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CaseLaw UPDATE
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- **Search & Seizure; Inventories**
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- **Venue; Accomplice Corroboration**
- **Rule 404 (b) Evidence; Collateral Estoppel**

Search & Seizure; Inventories

Kennebrew v. State, S18A0711 (9/10/18)

Appellant was convicted of malice murder and other crimes, but his conviction was overturned on appeal for ineffective assistance of counsel. *Kennebrew v. State*, 299 Ga. 864 (2016). Specifically, the Court found that trial counsel was ineffective for failing to file a motion to suppress evidence found in two backpacks because the warrantless search was not valid as incident to arrest.

On remand, appellant filed a motion to suppress and a hearing was held. The evidence, briefly stated, showed that On October 20, the appellant was located at the dorm room of appellant's girlfriend. Sometime after appellant was taken away in handcuffs, the girlfriend consented to a search of her dorm room and the police located two backpacks belonging to appellant. The trial court found that they were "briefly inventoried by Sgt. Neal at the scene for officer safety and then secured by CSI Woolford." The State conceded that the backpacks were "searched" six days later, on Oct. 26. The trial court found that the backpacks "would have inevitably been discovered through a lawful inventory search" and denied the motion. The Court granted an interlocutory appeal.

The State argued that the police performed two proper warrantless inventory searches — once at the scene of the seizure of the backpacks on October 20, and again on October 26. The Court disagreed. First, the Court found that the State's argument, and the trial court's finding, that CSI Woolford performed an inventory search at the scene on October 20 was not supported by any evidence as there was no evidence that CSI Woolford actually looked inside the bags. Also, this finding conflicted with the State's concession during the suppression hearing that the backpacks were not "fully inventoried" until six days after appellant was arrested. Thus, the State failed to carry its burden to show that an inventory search was done on October 20, and absent such a search, the motion to suppress could not be denied on that ground.

Next, the Court addressed the Oct. 26 inventory. The Court noted that the trial court apparently credited police testimony that for the safety of police, chain of custody purposes, and to protect the department from potential false claims of theft, its policy mandated that closed containers be inventoried *before* their submission to the property room. But the trial court made no findings as to whether the October 26 search took place before the backpacks were placed in the property room or as to the location of the backpacks during the six days prior to that search. And the State pointed to no record evidence that the October 26 search took place before the backpacks were placed in the property room.

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Thus, the Court found, the State failed to show that the October 26 search was done in accordance with standard, established inventory procedures.

The Court then addressed the trial court's inevitable discovery finding. The Court noted that under the exception for inevitable discovery, the State may introduce evidence that was obtained by an illegal search if the State can establish a reasonable probability that the evidence in question would have been discovered by lawful means. The State must also establish that the lawful means which made discovery inevitable were being actively pursued prior to the occurrence of the illegal conduct. Here, the Court found, to the extent that the State suggested that the evidence was discovered during an illegal search on October 20, but nonetheless was admissible because it inevitably would have been discovered later through a proper inventory search, that argument was based on the false premise that any search took place on October 20. And to the extent that the State argued that the evidence was discovered in an illegal search on October 26 but was nonetheless admissible because it would have been discovered eventually through a later, proper inventory search, it also failed. The Court found that the record did not support a finding that the October 26 search took place somewhere other than the DeKalb Police property room. Thus, the Court concluded, given the police department's policy that an inventory search be conducted *before* submission to the property room, no later search would have qualified as an inventory search. Accordingly, the Court found, the State failed to meet its burden to avoid application of the exclusionary rule under the inevitable discovery exception and the trial court's order denying the motion to suppress was reversed.

Statements; Voluntariness

Brown v. State, S18A1014 (9/10/18)

Appellant was convicted of felony murder. He argued that the trial court erred in admitting his two statements given to the police on March 22 and 26, 2016 because they were involuntarily made. The evidence, briefly stated, showed that appellant was advised of his rights before each interview and appellant acknowledged that he understood those rights. During the first interview, appellant made comments like "Well, go ahead and book me in here, sir," and then said, "I'm ready, man". He also clutched his chest and appeared out of breath. When the detective asked appellant if he needed an ambulance, appellant replied, "No, sir, brother. I'd like to get it over with," and "Let's go ahead and finish." When the detective later on in the interview told appellant his story was implausible, appellant clutched his chest again, causing the detective to leave the room to call for an ambulance. The detective returned and continued to interview appellant for about another seven minutes until the paramedics arrived; appellant briefly clutched his chest for about five seconds but did not otherwise appear to be in physical distress during this period. The interview ended when the paramedics arrived.

Before resuming the interview about a week later, the detective asked if appellant felt well enough to continue the interview, and appellant said that he did. In response to one of the detective's questions, appellant stated, "No. I'm ready to go and be locked up if you say I done it. No. I didn't do that bro. I'm not going to sit here and [say] I did it. No. I'm not going to sit — I'm not going to sit out here, no, sir."
After a brief exchange, appellant said he was scared and that he was trembling, and he then threw up his hands and appeared to labor to speak. Appellant twice refused the detective's suggestion to call for an ambulance, and the detective ended the interview when appellant appeared as though he could not speak. The video recording showed appellant no longer appeared to be in distress at the time the detective began leaving the room, and appellant joked with the detective as he walked out of the room.

The Court noted that appellant voluntarily agreed to be interviewed and waived his *Miranda* rights. Appellant was never handcuffed, threatened, or offered anything in exchange for his cooperation. The detective repeatedly told appellant that he was not under arrest, and appellant was not arrested after either interview. The Court noted that these circumstances are generally enough to establish that a statement is voluntary.

Nevertheless, appellant argued, his statements were involuntary because he was in significant pain as a result of either a stroke or heart attack. The Court disagreed. Noting that the trial court questioned the severity of appellant's medical complaints, the Court stated that even if appellant was in pain, this fact would not in and of itself render his statement involuntary.

Appellant next argued that he clearly asserted his wish to end the police interviews. But, the Court found, the trial court correctly determined that appellant did not unequivocally invoke his right to remain silent. Here, when given multiple opportunities to end the first interview if he was not feeling well, appellant repeatedly said he wanted to finish the interview. Appellant's statements during the first interview that the detective should "go ahead and book" him because he was "ready" and appellant's actions indicating that he was ready to be arrested were not clear and unequivocal assertions of the right to remain silent. Similarly, his statements at the second interview also were not clear assertions of the right. Appellant merely said he was willing to be locked up if the detective believed he committed a crime but that appellant would not "sit there" and admit to something he did not do. Thus, the Court concluded, appellant generally expressed a willingness to talk to the detective, repeatedly said he wanted to finish the interview rather than call for an ambulance, and never made an unambiguous statement that he wanted to stop speaking with the detective or wanted to remain silent. Under these circumstances, the trial court properly admitted the statements in question.

Venue; Accomplice Corroboration

Raines v. State, S18A0725 (9/10/18)

Appellant was convicted of malice murder, three counts of misdemeanor obstruction and other crimes. The evidence, briefly stated, showed that appellant shot a taxi cab driver on Avenue N in Thomaston. He contended that the evidence was insufficient to establish venue in Upson County. The Court disagreed.

The Court agreed with the State that it was undisputed that the entire area in question is located in Thomaston, Georgia. However, the Court stated, this alone is insufficient to show venue. But, taking the testimony at trial as a whole, sufficient evidence was presented from which a rational finder of fact could conclude that venue was established in Upson County. First, there is the general presumption that officers do not exceed their authority. And here, while the crime was investigated primarily by city police officers and the GBI, an agent of the Upson County Narcotics Task Force testified that he too was involved in the homicide investigation. Also, two of the State's exhibits were labeled "Upson County" and "County: Upson" and these went out with the jury. Finally, the State examined a GBI agent regarding his discovery of a notebook in the taxicab with the victim's name on it, which appeared to be a dispatch log containing a list of addresses with the headings "pick-up" and "drop-off," with the last, incomplete entry showing an address on Avenue N. Although the trial court sustained objections to the admission of the notebook, the GBI agent who examined the notebook was able to testify that based on his examination of the notebook, he had a location for where the crime occurred and it was located in Upson County and specifically Avenue N in Thomaston.

Appellant next argued that the State failed to show venue with respect to the three misdemeanor obstruction charges. The Court again disagreed. A GBI agent testified that appellant resisted arrest at the "Narcotics Task Force" while he, another GBI agent, and a member of the Thomaston Police Department were present. This location was identified by other witnesses as "the Upson County Narcotics Task Force." Thus, the Court held, from this evidence the jury could conclude, under the trial court's instruction, that venue of the obstruction charges properly lay in Upson County.

Finally, appellant argued that the trial court erred in not giving a jury instruction on accomplice corroboration, which he asserted was his sole defense and entitles him to it, even if he didn't actually request it. The Court stated that his assertion that this was his sole defense was not an accurate statement since his trial counsel never mentioned an accomplice in closing, arguing instead that the person alleged to be the accomplice was in fact the sole perpetrator of the crime, not appellant. And in any event, the lack of accomplice corroboration is not a separate defense; the corroboration is simply an element of the State's case, which must be proved beyond a reasonable doubt.

Moreover, the trial court did not omit the corroboration charge while also instructing the jury that the testimony of a single witness is sufficient to prove a fact, which would have amounted to plain error. Thus, the Court stated, it need not decide whether the absence of a correct instruction, rather than the presence of an incorrect instruction, is reversible error. Here, given the quantum of evidence, combined with the fact that the instruction was incomplete rather than overtly incorrect, appellant could not show that the instruction likely affected the outcome of the proceedings. Accordingly, there was no plain error.

Rule 404 (b) Evidence; Collateral Estoppel

State v. Atkins, S18A0770 (9/10/18)

Atkins was charged with murder and other crimes in connection with the shooting death of Wallace in 2015. The proffered evidence showed that Wallace was last seen waiting to sell marijuana to someone. A car drove up with Adkins and another. Wallace got in and the car drove off. Adkins shot Wallace in the car and later dumped his body on the side of the road.

The State proffered other acts evidence under Rule 404 (b). In 2013, Herbert was last seen waiting to complete a drug deal; his body was found on the side of a road. Jones and Atkins were subsequently charged with murder and other crimes related to Herbert's death in Chandler County. Jones pleaded guilty to voluntary manslaughter and armed robbery and agreed to testify at Atkins's trial. At his trial, Atkins argued that he was not present for the crime. The jury acquitted Atkins of murder, felony murder, conspiracy to commit murder, and two counts of possession of a firearm during the commission of a felony. The court declared a mistrial on the remaining counts, which included armed robbery and kidnapping, after the jury was unable to reach a verdict on those counts.

The trial court found that the other acts evidence was being offered for a legitimate purpose; there was sufficient proof from which the jury could find by a preponderance of the evidence that Atkins "committed some, if not all, of the prior acts"; and that the prejudicial impact of the other acts evidence did not substantially outweigh its probative value, noting that the Candler County incident was so similar to the present crime that it "almost qualifie[d] as a signature crime." Based on these findings, the trial court permitted the introduction of evidence showing Atkins's involvement in the drug

deal with, and kidnapping of Herbert, but excluded evidence about Herbert's murder "out of an abundance of caution." The State appealed.

Atkins argued that the collateral estoppel doctrine of the United States Constitution's Double Jeopardy Clause precludes the State from relitigating his involvement in Herbert's murder, because he presented an alibi defense in the Candler County case and that jury resolved the issue of his involvement in his favor by acquitting him of murder. In support of his collateral estoppel argument, Atkins relied primarily on *Ashe v. Swenson*, 397 U.S. 436 (90 SCt 1189, 25 LE2d 469) (1970) and its progeny, including the Court's decision in *Moore v. State*, 254 Ga. 674 (1985).

The Court stated that in *Moore*, it followed *Ashe* in concluding that collateral estoppel barred the admission into evidence of prior acts for which the defendant was previously acquitted. But, in *Dowling v. United States*, 493 U.S. 342 (110 SCt 668, 107 LE2d 708) (1990), decided five years after *Moore*, the defendant argued his prior acts were inadmissible pursuant to *Ashe*, but the Court expressly declined to extend Ashe "and the collateral-estoppel component of the Double Jeopardy Clause to exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted." The *Dowling* Court held that an acquittal in a criminal case does not bar the government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof. Because the admissibility of evidence under Rule 404 (b) was governed by a lower standard (preponderance) than the question of guilt in the prior criminal prosecution (beyond a reasonable doubt), the Court found no error in admitting evidence of a defendant's prior acts for which he was previously acquitted for Rule 404 (b) purposes, explaining that a jury might reasonably conclude by a preponderance of the evidence that the defendant committed the prior acts even though the jury was not convinced of that fact beyond a reasonable doubt. Thus, the Court stated, *Moore* cannot be squared with *Dowling*. "*Moore* was wrong to extend *Ashe* to control the admission of Rule 404 (b) evidence, and it is hereby disapproved." And because the trial court applied collateral estoppel principles to determine the admissibility of other acts evidence, the court erred at the second step of the Rule 404 (b) test.

The Court also held that the trial court erred in excluding the evidence "out of an abundance of caution." Rule 403 provides a list of reasons authorizing a trial court to exclude otherwise admissible and relevant reasons. "An abundance of caution" is not one of those enumerated grounds. Rule 404 (b) is a rule of inclusion and Rule 403 is an extraordinary exception to that inclusivity. The court's basis for excluding the murder was thus unsound. Given this legal error, along with its correct application of the now-disapproved decision in *Moore* and failure to align the purposes for which the State wanted to use the Rule 404 (b) evidence with the purposes the trial court determined appropriate, the Court vacated and remanded.

Nevertheless, the State argued, the doctrine of chances is a legitimate, non-character purpose of Rule 404 (b) evidence, and the Court should instruct the trial court on remand to rule on the State's argument that the other acts here are admissible for this purpose. The Court declined to do so. The Court stated that the doctrine is not an independent ground upon which to admit other acts evidence, but is instead a theory why other acts evidence may be relevant to prove intent, knowledge, or identity and disprove accident or mistake. Thus, because the doctrine of chances is not an independent ground to admit other acts evidence, the State may not introduce the other acts for this independent purpose.