

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 7, 2017

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THIS WEEK:

- **Statute of Limitations; Tolling**
- **Merger; Attempting to Elude**
- **Jury Charges; Ineffective Assistance of Counsel**
- **Rule 404 (b); In-Court Identifications**

Statute of Limitations; Tolling

State v. Watson, A16A2073 (3/10/17)

Watson was indicted for rape. The facts, very briefly stated, showed that in 1996, the victim reported that she had been raped by a stranger. Nearly sixteen years later, the State obtained a match from DNA evidence and arrested Watson, but he was not indicted for the rape until 2015. After the trial court granted Watson's plea in bar, the State appealed.

The State argued that the trial court erred in finding the applicable tolling provision to the statute of limitations did not apply. The Court noted that the tolling provision found in O.C.G.A. § 17-3-2(2) requires proof that the person who committed the crime was "unknown," and when this exception is relied upon, the tolling period ends when the State acquires "actual knowledge" of the defendant's identity. The "person unknown" tolling exception applies to a situation where there is no identified suspect among the universe of all potential suspects. Thus, the tolling exception to the statute of limitations cannot be based upon the subjective opinion of the district attorney as to whether there was enough evidence to file charges against a particular person.

Moreover, although the knowledge of a victim is imputed to the State, that knowledge must be *actual knowledge*. Here, the Court

found, the trial court found that the victim knew Watson's identity, including his name and telephone number. And the Court stated, while it is sympathetic to the trauma the victim experienced, and acknowledged that she offered plausible explanations for her inability to remember certain facts, it was nonetheless bound to accept the trial court's findings on disputed facts and witness credibility unless they are clearly erroneous. Based on the record, the Court stated that it could not say the trial court's findings were clearly erroneous as the victim testified that Watson told her his name and there was some indication in her testimony that she had told the State at some point that she had been given Watson's telephone number. Accordingly, the trial court did not err in granting the plea in bar.

Merger; Attempting to Elude

Gibbs v. State, A16A2229 (3/14/17)

Appellant was convicted of one count of aggravated assault on a peace officer, two counts of fleeing or attempting to elude a police officer, and one count of reckless driving. He argued the trial court should have merged his convictions for two counts of fleeing or attempting to elude a police officer because they are based on the same act of fleeing from a single police officer. The whole court agreed.

The Court noted that the language of the two counts of attempting to elude were mostly identical except that one count specified that, while committing this act, appellant "did, at Spring Street at Glenroy Drive, collide with a Buick Enclave, a vehicle;" while the other count specified that while committing this act, appellant "while fleeing in traffic conditions, to wit: wet

road and heavy traffic, . . . placed the general public at risk of receiving serious injuries.”

Citing *Smith v. State*, 290 Ga. 768, 773 (3) (2012), the Court stated that the Supreme Court made clear that when determining whether a course of conduct can result in multiple violations of a single statute, the proper focus is the “unit of prosecution” and that the unit of prosecution under O.C.G.A. § 40-6-395 is the act of fleeing from an individual police vehicle or police officer after being given a proper visual or audible signal to stop from that individual police vehicle or officer. Thus, because both counts charged appellant with fleeing from the same officer after having been given a proper signal to stop from that officer, the unit of prosecution under both counts is the same and the counts merged.

Nevertheless, the State argued that *Michael v. State*, 281 Ga.App. 289 (2006), supported its argument that the convictions did not merge. The Court acknowledged that in *Michael* it did hold that two convictions for fleeing or attempting to elude factually did not merge. But, *Michael* was decided before *Smith* and therefore, the Court held, to the extent that *Michael* holds otherwise, it is disapproved.

Jury Charges; Ineffective Assistance of Counsel

Shaw v. State, A16A2019 (3/15/17)

Appellant was convicted of aggravated battery and aggravated assault stemming from a fight at a Waffle House. He contended that the trial court committed plain error with regard to the jury instructions on the various forms of battery. Specifically, (1) the trial court’s failed to instruct the jury that the physical harm required to prove battery must be “substantial”; and (2) the trial court’s instruction on simple battery when the jury asked for clarification, as well as the court’s failure to recharge on battery with the correct wording. The Court agreed.

The record showed that the trial court initially charged the jury on battery and aggravated battery; but the court did not initially charge on simple battery, the least violent form of the crime. In its battery charge, the trial court stated that “a person commits the offense of battery when he intentionally causes physical harm or visible bodily harm to another,” thus leaving out that the physical harm required by the statute is “substantial”

physical harm. The court also did not give the definition of “visible bodily harm,” which is provided in O.C.G.A. § 16-5-23.1(b). When charging on aggravated battery, although appellant was only indicted on one form of aggravated battery for “seriously disfiguring” the victim by biting him, the court charged on two forms of aggravated battery, by charging that appellant would have committed aggravated battery if he (1) deprived the victim of a member of his body by rendering it useless, or (2) seriously disfigured the victim’s body or a member thereof. Then, in response to a jury question asking the court to clarify the difference between aggravated battery and “simple battery,” the court repeated the aggravated battery charge, but instead of repeating the battery instruction, the court mistakenly charged the jury on simple battery, repeating it three times.

The Court stated that the failure to charge that the physical harm required to prove battery must be “substantial” omitted an essential element of the crime of battery. The court again erred in the recharge by failing to recognize that the jury was confused about the various forms of battery, by failing to correct the original error in the definition of battery, and by charging on simple battery, which was not an issue in the case. Furthermore, these errors likely affected the outcome of the trial because it gave the jury the false choice of deciding whether appellant committed simple battery, which requires the least severe showing of harm of the three forms of battery, or aggravated battery, which requires a showing that the person caused bodily harm to the victim by “seriously disfiguring his or her body or a member thereof.” The jury was obviously confused about the various forms of battery and was deprived of the option of convicting appellant of battery, both because the original battery charge was flawed and because the recharge put the jury’s focus on simple battery. Accordingly, the jury never was instructed properly that it had the option of finding appellant guilty of battery by “intentionally causing substantial physical harm or visible bodily harm” to the victim, which can be a misdemeanor and which at most carries a penalty of five years of imprisonment. O.C.G.A. § 16-5-23.1. When a given instruction fails to provide the jury with the proper guidelines for determining guilt or innocence, it is clearly harmful and

erroneous as a matter of law. Accordingly, the Court held that these errors seriously affected the fairness of the proceedings and constituted plain error.

Appellant also contended that his trial counsel was ineffective by attempting to present a delusional compulsion defense without taking the steps necessary to give the jury the option to find him not guilty by reason of insanity. The Court again agreed. The Court reviewed the actions of defense counsel in great detail, including the facts of the case and the trial testimony. The Court also reviewed in great detail the testimony of the expert witnesses who testified for appellant at the motion for new trial. And based on this, the Court found that appellant established that he received deficient performance from his counsel because counsel either seriously mishandled an attempt to assert a defense of delusional compulsion or made an unreasonable decision not to investigate the possibility of asserting that defense. Furthermore, the testimony of appellant’s expert witness at the motion for new trial was sufficient to raise a reasonable probability that the jury would have accepted the defense of delusional compulsion. Accordingly, because both prongs of the *Strickland v. Washington* test were met, the Court reversed the denial of appellant’s motion for new trial.

Rule 404 (b); In-Court Identifications

Martin v. State, A17A0503 (3/15/17)

Appellant was convicted of armed robbery. The evidence, briefly stated, showed that on December 11, 2012, appellant and his co-defendant accosted Reyes-Gaucin as she walked home in Gainesville, grabbing her cell phone, putting a gun to her head and then grabbing her purse and fleeing in a white vehicle. At trial, the State presented evidence that on January 19, 2013, another Hispanic woman, Mayo-Romero, while walking in Gainesville, was robbed by two men wearing dark clothing and traveling in a white SUV. One of the men pointed a gun at her, while the other snatched her purse from her arm. Mayo-Romero identified appellant as the man who snatched her purse.

Appellant argued that the trial court erred in admitting the evidence of the January 19 robbery under Rule 404 (b). The Court

disagreed. The State offered the evidence to establish, among other things, appellant's identity as a participant in the Reyes-Gaucin robbery. Other-crimes evidence may be admitted as proof of identity if it is sufficiently similar to the charged crime to mark the offenses as the defendant's handiwork. In other words, the extrinsic act must be a signature crime, and the defendant must have used modus operandi that is uniquely his. And here, the Court found, the two incidents occurred within approximately one month of each other, and both involved the armed robbery of a Hispanic woman walking alone in Gainesville, during which a purse was snatched from the victim. The perpetrators wore dark clothing and used a small handgun, as well as a white SUV, to carry out the crimes. In both instances, the stolen purses were later found discarded on a roadway. According to a witness, Hispanics were the target of the robberies because "they worked . . . [and] [t]hey had all the money." Finally, Mayo-Romero positively identified appellant as one of her assailants in the January 19, 2013 robbery. Given these circumstances, the trial court was authorized to find that the modus operandi for each robbery was sufficiently similar to mark the offenses as appellant's handiwork. Furthermore, the Court found, although various evidence connected appellant to the Reyes-Gaucin crime, additional proof of identity was certainly relevant. The trial court, therefore, properly admitted evidence of the January 19, 2013 robbery.

Appellant also argued that Mayo-Romero's trial testimony identifying him as the purse snatcher should have been excluded. The record shows that Mayo-Romero testified through a Skype video feed. During her testimony, the prosecutor showed Mayo-Romero a picture of appellant and asked whether she recognized "this man." When Mayo-Romero responded, "yes," the prosecutor inquired, "Who is this?" Mayo-Romero stated: "The one who snatched my bag." According to the State, the prosecutor used a photograph to obtain the identification because "the testimony was taken via Skype and [Mayo-Romero] was unable to scan the courtroom" to identify appellant in person.

Appellant contended that the in-court identification based on a single photograph was impermissibly suggestive, improper, and unreliable. However, the Court noted, because appellant never raised these arguments at

trial, it was subject only to a plain error standard of review. And, the Court found, reversal was not authorized because no error occurred. Specifically, appellant's challenge to the identification testimony relied upon cases involving suggestive *pretrial* procedures that allegedly tainted a witness's subsequent in-court identification. But, appellant made not pretrial identification. Authorities had not previously shown her any photographs, and she did not identify appellant as the perpetrator before trial. Her testimony constituted an in-court identification that was subject to the same rules of evidence, witness credibility, and cross-examination as all testimony in a criminal trial. Accordingly, the Court held, the trial court did not err in admitting the identification testimony.