighed by its prejudicial effect. Notably, all three crimes involved appellant's violent attacks on women he knew or had been romantically involved with. Moreover, appellant

denied that he committed the crimes in this case, and there was very little evidence, other than the victim's testimony, from which the jury could have gleaned why appellant attacked her. Thus, the extrinsic acts evidence aided the jury in determining whether appellant committed the crimes in this case.

Finally, as to the third prong of the test, the Court found that the State offered sufficient proof for the jury to conclude that appellant committed the extrinsic acts. Both extrinsic act victims gave detailed testimony and appellant presented no evidence in rebuttal. Accordingly, because the evidence met all three prongs of admissibility, the Court concluded that the trial court did not abuse its discretion in admitting the Rule 404 (b) evidence.

Indictments; Demurrers

Smith v. State, A16A2120 (3/1/17)

Appellant was indicted for computer pornography (Count 1), obscene telephone contact with a child (Count 2), and criminal attempt to entice a child for indecent purposes (Count 3). The evidence, briefly stated, showed in a police sting, appellant, after answering an internet advertisement, and then texting messaging, went to a motel to have sexual relations with a girl under the age of 16. Appellant filed general and special demurrers, which the trial court denied as to Counts 1 and 3. Appellant was then granted an interlocutory appeal.

Appellant first argued that Count 3 of the indictment was insufficient to withstand a general demurrer because it failed to allege a violation of Georgia law. Specifically, appellant contended that the indictment failed to allege a violation of OCGA § 16-6-5 (a) because it charged him with enticing another person who he *believed to be* under the age of 16, while the language of the statute requires the State to prove that he enticed an actual child victim. The Court agreed that a *completed* violation of OCGA § 16-6-5 (a) requires that the enticement be of a victim who is an actual child under the age of 16. But here, appellant was charged with an attempted violation of OCGA § 16-6-5 (a), and the mere fact that the existence of a child victim is an element of the completed crime does not mean that it is indispensable in proving criminal attempt. Instead, the relevant question is whether the defendant took a substantial step toward the commission of a crime. And thus, the indict-

ment was sufficient to allege an attempted violation of OCGA § 16-6-5 (a) because it alleged that, with intent to entice or solicit a child for indecent purposes, appellant took a substantial step towards the commission of that crime (i.e. engaging in sexually explicit communications with a person who he believed to be under the age of 16, arranging a meeting place, and driving to a motel to meet her). Moreover, the Court noted, under OCGA § 16-4-4, it is no defense to a charge of criminal attempt that the crime the accused is charged with attempting was, under the attendant circumstances, factually or legally impossible of commission if such crime could have been committed had the attendant circumstances been as the accused believed them to be. Thus, the trial court did not err in denying appellant's general demurrer to Count 3.

Relying on *Wetzel v. State*, 298 Ga. 20 (2015), appellant also argued that the trial court erred in denying his special demurrer to the computer-pornography count of the indictment (Count 1) because it failed to specify the conduct that the State alleges is, by its nature, an unlawful offense against a child. The Court agreed.

In *Wetzel*, the Supreme Court found that an indictment under OCGA § 16-12-100.2 (d) (1) was deficient because it failed to identify the particular "unlawful sexual offense" at issue. Here, although Count 1 of the indictment, which alleged a violation of OCGA § 16-12-100.2 (d) (1), specifically identified enticement of a child for indecent purposes (OCGA § 16-6-5) as an offense that appellant allegedly attempted to commit, it also generally charged that he used a computer-messaging service to attempt to commit an "unlawful sexual offense." And while the indictment tracked the relevant statutory language, it might also operate to bestow upon the jury the power to create and then retroactively enforce an "unlawful sexual offense" based solely on its feelings, or its beliefs regarding how the community would feel, about appellant's conduct. Furthermore, the Court noted, because it was reviewing the indictment on interlocutory appeal, before any trial, it must apply the rule that a defendant who has timely filed a special demurrer is entitled to an indictment perfect in form and in substance. Thus, applying the analysis in *Wetzel*, Count 1 of appellant's indictment did not clearly apprise him of all of the alleged criminal conduct that he must defend against

at trial. Accordingly, the Court held, "[W]e are constrained to reverse the trial court's denial of his special demurrer as to Count 1 of the indictment."

Rule 404 (b); Jury Panels

Johnson v. State, A16A1844 (3/1/17)

Appellant was convicted of armed robbery and possession of a firearm during the commission of a felony. The evidence showed that he robbed a bank and during the robbery, he threatened the teller by lifting his shirt up to expose a gun stuffed in his waistband. He contended that the trial court abused its discretion by admitting other acts evidence pursuant to OCGA § 24-4-404 (b), specifically, an act of road rage and another armed robbery. The Court disagreed.

The Court noted that Georgia uses a three-part test to determine admissibility: (1) the evidence must be relevant to an issue other than defendant's character; (2) the probative value must not be substantially outweighed by undue prejudice; (3) the government must offer sufficient proof so that the jury could find that defendant committed the act. As to the first prong, the trial court allowed the State to introduce evidence of two other acts for the limited purpose of showing appellant's "intent to . . . use a firearm." The Court noted that in both of the other acts, appellant was alleged to have used a gun in an offensive manner against others. In the road rage incident, appellant allegedly pointed a gun at two women who were driving a vehicle, an act which could be considered an aggravated assault, and the other incident, appellant demanded money from a woman while pointing a gun at her, an act which could be considered an armed robbery. Thus, both involved the same intent as required to prove the crimes appellant was charged with in this case. Consequently, the other acts were "relevant" and satisfied the first prong for the admission of such evidence.

As to the second prong, the Court noted that defense counsel centered his entire defense upon the State's inability to prove that appellant was armed when he committed the robbery. Approximately 15 to 20 surveillance photographs were taken of appellant inside the bank and a gun was not visible in any of the photographs. Additionally, the victim's and the other witness to the robbery's descriptions of the gun did not match the gun that

was ultimately recovered from the vehicle appellant was driving. Accordingly, the other acts evidence was probative of the issue of appellant's intent and given the circumstances of this case, the trial court did not abuse its discretion in balancing the other act's probative value against its prejudicial effect and admitting the evidence.

And as to the third prong, the Court found sufficient evidence to show that appellant was the perpetrator in both other acts. Accordingly, the trial court did not abuse its discretion in admitting the evidence under Rule 404 (b).

Appellant also argued that the trial court abused its discretion when it did not excuse an entire panel of potential jurors after an issue with one potential juror during voir dire. Specifically, following the trial court's reading of the indictment to the potential jurors, one potential juror stated that he had "heard enough to convince [him]." The juror then asked the trial court if there was an eyewitness in the case. As the trial court attempted to respond that the potential juror did not yet know the evidence, the potential juror interrupted and stated, "[w]ell, if people saw [Johnson] do it . . . I couldn't be impartial in this." After the trial court stated the juror was excused, the State attempted to rehabilitate him. The potential juror stated that if the evidence showed that there were witnesses to appellant's alleged crimes and if he was on camera then he was guilty. At one point the trial court stopped the questioning of the potential juror and stated, "Okay. I think that's enough. I don't think . . . you're not impartial, are you?" The potential juror responded, "No" and the trial court excused the juror.

The Court stated that in determining whether a trial court is required to excuse a jury panel for remarks made during voir dire, the inquiry is whether the remarks were inherently prejudicial and deprived appellant of his right to begin his trial with a jury free from even a suspicion of prejudgment or fixed opinion. If so, then the trial court's failure to excuse the panel constitutes an abuse of discretion.

Here, the Court found, the statements made by the potential juror were not inherently prejudicial. The potential juror did not relay any harmful information about appellant, he only speculated as to what the evidence might show based upon the indictment while being reminded repeatedly by both the trial court and the State that he did not, in fact, actually

know what the evidence would show. Additionally, after excusing the potential juror for the second time, the trial court asked the remaining potential jurors if they were still perfectly impartial between the State and appellant and no one indicated otherwise. Accordingly, the Court concluded, the potential juror's statements provided no ground for disqualifying the entire panel of potential jurors.

Juveniles; Competency

In re L. L., A16A1953 (3/1/17)

Appellant, a 13-year-old, was charged in a delinquency petition with aggravated assault with a deadly weapon after the knife he threw at a 15-year-old neighbor lodged in her upper chest, leaving a deep cut. At a competency hearing, appellant presented the testimony of Dr. Slone, a licensed clinical psychologist who performed forensic evaluations of juveniles for Georgia Regional Hospital; the assistant public defender appointed at the time of his initial detention; and a social worker employed by the juvenile division of the Public Defender's Office. Dr. Slone filed two reports with the juvenile court: a behavioral health evaluation and a competency evaluation. After considering the testimony and Dr. Slone's written report, the juvenile court ruled that appellant was competent to stand trial. The juvenile court subsequently adjudicated him delinquent.

Appellant argued that the juvenile court erred by arbitrarily and summarily ignoring Dr. Slone's overwhelming opinion evidence that he was incompetent to stand trial. In support, he relied on *Strickland v. Francis*, 738 F2d 1542 (11th Cir. 1984). The Court disagreed,

In addressing the defendant's competence to stand trial, *Strickland* stated that it is well established that a factfinder need not adhere to an expert opinion on incompetency if there is reason to discount it. However, where the expert testimony so clearly and overwhelmingly points to a conclusion of incompetency, the factfinder cannot arbitrarily ignore the experts in favor of the observations of laymen. Also, in determining whether a defendant is faking mental illness, the *Strickland* Court identified the following four factors that reasonably could lead a factfinder to disregard expert testimony on the defendant's mental condition: (1) the correctness or adequacy of the factual assumptions on which the expert opinion is based; (2) possible bias in the expert's appraisal of the

defendant's condition; (3) inconsistencies in the expert's testimony, or material variations between experts; and (4) the relevance and strength of the contrary lay testimony.

The Court stated that to the extent the *Strickland* factors apply in this case, it was reasonable for the juvenile court to disregard Dr. Slone's conclusion that appellant was incompetent to stand trial based on the first factor. Dr. Slone ultimately determined that appellant was incompetent to stand trial because she did not believe that he had an adequate rational appreciation of the nature of the proceedings against him or of his own role in those proceedings, and she was concerned about his ability to adequately track and comprehend witness testimony and to testify without incriminating himself. However, the Court found, the factual assumptions underlying Dr. Slone's ultimate conclusion of incompetency were inadequate to support that conclusion. Those factual assumptions included that appellant had difficulty understanding his plea options and the particulars of the plea bargaining process, that he did not understand the difference between a felony and a misdemeanor, that he would tell the judge the truth if asked a question, and that his account of the incident was vague and confusing. Dr. Slone's ultimate conclusion relied upon these inadequate factual assumptions, while diminishing factors that went to the very heart of whether a juvenile defendant is capable of assisting in his own defense. In particular, according to Dr. Slone, appellant understood what he had been accused of doing, which in her mind was the most "urgent" part of assessing his appreciation of the charges and allegations against him. He also appreciated the severity of the charge; correctly described the roles of and responsibilities of courtroom personnel; understood courtroom decorum; understood that he did not have to testify; planned to tell his attorney everything about the incident; and was able to identify possible punishments. He further understood that his discussions with his attorney are confidential and, most notably, he correctly answered three hypothetical questions posed by Dr. Slone, showing that he appreciated the factors relevant to putting forth a meaningful defense. All of these factors support the trial court's finding of competency.

Accordingly, the Court concluded, the factual assumptions upon which Dr. Slone relied in reaching her ultimate opinion were

inadequate to support a conclusion of incompetency. Accordingly, the juvenile court did not err in taking exception to the opinion and finding appellant competent to stand trial.