Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 24, 2015

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THIS WEEK:

- **DUI Implied Consent; *Williams***
- **Notices of Appeal; Divestiture of Jurisdiction**
- **Discovery Violations; Rule 404 (b) Evidence**
- **Guilty Pleas; Direct Appeals**
- **Rule 404 (b) Evidence; Identity**
- **OCGA § 16-12-100.2; Sufficiency of Evidence**
- **Statements; *Miranda***
- **OCGA § 24-1-103 (a) (2); OCGA § 24-6-608**
- **Independent Blood Tests; Jury Charges**
- **Child Molestation; OCGA § 24-4-414**

DUI Implied Consent; *Williams*

Davis v. State, A15A0324 (6/12/15)

Appellant was convicted of two counts of DUI and reckless driving. Appellant contended that the trial court erred in denying his motion to suppress. The stipulated evidence showed that the traffic stop was initiated in a hospital parking lot. After the officer arrested appellant for DUI, the officer read the implied consent warnings and asked appellant to submit to a breath test. Appellant stated that he would prefer a blood test. The officer read the implied consent notice to appellant a second time and asked him to undergo a blood test; appellant agreed to the request.

Appellant argued that because his consent resulted solely from his being read the implied consent notice, it was not the voluntary consent required by the Fourth Amendment. Citing the Supreme Court's recent decision in *Williams v. State*, 296 Ga. 817 (2015), the Court stated that a suspect's right under the Fourth Amendment to be free of unreasonable searches and seizures applies to the compelled withdrawal of blood, and the extraction of blood is a search within the meaning of the Constitution. Consequently, where a DUI suspect challenges the validity of his consent to chemical blood tests, the State must prove that the suspect gave actual consent — i.e., that the totality of the circumstances show that the suspect acted freely and voluntarily in giving that consent. In light of *Williams*, therefore, the Court vacated both the order denying appellant's motion to suppress and the judgment of conviction and remanded the case for the trial court to consider whether the totality of the circumstances in this case showed that appellant's consent to the blood alcohol test was given freely and voluntarily.

Notices of Appeal; Divestiture of Jurisdiction

State v. Brown, A15A0457 (6/12/15)

The trial court entered directed verdicts of acquittal in favor of Brown, Rouse and King on charges of trafficking in cocaine, possession of marijuana with intent to distribute, and other drug violations. The State appealed, contending that the judgments were void as having been entered when jurisdiction vested in the Court of Appeals and not in the trial court. The record showed that two months prior to trial, the State filed pursuant to OCGA § 24-4-404 (b), notice of intent to introduce evidence of other acts of Brown and Rouse. Brown and Rouse had previously filed motions to suppress. On September 11, 2014, the trial judge signed

an order excluding certain evidence as a sanction for discovery violations and excluding the other-acts evidence, and the clerk of court stamped the order "filed" on September 12, 2014. The court placed the case on a trial calendar for September 17, 2014. On September 12, the State filed a notice of appeal pursuant to OCGA § 5-7-1 (a) (5) and also pursuant to that Code section, filed a separate "Certificate of Purpose" in which the prosecutor stated, "I hereby certify that the State's appeal of this Court's order excluding evidence as a sanction for discovery violations and excluding OCGA § 24-4-404 (b) evidence is not taken for purpose of delay, and the evidence is a substantial proof of a material fact in the proceedings."

On September 17, the court called the case for trial. The State notified the court that it had filed a notice of appeal and that the trial court was divested of jurisdiction to try the case. The trial court disagreed because the certification was not served on her directly and therefore, was not provided "to the trial court" as provided by § 5-7-1 (a) (5). The defendants then announced ready, but the State declined to participate. The trial court nevertheless impaneled a jury, and when the State failed to adduce any evidence, the defendants each moved for a directed verdict, which the trial court granted.

The Court found that it was undisputed that the State filed its notice of appeal from the trial court's evidentiary ruling within two days after the ruling was entered. Further, it was undisputed that the State filed with the clerk of the trial court a certification executed by the prosecuting attorney, who is an officer of the court, that the appeal was not taken for purpose of delay and that the evidence excluded in the appealed rulings was material. Thus, the Court concluded, this was sufficient to invoke its jurisdiction. In so holding, the Court also found no basis for concluding that the prosecuting attorney's certification of purpose and necessity "to the trial court" can only be satisfied by personally serving the judge presiding over a case. Moreover, it was undisputed that, before the trial judge moved forward with impaneling a jury in this case, the prosecuting attorney personally informed the judge of the pending appeal, on the record and in open court. Thus, there was also no issue of any lack of actual notice. Finally, the Court stated, even if it were inclined to question the prosecuting attorney's representation that the State did not file its appeal from the trial court's evidentiary rulings for purpose of delay, there was no support in the record for finding that delay was the State's purpose, especially in light of the fact that the trial court's pretrial rulings excluded virtually all of the inculpatory evidence that the State planned to offer and effectively doomed the entire prosecution. Accordingly, because the trial court lacked jurisdiction to proceed with a trial of the defendants, the proceedings were without legal effect, the directed verdicts of acquittal were void, and consequently, the final order of acquittal of all defendants were vacated.

Discovery Violations; Rule 404 (b) Evidence

State v. Brown, A15A0457 (6/12/15)

The State indicted Brown, Rouse and King on charges of trafficking in cocaine, possession of marijuana with intent to distribute, and other drug violations. The State contended that the trial court abused its discretion in granting the defendants' motion to exclude certain evidence, which was seized when investigators executed a search warrant, based on the court's finding that the State violated its reciprocal discovery obligations. The record showed that during the motion to suppress, the investigator referred to some personal notes that she made while conducting surveillance of the residence prior to obtaining the warrant to search it. The investigator stated that the only notes that she had ever created in connection with the case that she had not provided to the State were handwritten on scraps of paper and were limited to a description of the house and "what [she] saw that day," which was information she needed to include in her warrant application and affidavit. After she had transcribed this information verbatim into her warrant application, the investigator discarded those scraps of paper; they were not part of the State's discovery production.

The trial court found that "the failure to preserve notes pertinent to the case … raise[d] an issue of spoliation." Taking this together with the delayed production of the recording of the execution of the search, the trial court found a "pattern of failure [of the State] to provide full discovery." The court found that this pattern of behavior was "grossly unfair" and violated the defendants' rights. On this basis, the trial court granted the motions to suppress everything seized in executing the search warrant. The trial court expressly found, however, that the warrant was supported by probable cause and was properly executed and ruled that the suppression was "for reasons independent of the validity of the warrant itself."

The Court noted that while it is true that when law enforcement has information, the State is deemed to have it for purposes of the Reciprocal Discovery Act. However, this does not mean, as the trial court concluded, that everything associated with a case is subject to discovery. The Act specifies materials that must be produced, including statements attributable to the defendant; pictures, documents, and tangible evidence "intended for use by the prosecuting attorney as evidence" at trial; results or reports of physical or mental examinations and of scientific tests or experiments, again, if intended for use by the prosecuting attorney at trial; and any statement of any witness that the prosecuting attorney intends to call as a witness at trial and that relates to the subject matter of the witness's testimony. The purpose of the Act is to promote fairness and efficiency in criminal proceedings and to prevent so-called "trial by ambush." The Court found no basis for concluding that the Act requires every member of law enforcement to preserve "everything associated with [every] case," including informal notes created by an investigator only for the purpose of helping the investigator include accurate information in a warrant application. The record did not show that the investigator's informal notes, which the State could not produce, were subject to discovery under any of the provisions of the Act. Therefore, the Court concluded, the trial court abused its discretion in imposing the extreme sanction of evidence exclusion for the State's failure to produce the investigator's notes.

The State also contended that the trial court erred in ruling that the State's intended evidence of other crimes was not relevant for a proper purpose and abused its discretion in granting the defendants' motion to exclude the evidence on that basis. The Court disagreed. The record showed that the State filed its notice of intent to introduce evidence of other acts pursuant to OCGA § 24-4-404 (b) as proof of intent, motive, plan, and absence of mistake or accident. Specifically, the State identified the following acts: a 2005 charge against Brown and Rouse for trafficking in cocaine and a 2009 charge against Brown for possession of marijuana with intent to dis-

tribute. The trial court found that this was merely propensity evidence.

First, the Court noted that while a plea of not guilty makes intent a material issue, the intent exception must not be allowed to swallow the general rule against admission of prior bad acts. Second, the Court noted that other-acts evidence may be admitted to show the defendant's motive for committing the crime with which he is charged, but such evidence may not be admitted to demonstrate a propensity to act in accordance with the character indicated by that other crime or conduct. And here, the Court found, the State's proffer at the hearing on the other-acts evidence authorized the trial court to find that the jury could only use the evidence to find that Brown and Rouse had intended to deal drugs before and, therefore, the jury could believe they were more likely to have the intent, motive, and plan to deal drugs again. "This is precisely the circumstantial chain that is prohibited since all that it proves is that, because there is some evidence that they dealt drugs in the past, they are likely to have committed the present crime. The only logical link between the two allegedly common mental states is the defendants' alleged propensity towards dealing in drugs."

Nevertheless, as to the Rule 404 (b) ruling, Judge Dillard concurred specially, and stated that because he did not agree with all that was said regarding this part of the opinion, "the majority's opinion [as to this ruling]… may not be cited as binding precedent in future cases."

Guilty Pleas; Direct Appeals

Jones v. State, A15A0748 (6/15/15)

As part of a negotiated plea, appellant pled guilty to two counts of sale of cocaine. He was sentenced to 30 years with 20 years confinement followed by 10 years of probation. He then filed a direct appeal from the conviction. The Court stated that in reviewing a direct appeal from a guilty plea, the Court must evaluate the enumerated errors based solely on the trial court record, including the record of the guilty plea and sentencing as well as any subsequent evidence that was properly presented to the reviewing court, assuming all of that is also properly included in the record on appeal.

First, appellant argued that because of unspecific "illegitimate actions" of his plea counsel, his guilty plea was not informed because he thought "the plea deal would be a straight ten year sentence, but was given a different plea deal with a forty (40) year sentence." But, the Court found, this allegation cannot be evaluated in a direct appeal from a guilty plea absent an evidentiary hearing.

Appellant next argued that his plea was not knowingly and voluntarily entered because he was under the influence of marijuana during the plea hearing. However, the Court found, issues of mental competency cannot be resolved with reference only to facts appearing in the record of the plea and sentence. Therefore, appellant's claim of intoxication was not an issue which may be pursued by direct appeal from a guilty plea.

Finally, appellant contended that his guilty plea was not "free and voluntary" because he was "rushed" into it. The Court noted that the record included a transcript of the guilty plea hearing as well as a written plea waiver form. In both, appellant confirmed that he was aware of his rights to a trial by jury and to confront his accusers as well as the privilege against self-incrimination, and that he would waive those rights by entering a plea of guilty. Moreover, appellant affirmed that he had "enough time to confer … with [his] lawyer about this case" and that he had sufficient time "to subpoena witnesses if [he] desired them." Finally, appellant stated that he had discussed his case with his counsel; discussed the indictment with his counsel; and reviewed the evidence with his counsel. As a result, the trial court found that appellant's plea was freely, voluntarily, and knowingly entered. Thus, as to appellant's claim that he was "rushed," the transcript revealed that the trial court specifically asked him whether he had sufficient time to discuss his case with his counsel, and appellant replied that he had. Accordingly, any feeling of being "rushed" that appellant experienced was due to the circumstances in which he found himself.

Rule 404 (b) Evidence; Identity

Watford v. State, A15A0057 (6/15/15)

Appellant was convicted of two counts of making a false statement, two counts of forgery in the first degree, giving false information to a law enforcement officer, driving with a suspended license, speeding, and bail jumping. The evidence showed that in 2012, appellant gave an officer the name Jamal Hayes, appellant's former roommate, during a traffic stop and signed the tickets using Hayes's name. The State presented Rule 404 (b) evidence that during a subsequent 2013 traffic stop in which appellant was driving a Mercedes, he gave the officer a false name of Stephen McKenzie and an incorrect phone number. Appellant contended that the trial court erred in allowing the Rule 404 (b) evidence. The Court disagreed.

The Court noted that the trial court allowed the evidence to be introduced to prove identity. When evidence of other crimes or wrongs is introduced to prove identity, the likeness of the offenses is the crucial consideration. The physical similarity must be such that it marks the offenses as the handiwork of the accused. In other words, the evidence must demonstrate a modus operandi. The extrinsic act must be a signature crime, and the defendant must have used a modus operandi that is uniquely his.

Here, the Court found, while there were some differences between the January 2012 and May 2013 stops, they were similar in that both stops occurred in the Atlanta area but the driver, who did not have a license, claimed to have a license from the jurisdictions of Washington D.C. or Maryland. Appellant had connections with the Washington D.C./Maryland area, as shown by testimony that appellant and Hayes met in Washington D.C. and that appellant's mother lived in Maryland. In both instances, the driver provided information that was partially accurate. With respect to the 2012 stop, the State sought to prove that appellant used the name of a close friend; in the second stop, appellant provided a name apparently connected with his family. The registration information the officer obtained for the Mercedes showed that the vehicle was registered to two Maryland owners, one of whom was Lenora McKenzie Watford. Based on testimony that appellant's mother lived in Maryland and that his mother gave him a Mercedes, the jury could infer that the Lenora McKenzie Watford was appellant's mother and that appellant drew on a family name when he identified himself as Stephen McKenzie. Based on this evidence, the Court concluded that the trial court was authorized to find that other crimes/wrongs evidence was relevant to the issue of appellant's identity.

Nevertheless, appellant argued, the probative value of the evidence was outweighed by its prejudicial effect because the State had

other evidence of identity and argued that admitting the evidence was unnecessary. The Court held that appellant's arguments were "disingenuous," as his very strategy at trial and on appeal was to challenge the sufficiency of the evidence regarding his identity. Considering all of the circumstances, including the similarities between the traffic stops, the time gap between them (which was not unduly long), and the State's need for the evidence, the Court found no abuse of discretion in the trial court's decision that the probative value of the evidence of the 2013 stop outweighed its prejudicial effect.

OCGA § 16-12-100.2; Sufficiency of Evidence

Skelhorn v. State, A15A0280 (6/16/15)

Appellant was convicted of three counts of violating OCGA § 16-12-100.2, the Computer or Electronic Pornography and Child Exploitation Prevention Act of 2007. The evidence showed that appellant entered a Yahoo! chat room and communicated with a sheriff's deputy that he thought was a 13-year-old girl. He argued that use of a computer on-line service is an essential element of the crime of obscene internet contact with a child, and that although the State alleged that element in the indictment for these counts, it failed to prove the allegation. The Court disagreed.

The Court noted that the indictment charged appellant with violating OCGA § 16-12-100.2 (e) by having sexually explicit verbal and visual contact with a person he believed to be a child "by way of an on-line messaging service provided by a computer on-line service." The statute in effect at the time of the offense provided: "A person commits the offense of obscene Internet contact with a child if he or she has contact with someone he or she knows to be a child or with someone he or she believes to be a child via a computer on-line service or Internet service, *including but not limited to a local bulletin board service, Internet chat room, e-mail, or on-line messaging service*, and the contact involves any matter containing explicit verbal descriptions or narrative accounts of sexually explicit nudity, sexual conduct, sexual excitement, or sadomasochistic abuse that is intended to arouse or satisfy the sexual desire of either the child or the person, provided that no conviction shall be had for a violation of this subsection on the unsupported testimony of a child." (Emphasis supplied).

The Court held that the statute lists an on-line messaging service as a specific type of computer on-line service, and that the legislature did not intend to establish both the use of a computer on-line service and the use of an on-line messaging service as essential elements that have to be separately proved in order to convict a defendant of obscene internet contact with a child. Accordingly, the indictment charging appellant with using an on-line messaging service encompassed that element of the crime. And the Court found, the evidence adduced at trial was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that appellant used an on-line messaging service to contact a child with explicit verbal and visual depictions of sexual conduct.

Appellant also argued that the State's evidence was insufficient to prove that he took a substantial step toward committing the crime. Again the Court disagreed. The specific count alleged that appellant "did willfully use an Internet chat room to attempt to solicit, lure, and entice [a named law enforcement officer], posing as aimee__13cheer@yahoo.com, a person believed by [appellant] to be a 13-year-old child, to engage in the act of aggravated child molestation by [appellant] asking to meet said person for the purpose of [appellant] to perform oral sodomy on said person …" in violation of OCGA § 16-12-100.2 (d) (1).

The Court stated that since the statute does not define the synonymous terms "to solicit," "to lure," or "to entice," it must look to their plain and ordinary meaning as defined by dictionaries. In ordinary usage, the term "to solicit" means "[t]o seek to obtain by persuasion, entreaty, or formal application … [t]o commit the criminal offense of enticing or inciting (another) to commit an illegal act." The term "to lure" means "[t]o attract or entice, especially by wiles or temptation." Similarly, term "to entice" means "[t]o attract (someone), usually to do something, by arousing hope, interest, or desire."

In light of these definitions, the Court concluded that the State presented sufficient evidence to authorize a jury to find appellant had engaged in substantial steps to establish criminal attempt of the crime charged.

The essence of the crime is the attempted enticement of someone the defendant believes to be a minor, not actual engagement in sexual activity with a minor. The very nature of the underlying offense — [soliciting, luring,] or enticing engagement in unlawful sexual activity — necessarily contemplates oral or written communications as the principal if not the exclusive means of committing the offense. A rational trier of fact was authorized to find that appellant's chat with the "victim" constituted an important action leading to the commission of inducing her to engage in illegal sexual activity. Moreover, the Court added, although the State alleged in the indictment that one of the ways appellant violated the statute was by asking to meet the "victim," it also alleged that he violated the statute by using an internet chat room. Because the statute requires proof of only one act which is a substantial step toward the commission of the crime, inclusion in the indictment of more than one such act is mere surplusage, which is unnecessary to constitute the offense, need not be proved, and may be disregarded.

Statements; Miranda

Owens v. State, A15A0419 (6/16/15)

Appellant was convicted of possession of marijuana with intent to distribute. He contended that the trial court should have suppressed his statements made prior to receiving the *Miranda* warnings and after. The evidence showed that a group of several probation and police officers initiated a search of the house of a probationer, Brown, pursuant to a Fourth Amendment waiver in the terms of Brown's probation. The officers asked other persons in the house, including appellant, to remain in the living room while the officers spoke with Brown and performed the search. Appellant was not handcuffed and the officers did not consider him to be under arrest. At one point, an officer, standing in the doorway between the living room and the kitchen, smelled an overwhelming odor of raw marijuana and saw on the kitchen table a pile of green leafy material that appeared to be marijuana. The officer asked Brown if the material was marijuana. When Brown replied that he did not know, appellant spoke and stated that it was marijuana. Appellant also volunteered that the marijuana on the table was his. The officer asked if there was more marijuana in the house, and appellant replied, "There might be some, I don't know." A search of the kitchen uncovered, in addition to the marijuana on the table, multiple bags of marijuana and two scales of dif-

ferent sizes with marijuana residue on them. The officers placed appellant under arrest and handcuffed him. Before appellant was given a *Miranda* warning, however, other officers who had been searching the yard came into the house with a bag that contained marijuana and a firearm. As those officers were going through the bag and talking among themselves, appellant stated that the bag and its contents belonged to him. At that point, one of the officers read appellant *Miranda* warnings and asked if he would talk about the marijuana. Appellant told the officers that all of the marijuana was his.

Appellant argued that the statements made before receiving the *Miranda* warnings were inadmissible because he was in custody at the time. The Court disagreed. The Court found that when appellant made the initial statements, he was being lawfully detained in the living room while officers conducted a search of the common areas of the house pursuant to a Fourth Amendment waiver in a probation order pertaining to his housemate, Brown. He had not been formally arrested and was not handcuffed. Therefore, a reasonable person in his position would not have thought that the detention would not be temporary. The evidence also authorized a finding that appellant was not being interrogated when, after being placed in custody, he stated that the marijuana found in a bag outside the house belonged to him. Appellant did not make the statement in response to any questions, but instead volunteered the statement while two officers were searching the bag and talking to each other. *Miranda* would not apply to such an utterance, even if appellant had made it while in custody.

Appellant also argued that the statements he made after receiving the Miranda warnings were inadmissible because they were secured using the "two-step interrogation technique" disapproved by the United States Supreme Court in *Missouri v. Seibert*, 542 U. S. 600 (2004). But, the Court found, in *Seibert*, officers procured an initial statement in violation of *Miranda*, then advised the defendant of his *Miranda* rights without informing him that his initial statements would have been inadmissible, and conducted further interrogation that led the defendant to repeat the same information that he had provided in the inadmissible initial statement. Here, however, the statements that appellant provided prior to the reading of *Miranda* were admissible and not in violation of *Miranda*. Therefore, the interview after appellant waived his rights was no circumvention of *Miranda*.

OCGA § 24-1-103 (a) (2); OCGA § 24-6-608

Williams v. State, A15A0420 (6/17/15)

Appellant was convicted of nine counts of VGCSA. The evidence showed that Detective Brock used a CI to make three purchases of cocaine from appellant. He contended that the trial court erred in granting the State's motion in limine to prevent his cross-examining Brock about a website and publication with which he was affiliated.

Before reaching the merits of the argument, the Court addressed the State's assertion that appellant failed to preserve the issue for appellate review under the requirements of OCGA § 24-1-103 (a) (2), which provides that "[e]rror shall not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and … [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by an offer of proof or was apparent from the context within which questions were asked." The State contended that appellant failed to make the requisite offer of proof to preserve his argument regarding the motion in limine. However, the Court stated, OCGA § 24-1-103 (a) (2) does not require a formal offer of proof in every instance, as it expressly states that error also may be preserved if the substance of the evidence is apparent from the record. In so holding, the Court noted that the comparable evidentiary rule under federal law, Federal Rule of Evidence 103 (a) (2), does not require that a formal offer of proof be made to preserve an objection. Rather, where the substance of the evidence is apparent to the court from its context, an appellant is entitled to ordinary appellate review of a ruling excluding evidence.

Here the Court found, the trial considered the matter at a pre-trial hearing on the State's motion in limine seeking to exclude evidence regarding Detective Brock's affiliation with "an entity known as Uncle Wiggy," which, according to the prosecutor, led to Brock's leaving his employment with the police department. Appellant's counsel further explained that Brock had developed a website and a publication called, Uncle Wiggy's Secret Guide to Dealing With the Police (the "Publication"). And he stated that, "among a lot other things," the Publication stated, "remember, the police will try to trick you. The police can and will lie to you" (the "Statement"). Defense counsel asserted that he sought to introduce evidence of the Statement on the issue of Brock's "credibility," "believability," "veracity," and "truthfulness." The trial judge granted the State's motion in limine without elaborating on his reasons for doing so. The Court stated that although the better practice may have been to proffer the Publication into the record for consideration at both the trial and appellate levels, the substance of the evidence at issue was sufficiently apparent from the attorneys' discussion to preserve appellant's argument for its review.

The Court then addressed the merits of appellant's argument. The Court stated that OCGA § 24-6-608 sets out specific, limited methods for attacking or supporting the credibility of a witness by evidence in the form of opinion or reputation. Specifically, with respect to this case, the pertinent limitation provides that "[t]he evidence may refer only to character for truthfulness or untruthfulness." OCGA § 24-6-608 (a) (1). Additionally, the statute provides that specific instances of a witness's conduct, "for the purpose of attacking or supporting the witness's character for truthfulness, other than a conviction of a crime … or conduct indicative of the witness's bias toward a party may *not* be proved by extrinsic evidence." OCGA § 24-6-608 (b). But, the Court stated, such instances may, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness. OCGA § 24-6-608 (b) (1).

Here, appellant sought to cross-examine Brock about the Statement in the Publication that "police can and will lie." Appellant argued that this Statement went directly to the issue of Brock's credibility, which he contended was crucial to proof of identity, as Brock was only one of two witnesses who had identified appellant as a participant in the three drug transactions. The Court noted that the record provided no express context for the Statement within the Publication, but the trial court said that he was "a little bit familiar" with the Uncle Wiggy website, and he drew the distinction between a police officer's credibility under oath and an officer's tactics during an investigation into a

crime. The Court stated that the means used to obtain admissions in the nature of a confession do not prevent them from being free and voluntary notwithstanding the fact that they might have been obtained by artifice, trick or deception. Accordingly, within certain defined limits, police may lie to or trick a suspect, and thus the Statement itself is not untrue. Moreover, the Court found, even assuming that Brock's undefined "affiliation" with the Uncle Wiggy website and Publication somehow equated with his adoption or authorship of the Statement, such a generalized statement about police conduct is not probative of Brock's own credibility in testifying under oath. A statement that "police can and will lie" does not constitute a specific instance of Brock's personal conduct, probative of his own truthfulness or untruthfulness and concerning his character for truthfulness or untruthfulness as required to allow cross-examination on the issue under OCGA § 24-6-608 (b) (1). Accordingly, the Court concluded, the trial court had a substantive basis for granting the State's motion in limine and for prohibiting appellant's inquiry into the Statement on cross-examination.

Independent Blood Tests; Jury Charges

Scott v. State, A15A0740 (6/18/15)

Appellant, an emergency room doctor, was convicted of DUI (less safe) and acquitted of DUI (per se) and failure to maintain lane. The record showed that prior to trial, the court ordered that appellant be provided with a sufficient portion of her blood sample to allow her to conduct an independent test. Appellant contended that the trial court erred by denying her motion in limine seeking to prohibit the State from introducing evidence concerning an independent blood test. Specifically, she argued that references to the independent test were highly prejudicial and improperly burden-shifting because in effect the jury was told that the State administered blood test was in fact accurate or otherwise the defense would have introduced the results of the independent test.

The Court noted that from the beginning of the case, appellant challenged the process used to collect the blood, suggesting that the blood draw had been tainted. Further, appellant testified at length concerning what she perceived as irregularities in the collection and transmission of her blood samples, offering multiple reasons why the results of her tests may have been inaccurate, including agreeing with her counsel's suggestion that it may not have been her blood that the State analyzed. Moreover, appellant argued in closing that "[s]omething happened. Either it wasn't her blood or something occurred that tainted that … test." Citing *Schlanger v. State*, 290 Ga. App. 407, 414 (6) (2008) (physical precedent only), the Court noted that the prosecutor made only passing references to the independent tests in its closing argument and in response to appellant's closing argument that the blood tested was not her blood or that the draw was tainted which did not rise to the level of being impermissibly burden shifting. Therefore, she her argument was without merit.

Appellant also contended that the trial court erred in refusing to give his request to charge to the effect that HGN and field sobriety tests cannot be used to quantify a blood alcohol content over 0.10 grams. Specifically, she argued that in *Bravo v. State*, 304 Ga. App. 243, 246-249 (1) (2010), the Court held that the arresting officer's testimony identifying a specific numeric blood alcohol content based solely on defendant's HGN results should have been excluded. Thus, she argued, her requested charge was authorized based on the officer's testimony during direct examination that "in our studies and the way we were trained, just by the field sobriety alone, it is between [a] 93 and 95 percent success rate of them being a .1 or higher on the side of the road at that particular time." However, the Court stated, *Bravo* did not concern a request to charge, and contrary to appellant's argument, the Court has previously held that such testimony is admissible. Furthermore, the Court stated, it specifically recognized this holding in *Bravo*. The testimony deemed inadmissible in *Bravo* was much narrower and more specific because it concerned the arresting officer's identification of a specific numeric BAC level based solely on defendant's HGN results. Accordingly, the Court concluded, appellant failed to show that the trial court erred by refusing to give her requested charge.

Child Molestation; OCGA § 24-4-414

Eubanks v. State, A15A0473 (6/23/15)

Appellant was convicted of child molestation. He contended that trial court erred in admitting evidence of prior bad acts pursuant to OCGA § 24-4-414. The evidence showed that appellant digitally penetrated the 11-year-old female victim. The Court disagreed.

OCGA § 24-4-414 (a) provides that "[i] n a criminal proceeding in which the accused is accused of an offense of child molestation, evidence of the accused's commission of another offense of child molestation shall be admissible and may be considered for its bearing on any matter to which it is relevant." Here, the State introduced evidence that appellant committed several acts of child molestation by digitally penetrating a girl from the time she was five to the time she was 12 years old, ending approximately 17 years prior to his trial in this case. Appellant argued that this evidence, while relevant, should have been excluded under OCGA § 24-4-403, which provides that "[r]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." But, the Court found, the circumstances of the prior molestation were that appellant molested a niece during times she visited her father, who was appellant's brother. The age of the victim during the abuse overlapped with the age of the victim in this case, and the manner of abuse was the same. These similarities made the other offense highly probative with regard to the defendant's intent in the charged offense. Further, in the face of appellant's attacks on the victim's credibility, the State was able to use the evidence to show that appellant had a motive of seeking nonconsensual sexual contact with a minor, which was important here because the victim only complained of a single, isolated incident. Although somewhat remote in time, the remoteness itself did not require exclusion because of the similarity of the events and the resulting probative value of the challenged evidence. Finally, the Court found, the trial court gave a limiting instruction to mitigate the risk of undue prejudice, reminding the jury "to keep in mind the limited use and the prohibited use of this evidence about the other acts of the defendant." Under these circumstances, the Court concluded that the trial court did not abuse its discretion in admitting the evidence of appellant's similar prior sexual misconduct against a minor victim.

Appellant also contended that the trial court erroneously instructed the jury that it could consider the evidence of his prior molestation to show a "disposition to commit the act of child molestation." Specifically, he argued that the court's charge invited the jury to make an improper inference as to his character. But, the Court stated, the General Assembly's recent adoption of the new Evidence Code belies this argument. In child molestation cases, the new Code explicitly provides that "evidence of the accused's commission of another offense of child molestation shall be admissible and may be considered for its bearing on any matter to which it is relevant." Courts interpreting this language have concluded that, in this specific context, showing a disposition toward molestation is a relevant purpose and not unfairly prejudicial in light of the nature of that conduct. In other words, evidence that a defendant engaged in child molestation in the past is admissible to prove that the defendant has a disposition of character that makes it more likely that he did commit the act of child molestation charged in the instant case. Thus, the Court stated, "We see no reason to depart from the Georgia legislature's recent and clear statement of policy on this issue." Furthermore, the Court noted, the trial court cautioned the jury not to consider the evidence for an improper purpose. Therefore, taken as a whole, the charge was a correct statement of law and presented no basis for reversal.