Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 20, 2015

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THIS WEEK:

Similar Transactions; Rule 404(b) Evidence

Curry v. State, A14A2111 (2/5/15)

Appellant was convicted of two counts of human trafficking, pimping for person under 18; sexual exploitation of children and related crimes all concerning two victims. Appellant argued that the trial court violated O.C.G.A. § 24-4-404(b) by admitting, over his objection, the testimony of L. B., a third woman who claimed that he sold her to men as a prostitute. The Court disagreed.

To be admissible under Rule 404(b), the similar transaction evidence 1) must be relevant to an issue other than the defendant's character; 2) must be sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the act(s) in question; and 3) the probative value of the evidence cannot be substantially outweighed by undue prejudice. Additionally, the evidence must satisfy Rule 403. As to the first prong, appellant argued that his intent was not an issue because his defense strategy was to show that the victims were not credible, not that he did not intend to commit the crimes charged. But, the Court found, this argument, was belied by the record. Here, the Court found, appellant pled not guilty, thereby making his intent a material issue and placing a substantial burden on the State to prove intent, and he took no affirmative steps to remove intent as an issue. Instead, contrary to appellant's contention that his defense strategy was not to show that he lacked intent to commit the offenses, his defense counsel argued to the jury that the victims were "very close friends" who took advantage of appellant when he was only trying to help them. Thus, this defensive strategy squarely challenged the element of intent. And under these circumstances, the trial court did not err in finding that the first prong of the similar-transaction test was satisfied because the evidence at issue was admissible for a purpose other than appellant's character.

Appellant did not challenge the second prong of the test. As to the third prong, appellant argued that the evidence was more prejudicial than probative because his intent was not an issue. But since the Court already found that intent was an issue, appellant's arguments as to the third prong were unavailing.

Finally, appellant argued that the evidence was not sufficiently similar. The Court again disagreed. The proper focus is on the similarities, not the differences. Here, L. B. testified that appellant sold her as a prostitute and held her against her will, just like he did with the victims in this case. Indeed, the

evidence showed that appellant sold all three victims to men as prostitutes; required them to solicit their own clients; controlled the time, prices, and location for their services; exerted control over them at all times; kept all proceeds; and prevented them from leaving his house through threats and intimidation. And given the striking similarities between these offenses, the Court concluded that the extrinsic evidence of appellant's prior bad acts was sufficiently similar to the charged offenses to be admissible under O.C.G.A. § 24-4-404(b). Thus, the Court held, the trial court did not abuse its discretion in finding that appellant's prior bad acts were admissible under O.C.G.A. § 24-4-404(b).

Search & Seizure; No Knock Warrants

State v. Lopez-Chavez, A14A1834 (2/10/15)

Lopez-Chavez was charged with VGCSA. She filed a motion contending that the evidence discovered in her house should be suppressed because the no knock provision in the search warrant was invalid. The trial court agreed and the State appealed.

The Court stated that a no-knock provision in a warrant is sufficiently supported if the State demonstrates a reasonable suspicion that knocking and announcing the officers' presence would be dangerous or futile under the particular circumstances, or that it would hinder the effective investigation of the crime by, for example, allowing the destruction of evidence. In this regard, the Court stated, it is sufficient if the information supplied by affidavit and sworn testimony would lead to the reasonable conclusion that the officers could be harmed if they announced their authority and purpose.

But here, the Court found, the affidavit merely contained a generalized statement that unspecified evidence might be destroyed if the police announced their presence before entering, and it did not appear that the officer who presented the affidavit pointed to any specific items or data that might be destroyed if the no-knock intrusion was not allowed. Thus, the magistrate was not provided with underlying details that would have allowed him to evaluate whether these conclusions were based on specific facts or whether they were merely boilerplate based on speculation and presumptions. Furthermore, there was no evidence that any persons suspected to be on the premises had a previous history of violence or that they even possessed a firearm such that they might be expected to use weapons against the officers conducting the search. Thus, the request for a no-knock entry was solely based on a generalized experience or belief that weapons are associated with the drug trade, and the trial court properly determined that the no-knock provision was not justified on this basis.

In so holding, the Court also rejected the State's requests that the Court consider the results of the search to justify failing to knock and announce the officers' entry. The Court stated, "We take this opportunity to make it clear that in reviewing whether a no-knock provision in a warrant is justified, the focus is on the sworn testimony and evidence presented to the judge who issued the warrant….Allowing the ends to justify the means would undermine the directive in O.C.G.A. § 17-5-27 that police must make a good faith effort to knock and announce their presence before executing a search warrant."

Forfeitures; Sufficiency of Answer

Crimley v. State of Ga., A14A1575 (2/10/15)

The trial court granted the State's motion to dismiss the answer to the State's forfeiture complaint filed under O.C.G.A. § 16-13-49(o). The record showed that appellant filed a timely verified answer that did not comply with O.C.G.A. § 16-13-49(o)(3)(A) through (G), other than by stating the caption of the proceedings and the name of the claimant as required by subsection (A). It pleaded none of the specific facts required, and while it referred to an Exhibit "A," no document was so designated. However, as the State acknowledged, a verified document titled "Notice of Claim" was filed with this first answer, and that document referred to and incorporated 16 pages of supporting documents. Three days later, appellant filed a second verified answer, identical to the first, but apparently omitting the "Notice of Claim" while attaching additional documents.

The Court stated that neither of the two answers, standing alone, complied with the statutory requirements. But, in determining whether appellant complied with the requirements of O.C.G.A. § 16-13-49(o)(3), the Court must consider all of his filings in response to the State's complaint as constituting his answer, even though they are not formally or expressly incorporated in the two documents styled "Answer." And here, the Court found, appellant's answers and their various attachments, while unartfully drafted and poorly presented, were sufficient as a whole to survive a motion to strike. Moreover, the Court noted, this was merely the pleading stage, and appellant was not required to prove his case in his answer. Accordingly, the Court reversed and remanded for a hearing on the merits.

Criminal Negligence; Failure to Supervise Children

Corvi v. State, S14A1705 (2/16/15)

Appellant was convicted of cruelty to children in the second degree and reckless conduct relating to the drowning deaths of two five-year-old girls. The evidence, briefly stated, showed that appellant lived with the parents of one of the victims and had an informal arrangement that she would look after the parents' children for room and board. The other victim was appellant's granddaughter, who came over to spend the night and play with the other victim. Around noon that day, the parents left to go to the grocery store, leaving appellant in charge of the two victims. Because it was raining, appellant told the girls that they could not go swimming in the backyard pool and the girls went upstairs to play inside. Appellant, a diabetic, was upstairs cleaning when she became dizzy because of low blood sugar and went down two floors to the basement to take medication. While she was downstairs, she made a telephone call, but only after checking that the victims were still upstairs playing. The call began at 12:55. When the parents came home approximately 45 minutes later, they saw appellant coming out of the house, still on the phone and drinking a soda. They asked where the girls were and appellant replied upstairs. However, the girls were found drowned in the pool.

Appellant contended that the evidence was insufficient to support her convictions. The Court agreed. Both cruelty to children in the second degree and reckless conduct are crimes involving criminal negligence. "Criminal negligence is an act or failure to act which demonstrates a willful, wanton, or

reckless disregard for the safety of others who might reasonably be expected to be injured thereby." O.C.G.A. § 16-2-1(b). Here, the Court found, the girls left the upstairs bedroom and went to the pool at some point while appellant was on the phone. The lead investigator testified that he decided to swear out a warrant for appellant's arrest when he learned she was on the phone for 45 minutes. Yet, the Court noted, there was no evidence showing that the length of time appellant was on her phone call would have made a difference in the children's deaths. The only time-frame established for the drowning to have occurred was between 12:55 p.m. when appellant initiated her phone call, and 1:41 p.m. when the family called 911. It was unknown when the girls left the upstairs bedroom and it was unknown how long they had been in the pool when found. And, an expert testified that a child could drown in as little as four to six minutes once submerged. Thus, the Court found, it could not be said that taking a 45-minute phone call in itself constituted a failure to reasonably supervise the children.

Also, the Court stated, this was not a case where a caretaker left small children unattended in a pool or a similar objectively dangerous circumstance. Here, appellant never left the children alone in the house and she confirmed that they were upstairs playing when she initiated her phone call. Appellant had told the girls they could not go swimming and there was no showing that the girls had a propensity to disobey appellant or other adults. While one of the victims was described as a good swimmer, no evidence was presented that she would swim in her family's pool unsupervised or had a propensity to do so. Also, no evidence was presented that appellant routinely failed to supervise either girl, or any other child in her care. Thus, the Court concluded, the factual circumstances of this case, even when viewed in a light most favorable to the verdict, did not show appellant's conduct constituted criminal negligence that would sustain charges of cruelty to children in the second degree and reckless conduct. The evidence was therefore insufficient to convict and the trial court erred when it failed to grant appellant's motion for a directed verdict and when it rejected the claim in its order denying appellant's motion for new trial.

Judicial Comments; Venue

Sales v. State, S14A1478 (2/16/15)

Appellant was convicted of felony murder, armed robbery, and possession of a firearm during the commission of a crime. Appellant contended that the trial court committed automatic reversible error under O.C.G.A. § 17-8-57 when he commented on venue. The Court agreed.

The record showed that during voir dire, while instructing prospective jurors to consider whether they might have heard something about the case or know any of the parties involved, the trial court stated: "*This happened in Taylor County.* So if anybody knows any of the parties, we would respectfully ask you to let us know now." (emphasis supplied) The Court found that this statement made by the trial court clearly, unambiguously and erroneously suggested to jurors that venue in Taylor County had been established or was not in dispute in this case. Moreover, the Court noted, this case was indistinguishable from *Rouse v. State*, 296 Ga. 213 (2014) in which the trial court stated, "you will be hearing about a case … that happened in Muscogee County," while giving preliminary instructions to the venire. Considered in context, the statement could not reasonably be construed as a mere comment on the evidence jurors could expect to hear or as a comment on what the State was expected to prove at trial. Accordingly, by stating to the venire that the crime happened in Taylor County, the trial court "expressed or intimated the court's opinion as to a disputed issue of fact" in violation of O.C.G.A. § 17-8-57 and appellant must be granted a new trial.

Supplementing the Record; Merger

Leeks v. State, S14A1370 (2/16/15)

Appellant was convicted of two counts of felony murder, aggravated assault with a deadly weapon, and possession of a knife during the commission of a felony. The case was tried before Judge Glanville, but because he was away on military duty, the motion for new trial was heard by Judge Manis. Appellant argued that Judge Manis erred in granting the State's motion to supplement the record. The record showed that the jury submitted five notes to Judge Glanville. The first three notes were discussed in the trial transcript: Judge Glanville discussed the questions with counsel, called the jury to open court, and responded to the questions in the presence of appellant and all counsel. However, there was no discussion in the transcript of the last two jury notes. Both of the notes were included as exhibits in the record, showing the time and date received by the court as well as a handwritten response by Judge Glanville. The question and response on Jury Note 4 was as follows: "On charges 2+3 (Felony Murder) are there lesser charges, such as manslaughter. … Answer: You will have to rely upon the [] charge of the court." The question and response on Jury Note 5 was as follows: "We would like to see the letter [appellant] wrote to Mrs. Woodall. … Answer: You will have to rely upon the evidence that was presented."

Because the transcript was incomplete, the State moved to supplement the trial transcript, pursuant to O.C.G.A. § 5-6-41(f), with the affidavit of Judge Glanville and the testimony of the two prosecutors who tried the case, in order to show Judge Glanville's customary practice for responding to jury questions and notes. After holding a hearing, Judge Manis granted the State's motion to supplement, finding that none of the attorneys could swear positively that Judge Glanville called them back to court to discuss the two jury questions, but further concluding that all of the attorneys agreed that it was Judge Glanville's customary practice to inform the attorneys of a jury question, summon the parties, and solicit input as to an appropriate response, either at a bench conference or in open court outside the presence of the jury. Moreover, Judge Manis found that with regard to both jury notes, if the attorneys had not agreed on a response, Judge Glanville would have immediately gone back on the record to permit the parties to state their respective positions and make a ruling. Judge Manis ordered that the transcript be amended to reflect all of these findings.

Appellant argued that the findings by Judge Manis with regard to these two jury notes were clearly erroneous because neither Judge Glanville nor the prosecutors could absolutely recall what each jury note said or what discussions occurred. She further contended that the evidence conflicted and because there was no transcript, the presumption must be that Judge Glanville did not discuss the two jury questions with counsel. However, the

Court found, where the correctness of the record is called into question, the matter is to be resolved by the trial court. In fact, Judge Manis' findings as to what transpired with regard to the two jury notes are dispositive and not subject to appellate review.

The Court also noted that, although not raised by either party, there was an error with respect to the merger of certain counts for judgment and sentencing. The jury found appellant guilty of felony murder predicated on aggravated assault, felony murder predicated on possession of a knife during the commission of a felony, aggravated assault, and possession of a knife during the commission of aggravated assault. Appellant was sentenced to life imprisonment on the felony murder count predicated on aggravated assault. The court then merged all remaining counts. However, the second felony murder count predicated on possession of a knife during the commission of a felony was vacated by operation of law because the felony murder convictions involved the same victim. As for the underlying felonies, the aggravated assault felony merged into the felony murder charge for which appellant was sentenced. Because the second felony murder charge was vacated by operation of law, the underlying felony of possession could not have merged into the second felony murder count. Instead, appellant should have been sentenced for the separate count of possession of a knife during the commission of the felony of aggravated assault. Accordingly, appellant's sentence was void and the Court remanded the case for resentencing.

Successive Habeas Petitions; Aggravated Stalking

State v. Cusack, S14A1471 (2/16/15)

In 2006, Cusack pled guilty to one count of aggravated stalking and seven counts of criminal damage to property in the second degree. In 2010, he unsuccessfully filed a petition for habeas corpus alleging three grounds for relief. In 2013, Cusack filed a second petition for habeas corpus. Citing *State v. Burke*, 287 Ga. 377, 379 (2010), he alleged a new ground for relief that "a single violation of a protective order, alone, simply does not establish 'a pattern of harassing and intimidating behavior'" and claiming that his aggravated stalking conviction was based solely on a single violation of a protective order, and therefore was void. The habeas court agreed. And, although O.C.G.A. § 9-14-51 provides that a second habeas petition may not be filed, there is an exception if the grounds raised in the second petition could not have been raised in the first petition. The habeas court found that since *Burke* was decided three months after Cusack filed his first petition, his petition fell within this exception to O.C.G.A. § 9-14-51. The State appealed and the Court reversed.

The Court noted that the habeas court treated *Burke* as though the opinion created a substantive change in the criminal law. But, the Court stated, the habeas court was incorrect. In fact, not only after, but also before *Burke*, Cusack could not have been convicted of aggravated stalking based solely upon a single violation of a protective order; the authority on that point was clear. *Burke* did not overrule any prior interpretation of the aggravated stalking statute, or change anything in its application. Rather, *Burke* simply addressed a certain fact pattern, and the State's argument that under that fact pattern, the defendant could be found guilty of aggravated stalking. However, the State's argument was simply wrong, and the fact that the Court in *Burke* rejected a meritless argument that went against the language of the statute did not mean that *Burke* constituted a change in substantive criminal law. Accordingly, under the precedents existing at the time of Cusack's first habeas petition, a claim that Cusack could not be convicted of aggravated stalking based solely on a single violation of a protective order could have been raised. Consequently, pursuant to O.C.G.A. § 9-14-51, habeas relief could not be granted on Cusack's second habeas petition.

Capital Litigation; Prosecutorial Misconduct

Spears v. State, S14P1344 (2/16/15)

Appellant was convicted of murder and multiple other crimes and sentenced to death. Appellant argued that the prosecutor made improper arguments during the sentencing phase. The record showed that the prosecutor argued as follows: "If given the chance, this man in the future will kill again. If he gets a life sentence and is serving time in prison, it could be a prison guard, it could be a fellow inmate. If he ever escaped, it could be you, it could be a family member, another innocent bystander."

Appellant first contended that this argument was speculative. The Court disagreed. An argument that a death sentence is necessary to prevent future dangerous behavior by the defendant in prison must be based on evidence suggesting that the defendant will be dangerous in prison. Arguments addressing future dangerousness are not improper if based on evidence adduced at trial. But it is improper for the State to argue that a defendant will kill in prison simply because he killed while free. Here, the Court found, appellant's confession and other evidence at trial showed that appellant was willing to and had planned to commit other murders and that he had no concern about the number of murders that he might commit. Thus, the prosecutor's argument regarding future dangerousness was not based on mere speculation.

Appellant also argued that the prosecutor violated the "Golden Rule." The Court agreed. The "Golden Rule" prohibits any argument that, regardless of the nomenclature used, asks the jurors to place themselves in a victim's position. A "Golden Rule" argument is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. The Court noted that it has not previously addressed the application of the "Golden Rule" to the jury's consideration during the sentencing phase of the possible future acts of a defendant. Nevertheless, "we conclude now that the prosecuting attorney violated the 'Golden Rule' and improperly attempted to personalize the sentencing question for the jury by arguing, 'If he ever escaped, it could be you.'" However, because appellant did not raise any objection at trial regarding the "Golden Rule," his claim on appeal based on it was waived insofar as it concerned his convictions. And, the Court held, upon its examination of the entire trial record, the absence of the prosecuting attorney's violation of the "Golden Rule," which was a marginal one whose impropriety was not obvious from the Court's prior case law, would not in reasonable probability have changed the jury's sentencing verdict.

Finally, appellant also argued that the

prosecutor committed error when he argued, "[H]e is a cold-blooded killer and if he ever gets the chance to do it again, he will, and the State would urge you to take care of this rabid animal, do the right thing." The Court found that the reference to rabies was, at least initially, a proper illustration used to respond to appellant's mitigating evidence. Nevertheless, the Court found, the final reference to appellant as a "rabid animal" was unnecessary and undesirable. But, the Court also noted that appellant raised no objection to the use of this phrase, which would not have formed the basis for reversal even if it had been objected to and had been erroneously allowed. Accordingly, although characterizing arguments using metaphors for a defendant such as 'animal' and 'snake' is unnecessary and undesirable, allowing them is not reversible error.

Judicial Misconduct; Ineffective Assistance of Counsel

Anderson v. State, S14A1372 (2/16/15)

Appellant was convicted of malice murder and related crimes. He argued that the trial judge prejudiced the jury against him by demonstrating partiality toward the State's attorney and against his trial counsel. The record showed that, in the presence of the jury and before it returned its verdicts, the trial judge referred to the prosecutor, Clint Rucker, as either "Mr. Rucker" (27 times) or "Clint" (20 times). The judge similarly referred to appellant's trial counsel, Melissa Redmon, as "Ms. Redmon" (six times) and "Melissa" (three times). The judge also called her "Young Lady" or "Ms. Young Lady" four times and "Miss Conflict" two times. During the trial, however, appellant did not object to these remarks by the trial judge or file a motion for the judge's recusal. He therefore failed to preserve this argument for review on appeal.

Appellant, however, also alleged that his counsel was ineffective for failing to object or move for recusal. At the motion for new trial, appellant's trial counsel stated that she did not consider the trial judge's references "disrespectful or derogatory," and that "due to his demeanor, his nature, [the] way he treated us in the courtroom, I don't think anyone else would have taken it as that way either." The Court stated that an attorney's decision not to make an objection must be patently unreasonable to rise to the level of deficient performance. Given trial counsel's first-hand perception of the tone and impact of the judge's comments, the Court found she had a reasonable basis for not objecting to the trial judge's comments and for not moving for the judge's recusal. Therefore, she did not provide ineffective assistance on this basis. However, the Court stated, "We do not condone the trial judge's use of first names and potentially belittling monikers to refer to counsel, particularly in the presence of the jury. Judges should maintain a substantial degree of formality in their court proceedings…."