

THIS WEEK:

- **Venue; Sufficiency of the Evidence**
- **Out-of-Time Appeals; *Flores-Ortega***
- **Jury Instructions; Ineffective Assistance of Counsel**
- **Rule 404 (b) Evidence**

Venue; Sufficiency of the Evidence

Worthen v. State, S18A1212 (1/22/19)

Appellant was convicted of malice murder and other crimes. The evidence showed that the crimes were committed on the sidewalk and street in front of 490 Angier Avenue in Fulton County. Relying on *Jones v. State*, 272 Ga. 900, 903 (3) (2000), appellant argued that although there was evidence that the victim's apartment building at 490 Angier Avenue was in Fulton County, this evidence was legally insufficient to establish that the location where the victim was fatally shot — the sidewalk or street just in front of the building — was in the same county.

The Court noted that in *Jones*, it held that venue had not been proven sufficiently because the only venue evidence presented at trial related to the county where the victim's neighbor lived, which was on Evans Drive "directly across the street from the murder victim's home" where the murder occurred. *Id.* at 903. Citing no authority, the majority declared that this evidence was "irrelevant" to the location of the murder because "[i]t is entirely possible that the neighbor's house is located in one county, while the houses located across the street are sited in an adjoining county." *Id.* at 903-904.

But, the Court stated, apart from *Jones's* rejection of inferences based on proximity, it has treated the jurisdictional fact of venue consistent with the general principle of allowing jurors to draw reasonable inferences from circumstantial evidence in deciding whether a crime was committed in the county alleged. It therefore overruled division (3) of *Jones* and disapproved of all cases that cited its holding favorably.

The Court also noted that it has gone down this road before. In *Gosha v. State*, 56 Ga. 36 (1876), and again in *Futch v. State*, 90 Ga. 472 (1892), relying on *Gosha*, the Court held that there can be no inferences-based-on-proximity relating to venue. And, while subsequent decisions in the 1930's and 1940's expressly recognized that the no-inferences-based-on-proximity holdings of *Gosha* and *Futch* were no longer good law, the Court, nevertheless, also overruled *Gosha*, and disapproved of all cases that cited its holding favorably.

Under the general principle of allowing jurors to draw reasonable inferences from circumstantial evidence regarding the sufficiency of the venue evidence, the Court "easily" concluded that the evidence was sufficient to support the jury's finding that venue was proved beyond a reasonable doubt to be in Fulton County. Read in context, the record showed that the police witnesses who testified that "490 Angier Avenue" is in Fulton County were referring not to the precise real estate

dimensions of the apartment building with that street address, but rather to the crime scene that included the spot on the sidewalk or street just in front of the building where appellant shot and killed the victim. “But even if the witnesses were being that precise, the jurors could quite reasonably infer that the sidewalk and street just in front of that property were also located in Fulton County, there being no reason founded on the evidence to conclude otherwise.”

Out-of-Time Appeals; *Flores-Ortega*

Ringold v. State, S18A1215 (1/22/19)

Appellant was indicted on four counts of malice murder and one count of aggravated assault. The State sought the death penalty. During trial, appellant decided to enter a plea in exchange for the State taking death off the table. He was sentenced to concurrent terms of life without parole and a term of years on the other convictions. A month later, he moved to withdraw his plea. A hearing was held at which appellant was represented by new counsel. Following the hearing, the trial court denied his motion. The trial court did not advise appellant of his appeal rights at the hearing or in its order. Four years later, appellant filed a pro se motion for an out-of-time appeal, alleging that his trial counsel was ineffective for failing to advise him of his right to appeal. The trial court denied the motion without a hearing.

Citing *Carter v. Johnson*, 278 Ga. 202 (2004), appellant argued that the trial court and his motion-to-withdraw counsel (hereinafter “counsel”) failed to advise him of his right to appeal the denial of his motion to withdraw his guilty plea. The Court first addressed appellant’s assertion regarding the trial court and found that appellant failed to raise this issue before the trial court. Therefore, it was waived because issues cannot be raised for the first time on appeal.

As to the issue of whether the appellant’s counsel was ineffective for not advising him of his appeal right, the Attorney General agreed that *Carter* applies and that appellant is entitled to a hearing to determine who bore the ultimate responsibility for the failure to appeal. The District Attorney, however, argued that appellant is not entitled to a hearing because he failed to demonstrate prejudice from the purported ineffective assistance of counsel. The Court agreed with the Attorney General but found that the controlling authority is *Roe v. Flores-Ortega*, 528 U.S. 470, 476-477 (II) (A) (120 SCt 1029, 145 LE2d 985) (2000), not *Carter*.

A defendant who timely seeks to withdraw a guilty plea is entitled to the assistance of counsel and has both the right to appeal the denial of his motion to withdraw guilty plea and the right to the effective assistance of counsel as guaranteed by the Sixth Amendment for that appeal. For a defendant who did not receive his first appeal of right because of his counsel’s ineffective assistance, the remedy is an out-of-time appeal.

A defendant’s claim that his counsel was ineffective in failing to file a notice of appeal is reviewed under the familiar standard of *Strickland v. Washington*. Thus, under *Flores-Ortega*, to determine whether counsel was constitutionally ineffective for failing to file a timely notice of appeal, the first question that must be answered is whether counsel “consulted” with the defendant about an appeal — that is, whether counsel advised the defendant about the advantages and disadvantages of taking an appeal, and made a reasonable effort to discover the defendant’s wishes. If counsel adequately consulted with the defendant, counsel performed deficiently only if he failed to follow the defendant’s express instructions with respect to an appeal. However, if counsel did not consult with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel’s failure to consult with the defendant itself constituted deficient

performance. To make that determination, the trial court must take into account all the information that counsel knew or should have known. And, while there are circumstances in which counsel's failure to consult will not amount to deficient performance, *Flores-Ortega* stated that the trial courts, in evaluating the reasonableness of counsel's performance using the above test, will find, in the vast majority of cases, that counsel had a duty to consult with the defendant about an appeal.

Turning to the prejudice prong of *Strickland* test, *Flores-Ortega* stated that "a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed. In so holding, the Court noted, *Flores-Ortega* squarely rejected the argument that the defendant must show that he would have actually prevailed in a timely appeal, as well as any requirement that the would-be appellant specify the points he would raise were his right to appeal reinstated, because it is unfair to require an indigent, perhaps pro se, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal. Instead, *Flores-Ortega* mandates that when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant is entitled to an appeal because he effectively has been deprived of an appellate proceeding altogether.

And here, the Court found, appellant contended he is entitled to an out-of-time appeal because his counsel was ineffective in not informing him of his right to a direct appeal from the denial of his motion to withdraw his guilty plea. However, the Court stated, it could not determine whether appellant's counsel rendered deficient performance under *Flores-Ortega* because the trial court denied appellant's motion for an out-of-time appeal without holding an evidentiary hearing. Therefore, the Court vacated the trial court's order denying appellant's motion for an out-of-time appeal and remanded the case for the trial court to determine whether appellant's motion-to-withdraw counsel was ineffective in failing to file a timely notice of appeal, consistent with the test in *Flores-Ortega*. If appellant shows that his counsel was deficient in failing to file a timely notice of appeal and that, but for counsel's deficiency, he would have appealed, he is entitled to an out-of-time appeal.

Jury Instructions; Ineffective Assistance of Counsel

Martin v. State, A18A1627 (1/9/19)

Appellant was convicted of second-degree burglary, aggravated assault, criminal attempt to commit a felony, and possession of a firearm during the commission of a felony. He contended that the trial court erred in denying his oral request to charge the jury on pointing a firearm as a lesser-included offense to aggravated assault. The Court disagreed. Appellant did not request the charge on the lesser-included offense in writing and a trial judge never errs in failing to instruct the jury on a lesser-included offense where there is no written request to so charge. An oral request to charge does not alter this mandate. Thus, because there was no written request for the lesser-included charge, the Court found no error.

Nevertheless, appellant contended that his trial counsel rendered ineffective assistance by failing to make the request in writing. The Court noted that appellant made this argument during his motion for a new trial, but when the State conceded that the issue was properly preserved for review, the trial court deemed the ineffective assistance argument as moot. However, the Court stated, the claim was not moot because a written request for a charge on a lesser-included offense is required to preserve the issue on appeal.

Consequently, the failure of appellant's trial counsel to make such a written request was a failure to preserve the issue for appeal. To the extent the State has conceded otherwise, the Court noted that it is not bound by that concession. Therefore,

the Court vacated that portion of the order on the motion for new trial that addressed the ineffective-assistance claim and remanded the case for the trial court to rule on the merits of that claim.

Rule 404 (b) Evidence

State v. Isham, A18A1621 (1/10/19)

Isham was indicted for rape, aggravated assault with intent to rape, aggravated assault, and two counts of aggravated sodomy. These charges arose after the victim reported to police that, on July 21, 2017, she accepted a ride home offered by Isham from a local Walmart shopping center, but instead of driving her home, Isham drove to an isolated area and forcibly raped her and committed other sexual acts. Prior to trial, the State sought, pursuant to Rule 404 (b), to introduce evidence that, on July 23, 2017, Isham was arrested and charged with public indecency, public drunkenness, and disorderly conduct after he exposed himself to a female customer inside the same Walmart store. He pled guilty to the disorderly conduct charge, and the State nolle prossed the other two charges.

After a hearing, the trial court found that the State's need to prove that Isham was soliciting sex at the Walmart where he met the victim was low because it appeared that he was going to argue that the victim consented to the sexual acts, while the undue prejudice resulting from the admission of the other acts evidence "would be extremely high." The court noted that, due to the "offensive nature" of the exposure incident, it "would likely produce an irrational response from the jury" and there was a likelihood the jury could convict Isham in the instant case because of the exposure incident. Accordingly, the trial court concluded that the undue prejudice substantially outweighed the probative value of the other acts evidence, and, therefore, this evidence was inadmissible in the State's case-in-chief or in rebuttal. However, the court noted that, if as the trial progressed, the State believed that "the defendant [was] contesting some issue that may cause the probative value of this evidence to soar," the State could seek further ruling on the issue outside the jury's presence. The State appealed.

The State contended that the trial court abused its discretion in excluding the other acts evidence because it failed to properly apply the required balancing test. Specifically, the State argued that the trial court misinterpreted *Brown v. State*, 303 Ga. 158 (2018) as requiring consideration of the potential defenses in Isham's case as part of its Rule 404 (b) analysis, which "inadvertently skewed" the trial court towards exclusion of the other acts evidence. But, the Court found, there was no error in considering potential defenses as they were inextricably intertwined with consideration of the prosecutorial need for, and probative value of, the other acts evidence. Indeed, the State itself argued at the hearing that the other acts evidence was necessary because by pleading not guilty, Isham placed consent at issue. Further, there was nothing in the record that indicated that consideration of Isham's potential defenses skewed the case toward a defense perspective or that the trial court misinterpreted or misapplied *Brown*.

Additionally, the State argued that the trial court failed to take into account that excluding evidence under OCGA § 24-4-403 is an extraordinary remedy that must be used sparingly and failed to consider the prosecutorial need for the other acts evidence. However, the Court found, the trial court expressly noted that exclusion of other acts evidence under Rule 403 is an extraordinary remedy to be used sparingly. The trial court then considered the probative value of the exposure incident in the underlying prosecution and weighed that value against the risk of unfair prejudice. The trial court expressed concern that the probative value of the exposure incident was low, while admission of it in the underlying prosecution

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“would likely produce an irrational response from the jury” and carried “a likelihood the jury may convict [Isham] of the charged behavior because of the other perverted behavior in which he has participated which might cause the jury to conclude the defendant had a propensity to commit the far more serious crimes charged.” Thus, the trial court determined that “the undue prejudice which would result from the admission of the proffer[ed] ‘other acts’ substantially outweighs the probative value of that evidence,” which, the Court stated, is an accurate paraphrase of the standard set forth in OCGA § 24-4-403 and was well within the range of possible conclusions the court could have reached based on the concerns outlined in Rule 403. And, there was nothing in the record that indicated that the trial court misinterpreted or misapplied the three-part test for determining the admissibility of other acts evidence under Rule 404 (b).

Moreover, the Court stated, the trial court left its ruling open for reconsideration, noting that if, as the trial progressed, an issue arose that caused the probative value of the other acts evidence to increase, the State could seek further ruling on the admissibility of this evidence from the court. Accordingly, the Court concluded that the State failed to carry its burden of demonstrating that the trial court clearly abused its discretion in excluding the other acts evidence.