Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING FEBRUARY 22, 2019
Issue 8-19

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Severance; Bruton

Carcamo v. State, A19A0529 (1/14/19)

Appellant and his co-defendant, Reyes, were convicted of rape and kidnapping. The evidence, briefly stated, showed that the victim was celebrating her 21st birthday at a nightclub. She became heavily intoxicated to the point of incoherency and an inability to stand up. Appellant and Reyes noticed her outside the nightclub and literally carried her away. When they reached the parking lot where Reyes's car was parked, Reyes unlocked his vehicle and opened the door, and appellant placed the victim on the backseat, where he had sexual intercourse with her while she was unconscious. Reyes sent a text to another guy, telling him "[a] drunken broad landed here. Bring the sweater and we're going to mount her." A translator testified that "sweater" in this context could be slang for "condom."

Appellant argued that severance was required pursuant to *Bruton v. United States*, 391 U.S. 123 (88 SCt 1620, 20 LE2d 476) (1968). Under *Bruton*, a defendant is deprived of his rights under the Confrontation Clause to the Sixth Amendment when the defendant is tried jointly with a co-defendant who elects not to testify, and the co-defendant's out-of-court testimonial statement directly implicating the defendant as a participant in the crime is introduced into evidence. Because Reyes elected not to testify, appellant contended that *Bruton* was violated by the admission of Reyes's text message. The Court disagreed.

First, *Bruton* is not violated if a co-defendant's statement does not incriminate the defendant on its face and only becomes incriminating when linked with other evidence introduced at trial. Here, the text message did not refer to appellant by name; rather, it used the word "we're" in referring to those involved in the incident. Hence, standing alone, the text message fell outside the ambit of *Bruton* as it did not directly implicate appellant and became inculpatory only when linked with other evidence introduced at trial.

Second, *Bruton* applies only to out-of-court statements by non-testifying co-defendants that are "testimonial" in nature. A statement is testimonial if its primary purpose was to establish evidence that could be used in a future prosecution. Testimonial statements include affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially. Here, the statement was in the form of a text message addressed to an acquaintance rather than a statement made to law enforcement

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or a statement made in a formal legal document or court proceeding. Furthermore, the text message was sent during the approximate time period when Reyes and appellant were at the car with the unconscious victim, and in the message, Reyes explained what was transpiring and told the other guy to bring a condom. Clearly, the text message was not written with the primary purpose of being using in a future criminal prosecution; rather, it was written in furtherance of a conspiracy to rape the victim. Accordingly, the text message was non-testimonial in nature, and its admission therefore did not violate *Bruton*. And, given that there was no *Bruton* violation, the text message was not a basis for severance of appellant's trial.

Voir Dire; Juror Removal

Anthony v. State, A18A2134 (1/17/19)

Appellant was convicted of armed robbery. He argued that the trial court erred in failing to remove one of the jurors after learning that the juror knew one of the State's witnesses. The Court disagreed.

The Court stated that a defendant has the right to trial by a fair and impartial jury, and in pursuit of that end, is entitled to exercise knowledgeable challenges. However, an incorrect response given by a potential juror on voir dire does not necessarily call for a new trial. The determinative question is whether there exists bias on the part of the juror which results in prejudice to the defendant. If the prospective juror's response was given in good faith without the deliberate intent to mislead, the trial court may well find that no prejudice resulted, even in the situation in which the lack of disclosure might have impaired the defendant's right to knowledgeably exercise a peremptory challenge. The question of juror impartiality is one of both law and fact, and a trial court's findings on the question will be set aside only where manifest prejudice to the defendant has been shown. Thus, in order for a defendant to be entitled to a new trial because of voir dire examination, the defendant must show (1) the juror failed to answer honestly a material question, and (2) a correct response would have provided a valid basis for a challenge for cause.

During trial, the prosecutor notified the judge that hat he had just learned that the juror knew Officer Johnson. Appellant's trial counsel expressed concern about the fact that the juror did not raise his hand during voir dire when asked if he knew any of the witnesses, and suggested that the juror should be questioned if he knew Officer Johnson other than from just seeing him on the job. Upon questioning of the court, the juror stated that Officer Johnson and he have mutual friends and that he did not raise his hand when asked if anyone knew "Officer Johnson" because he did not know he was a police officer. He also said that his acquaintance with Officer Johnson would not affect his ability to be fair and impartial. The trial court then determined not to remove the juror.

The Court stated that generally, a juror's knowledge of, or non-familial relationship with, a witness, attorney, or party provides a basis for disqualification only if it is shown that it has resulted in the juror having a fixed opinion of the accused's guilt or innocence or a bias for or against the accused. And here, the Court found, the record showed that the juror did not demonstrate a preconception of guilt, innocence, or bias toward appellant. Therefore, appellant failed to show that manifest prejudice resulted from the trial court's denial of his motion for new trial on this ground.

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Sufficiency of the Evidence; Theft by Receiving

Wooten v. State, A18A1521 (1/17/19)

Appellant was convicted of VGCSA and theft by receiving stolen property. The evidence, very briefly stated, showed that on May 13, 2016, officers came to appellant's house after appellant called about a possible temporary protection order and the dispatcher stated to the officer that appellant was not making any sense. Upon entering the home, the officers noticed marijuana in plain view. A search warrant for the house and curtilage was obtained. A search of appellant's truck yielded a gun in the center console that had been reported stolen.

Appellant argued that there was insufficient evidence to sustain his conviction for theft by receiving stolen property because the State failed to meet its burden to show that he knew or should have known that the gun found in his truck was stolen. The Court agreed.

Under OCGA § 16-8-7 (a), "[a] person commits the offense of theft by receiving stolen property when he receives, disposes of, or retains stolen property which he knows or should know was stolen unless the property is received, disposed of, or retained with intent to restore it to the owner." Proof of possession, alone, of recently stolen property is not sufficient to establish the essential element of the offense of theft by receiving stolen property that the possessor knew or should have known that the property was stolen. Guilty knowledge may be inferred from circumstances, where the circumstances would excite suspicion in the minds of ordinarily prudent persons. However, knowledge that a gun was stolen cannot be inferred even when the defendant bought a gun on the street at a reduced price, or when the gun was labeled for law enforcement use. Nor can such knowledge be inferred when there is only evidence that the defendant found a gun that had been reported stolen.

Applying these principles, the Court found that the evidence showed no more than appellant's possession of a stolen handgun, and the State failed to establish additional circumstances from which a jury could rationally infer that appellant knew or should have known that the gun was stolen. Here, the owner of the handgun, appellant's daughter-in-law, testified that she discovered the gun was missing in August 2015, after her house burned down in a fire. The investigating officer testified that the same gun was later recovered during a search of appellant's truck. The State, however, did not offer any other evidence regarding the gun, including proof that appellant knew or should have known that the gun was stolen. Therefore, the Court held, because the record shed no light on appellant's knowledge of the provenance of the handgun, the evidence was insufficient to enable a rational trier of fact to find appellant guilty beyond a reasonable doubt of theft by receiving stolen property. Accordingly, the Court reversed appellant's conviction for theft by receiving stolen property.

OCGA § 16-6-5.1 (b) (1); Substitute Teachers

State v. Rich, A18A1986 (1/24/19)

After Rich was indicted on three counts of sexual assault of a student under OCGA § 16-6-5.1 (b) (1), Rich moved to dismiss or quash the indictment, contending that she was not a "teacher" for purposes of the statute. The trial court granted Rich's motion, finding that even if OCGA § 16-6-5.1 (b) (1) applied to Rich, it did not apply to her conduct beyond school hours. The State appealed.

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The State contended that the trial court erred in granting Rich's motion to dismiss or quash the indictment because Rich qualified as a "teacher" under OCGA § 16-6-5.1 (b) (1). Specifically, the State argued that Rich frequently accepted "teaching assignments" at the school, was heavily relied upon by the school, had worked frequently during the relevant times identified in the indictment, and essentially became a familiar figure in the school community "as a teacher." The Court disagreed.

The Court noted that OCGA § 16-6-5.1 does not define the term "teacher," and the Supreme Court of Georgia has left open the question of whether the statute applies to a substitute who lacks a teaching certificate. Under our Education Code, "teacher" means "any professional school employee certificated by the Professional Standards Commission [PSC], but not including school administrators." OCGA § 20-2-942 (a) (4). And it was undisputed that Rich did not hold a teaching certificate or permit from the PSC, as is generally required of public school teachers in the School District. Also, Webster's Dictionary defines a teacher as "one that teaches or instructs," especially "one whose occupation is to instruct." Although a substitute may in fact be hired to teach a class, here, Rich was not tasked with teaching classes, instructing classes, or developing lessons for the students. Rather, her duties comprised monitoring students, assisting them with completing their lesson plans or study guide packets as previously assigned by their regular teacher, and, answering their questions while they worked if her knowledge of the material enabled her to do so. As the principal testified, a daily substitute like Rich "is a facilitator assisting those students … as that period goes on." Also, as a daily substitute, Rich had even fewer obligations than a long-term substitute, who has the "same job duties and responsibilities of a certified teacher." In fact, the Court noted, because Rich held only a high school diploma, she could not even qualify to be a long-term substitute under the regulations promulgated by the PSC.

The Court rejected the State's argument that because Rich often worked at the school, her duties and responsibilities were those of a "teacher." The crucial inquiry is whether her job was equivalent to that of a "teacher," not the number of days she was present in school. To a great extent, Rich simply did not do the sorts of things that teachers typically do. She was not expected to prepare for class, administer any state-mandated tests, grade or evaluate students' work, answer students' questions after class, or participate in after-school programs. Nor did she independently assign class work or homework.

Thus, the Court found, given that Rich did not hold a teaching certificate; was not on contract as a teacher; did not actually teach or instruct classes; and had considerably fewer obligations than the teacher for whom she substituted (and even a long-term substitute), it was reasonable to conclude that, when OCGA § 16-6-5.1 (b) (1) is strictly construed against the State, Rich was not in fact a "teacher" for purposes of the statute. Where a criminal statute is susceptible to more than one reasonable interpretation, the interpretation most favorable to the party facing criminal liability must be adopted.

Finally, the Court observed, the Legislature uses both the terms "substitute teacher" and "substitutes for teachers" elsewhere in the Georgia Code, and it opted not to include either of these two terms when delineating the persons who fall under OCGA § 16-6-5.1 (b) (1). Accordingly, while the Court did not condone the alleged conduct of Rich, in accordance with the relevant rules of statutory construction, it determined that Rich was not a "teacher" for purposes of OCGA § 16-6-5.1 (b) (1). Therefore, the trial court properly granted Rich's motion to quash or dismiss the indictment.

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General Demurrers; Uniform Traffic Citations

Strickland v. State, A18A1829 (1/25/19)

Appellant was charge by uniform traffic citation (UTC) with following too closely in violation of OCGA § 40-6-49. At the close of evidence during his bench trial, appellant made an oral motion to quash the charge, which the trial court denied. Appellant contended that the trial court erred in denying his motion to quash the charge because the citation failed to allege the essential elements of the offense. The Court agreed and reversed.

Here, the UTC charged appellant with the offense of "following to[o] close[ly] in violation of code section 40-6-49." However, the Court noted, OCGA § 40-6-49 provides more than one way in which the code section may be violated. Thus, the citation was substantively defective because it simply alleged that appellant violated a certain statute, which is insufficient to survive a motion to quash. Specifically, the citation failed to recite the language of OCGA § 40-6-49 setting out all the elements of the offense. The fact that the citation included the verbiage of "following too closely" — the title of the code section — did not remedy the issue. Likewise, the citation failed to allege any facts necessary to establish a violation of OCGA § 40-6-49. While it indicated an accident occurred, the citation did not provide any details. It was unclear from the citation how the accident occurred, how many vehicles were involved, at what speeds the vehicles were traveling, and the approximate distance between the vehicles. The citation also alleged that the weather was "clear," the road was "dry," and the traffic was "medium," but this alone was insufficient to establish that appellant violated OCGA § 40-6-49. Accordingly, the Court concluded, the trial court erred in denying appellant's motion to quash the citation, and appellant's conviction was reversed.

Home Invasion; Sufficiency of the Evidence

Mahone v. State, A18A1584 (1/30/19)

Appellant was convicted of home invasion in the first degree, aggravated assault, and assault on an unborn child. The evidence, briefly stated, showed that appellant broke into the apartment of the victim, his pregnant ex-girlfriend, found the victim in the bedroom, and assaulted her with a clothes iron he found in the apartment after he broke in. He contended that the evidence was insufficient to sustain his conviction for home invasion in the first degree. The Court agreed.

The Court stated that the plain and unambiguous language of OCGA § 16-7-5 (b) makes clear that to commit the crime of home invasion in the first degree, a perpetrator must: (1) make an unauthorized entry into a legally occupied dwelling house; (2) do so with the intent to commit a forcible felony therein; and (3) do so *while in possession* of a deadly weapon or other instrument capable of causing serious bodily injury. In this case, however, the uncontroverted evidence showed that appellant did not possess the iron he used in his assault of the victim at the time he entered the apartment. Instead, he found the iron after he made his unlawful entry. Accordingly, the State failed to prove an essential element of the crime of home invasion in the first degree. The trial court, therefore, erred when it denied appellant's motion for a directed verdict on the home invasion count.

Nevertheless, the Stated argued, the trial court's ruling is supported by the statutory definition of "dwelling" found in OCGA § 16-7-5. For purposes of the home invasion statute, the term "dwelling" is defined under the burglary statute, OCGA § 16-7-1. Thus, "dwelling" is defined as "any building, structure, or portion thereof which is designed or intended

for occupancy for residential use." OCGA §16-7-1 (a) (1). Focusing on the phrase "or portion thereof," the State argued that under the home invasion statute, an illegal entry occurs any time a separate portion of the dwelling is entered. The State therefore reasoned that assuming appellant located the iron after he entered the apartment but before he entered the bedroom in which the victim was located, he committed home invasion when he entered the bedroom in possession of the iron. The Court disagreed.

First, the Court stated, the State's position ignores the fact that the term "or portion thereof," as used in the definition of dwelling, does not refer to portions of the dwelling. Instead, it refers to that part of a building or structure in which a residence is located. Thus, where a single building (such as an apartment building) contains multiple dwellings, an entry is made each time the threshold of an individual residential unit is crossed. Second, the State's argument ignores relevant precedent regarding burglary which has made clear that an unlawful entry into a dwelling house is complete once the perpetrator breaks the plane of the structure with the intent to commit a felony therein

Third, there is another statutory provision — the burglary statute — that punishes the exact conduct the State is attempting to prosecute as home invasion. Under OCGA § 16-7-1, a person commits burglary in the first degree when "without authority and with the intent to commit a felony … therein, he or she enters … an occupied … dwelling house of another … ." OCGA § 16-7-1 (b). Here, the only thing distinguishing burglary from home invasion is the fact that home invasion requires the perpetrator to enter the residential dwelling while in possession of a weapon. Accordingly, the State's proposed interpretation of the home invasion statute would render the burglary statute meaningless, and the Court declined to interpret OCGA § 16-7-5 so as to render the burglary statute inconsequential in circumstances where it was intended to apply.

Accordingly, the Court found that appellant's unauthorized entry into the victim's apartment was completed when he broke down the apartment door and crossed the unit's threshold. Given that appellant did not possess a weapon at the time he entered the apartment, it was "constrained to reverse his conviction for home invasion in the first degree."