

THIS WEEK:

- **Rebuttal Evidence; Rule 404 (b)**
- **Juvenile Delinquents; Mootness**
- **Ineffective Assistance of Counsel; Prosecutorial Misconduct**
- **Ineffective Assistance of Counsel; Res Judicata**
- **Reckless Conduct; Mistake of Fact**
- **Motions to Withdraw Guilty Pleas; Uniform Superior Court Rule 33.8 (d) (4)**
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Rebuttal Evidence; Rule 404 (b)

Strother v. State, S19A0279 (5/20/19)

Appellant was convicted of malice murder and other crimes. The evidence, very briefly stated, showed that Appellant, his girlfriend Ray and her female friend, Dorsey, set in motion a plan to rob the victim. Dorsey lured the victim to the back of Townsend's house under the pretense that they were going to buy marijuana. Appellant was waiting behind the house. He shot and killed the victim. Dorsey and Ray were interviewed by the police the next day. They initially refused to name the shooter and then implicated someone named "Tuck" as the shooter. They were then arrested. Each was interviewed a second time and gave statements implicating appellant.

Appellant contended that the trial court abused its discretion by admitting into evidence Dorsey's and Ray's police-interview statements about appellant's gang activities and Ray's interview statements about appellant's committing other murders. Specifically, appellant argued that this evidence was not relevant, violated OCGA § 24-4-404 (b)'s prohibition on bad character evidence and that statute's pretrial notice requirements, and was highly prejudicial and should have been excluded under OCGA § 24-4-403. The Court disagreed.

The record showed that appellant moved in limine prior to trial to exclude evidence of his gang activities. The court granted the motion after the prosecutor agreed not to introduce the gang evidence unless it became relevant. At trial, the sergeant who had interviewed Dorsey and Ray testified for the State. During cross-examination, appellant's counsel advanced his defense theory that Dorsey and Ray falsely provided appellant's name to the sergeant because they were afraid of the actual shooter. Counsel emphasized Dorsey's and Ray's initial refusal to name the shooter during their first interviews and questioned the sergeant about the women being afraid of Townsend and "other people" but not afraid of appellant. The prosecutor then argued that appellant's counsel had "opened the door" to statements in the interviews about appellant's gang activities, which were now relevant to rebut the defense theory that the women were not afraid of appellant.

and instead feared the actual shooter. Appellant's counsel objected based on relevance, but said, "in all candor, I knew that upon cross-examination [of the sergeant], the issue would come up because I would bring it up that they're not afraid, so . . . I'm going to take it as it comes."

The State then played Ray's second recorded interview for the jury. In the interview, Ray said that appellant was a member of the Bloods gang "and they take people out" and that his job as a gang member was to "sweep the streets." When the sergeant asked her whether appellant had bragged about having "several bodies on his credit," Ray said that appellant had "said that he's beat a case before about a body"; that she had heard people say that appellant had killed four people; and that she had heard appellant bragging about killing other people. The State then played the recording of Dorsey's second police interview. Dorsey told the investigators that appellant was a member of the Bloods gang and that he hung out with other gang members.

The Court stated that the statements of the two women became relevant when appellant's counsel elicited testimony supporting his theory of defense — that Dorsey and Ray first refused to name the shooter and later falsely accused appellant because they were afraid of the actual shooter. That theory made relevant (or as the State framed it, "opened the door" to) evidence that Dorsey and Ray had instead initially refused to name appellant because they were afraid of him. Accordingly, the Court held, the police-interview statements were relevant evidence under OCGA § 24-4-401.

As for appellant's claim that OCGA § 24-4-404 (b) required the exclusion of the statements, the Court noted that appellant made no such objection at trial. Therefore the review of this claim was only for plain error. The Court found that the Eleventh Circuit has consistently held that even though Federal Rule 404 (b) precludes the admission of extrinsic evidence to prove a defendant's character in order to show that he acted in accordance with that character, inadmissible extrinsic evidence is admissible on redirect examination as rebuttal evidence, when defense counsel has opened the door to such evidence during cross-examination. And here, the State did not introduce Dorsey's and Ray's police-interview statements for any of the purposes listed in OCGA § 24-4-404 (b), but rather to rebut appellant's defense theory seeking to cast doubt on those witnesses' identification of the shooter. Indeed, the State made no attempt to prove that appellant had actually been a gang member or committed other murders. Thus, the Court concluded, the trial court did not err, plainly or otherwise, by not excluding the statements under OCGA § 24-4-404 (b). And because the statements did not come under § 24-4-404 (b), appellant's argument that the State failed to provide the pretrial notice required by § 24-4-404 (b) also failed.

Finally, the Court also rejected appellant's claim that the police-interview statements were so prejudicial as to be inadmissible. Again, the Court noted, appellant did not object on this ground during trial, so this issue was reviewable only for plain error. Here, the Court found, the State needed to, and was entitled to, counter the defense theory challenging the credibility of its two main witnesses. That Dorsey and Ray believed appellant was a member of the Bloods gang, and that Ray thought appellant might have committed other murders, made it considerably more likely that the reason they hesitated in naming him as the shooter was fear of him, and considerably less likely that they falsely accused him because they feared someone else.

Moreover, the Court found, the prejudice stemming from the gang- and murder-related statements was significantly reduced by other evidence. After Ray made her statements about the other "bodies," she told the investigators that she did not really believe appellant when he bragged about other murders, and the sergeant testified that there was no evidence

that appellant had been involved in other murders. And, the State made no attempt to prove that appellant had actually been a gang member or committed other murders. Indeed, the prosecutor did not question Dorsey, Ray, or any other witness about appellant's gang activities or other crimes, and although closing arguments were not transcribed, appellant did not contend that the prosecutor emphasized (or even mentioned) that evidence during his closing.

Thus, the Court held, viewed in full context, the admission of the disputed statements was not a blatant abuse of discretion under OCGA § 24-4-403 that would qualify as "clear or obvious" error. Accordingly, appellant's argument failed.

Juvenile Delinquents; Mootness

In re M. F., S18G1338 (5/20/19)

On May 11, 2017, a juvenile court found appellant delinquent for criminal attempt to enter an automobile and placed him on probation for 12 months. Appellant appealed, but on May 11, 2018, the Court of Appeals issued an order in which it declined to reach the merits of appellant's appeal, concluding that his case was moot because his probationary sentence had expired and because appellant "ha[d] not shown, on this record, any adverse collateral consequences arising from the juvenile court's adjudication of him as delinquent." The Court granted certiorari.

The Court stated that there are circumstances where cases that may appear to be moot are nonetheless viable due to the particular nature of the litigated issue. Specifically, in the criminal context, apparent mootness can be defeated where adverse collateral consequences continue to plague the affected party. Where a party challenges the legality of his conviction after his sentence has expired, collateral consequences are presumed if the party was convicted of a felony. However, a party convicted of a misdemeanor is required to demonstrate, in the record, adverse collateral consequences that have continued beyond the expiration of his sentence to show that his case is not moot.

The State contended that there were no adverse consequences, citing OCGA § 15-11-606, which provides that "[a]n order of disposition or adjudication shall not be a conviction of a crime and shall not impose any civil disability ordinarily resulting from a conviction." The Court disagreed. Simply because a juvenile who has been adjudicated delinquent may later be able to vote, serve on a jury, lawfully possess a firearm, and say that he has not been convicted of a crime does not negate the fact that significant adverse collateral consequences inherently and unquestionably can flow from the adjudication. For example, juvenile courts are permitted to consider prior delinquency adjudications during sentencing. Prior adjudications permit a juvenile court to treat a delinquent act as eligible for designated-felony status, even where the delinquent act would not ordinarily be treated as such. Also, the Juvenile Code specifically provides that "the disposition of a child and evidence adduced in a hearing in the juvenile court" may be used against the child "in the establishment of conditions of bail, plea negotiations, and sentencing in criminal offenses." OCGA § 15-11-703. Similarly, the federal sentencing guidelines treat prior juvenile adjudications as aggravating factors for calculating a defendant's sentence in federal court. And juvenile records, while closed to inspection by the general public, are available to various parties for a wide range of purposes.

Thus, the Court found, the consequences of a juvenile's adjudication of delinquency continue to reverberate even after the expiration of his disposition. Accordingly, the Court held that a juvenile who appeals his adjudication of delinquency is

not required to show adverse collateral consequences in the record; such consequences will be presumed. Consequently, the Court remanded the case to the Court of Appeals to consider the appeal on the merits.

Ineffective Assistance of Counsel; Prosecutorial Misconduct

Cochran v. State, S19A0149 (5/20/19)

Appellant was convicted of murder and related offenses. He contended that his trial counsel rendered ineffective assistance by failing to object to two portions of the State's closing arguments. The Court disagreed.

First, the prosecutor argued, "Let me begin by responding to something that was said. Please understand the problem with us lawyers is if you get two of us in a room full of people we'll fight back and forth trying to prove who[] [is] smartest in the room. My purpose here is different than [defense counsel]. My intention has been to present the evidence. Now, I come to work every day because it's important to hold people that shoot a woman accountable. I came here today and before you to ask you to hold [appellant] accountable for shooting [the victim]. Appellant contended that this was objectionable because the comment suggested that the prosecutor was "objective and truthful, implying that trial counsel [was] biased and lying." However, the Court found, it was clear from the record that the prosecutor's remarks were acceptable rebuttal. During appellant's closing argument, trial counsel mentioned the prosecutors by name – calling one "abusive and dramatic" – and suggested that the investigation of the murder was incomplete because the State was not looking for the "truth," but instead was attempting to "win th[e] case." Thus, in context, the prosecutor's comment was made in response to and in an effort to defuse defense counsel's comment during closing argument. Because the prosecutor's comment was not improper under these circumstances, appellant's trial counsel was not deficient for failing to object.

Second, the prosecutor argued, "[w]hen [defense counsel] get[s] so desperate [he has] to suggest maybe [the victim] was held hostage for a few days, what he's saying is this evidence is too strong." Appellant contended that the remark was "personal" and "denigrating," suggesting to the jury that "trial counsel himself believed [appellant] to be guilty and so came up with the hostage scenario at the last minute after the original theory of the case was discredited." But, the Court found again that viewed in context, the State's remark was made during the course of its discussion of the evidence specifically connecting appellant to the murder, and it was permissible for the State to comment on the defense's theory of the case. Further, though the comment was disparaging, it was within bounds. Accordingly, the Court concluded, because the prosecutor's comments with which appellant takes issue were permissible, counsel's failure to object to these comments during argument was not deficient performance.

Ineffective Assistance of Counsel; Res Judicata

Davis v. State, S19A0308 (5/20/19)

Appellant pled guilty to murder in 2000. He did not file a direct appeal. In 2002, he filed a pro se habeas petition alleging fourteen grounds of ineffective assistance of counsel. The habeas court denied his petition and appellant did not appeal from that order. In 2018, he filed, with the assistance of counsel, a motion for an out-of-time appeal contending, in part, that he was denied the effective assistance of counsel based on his trial counsel's failure to file an appeal from his conviction. Following a hearing, the trial court denied the motion.

The Court stated that a defendant is entitled to an out-of-time appeal only where he alleges and proves an excuse of constitutional magnitude for failing to file a timely direct appeal, which usually is done by showing that the delay was caused by his trial counsel's ineffective assistance in providing advice about or acting upon an appeal. Thus, the only relevant question is whether appellant's failure to file a timely appeal resulted from the ineffective assistance of his trial counsel.

But, the Court further stated, appellant's effort to obtain an out-of-time appeal was frustrated by the doctrine of res judicata. Three prerequisites must be satisfied before res judicata applies — (1) identity of the cause of action, (2) identity of the parties or their privies, and (3) previous adjudication on the merits by a court of competent jurisdiction. Where a convict seeks post-conviction relief based upon grounds previously litigated in a habeas proceeding, i.e., were raised in a habeas proceeding and resolved by the final judgment of the habeas court, the convict is collaterally estopped from pursuing those grounds in his effort to obtain post-conviction relief.

Furthermore, the doctrine of res judicata precludes not only re-litigation of claims that were actually adjudicated in the prior cause of action, but those which could have been adjudicated therein. And here, the Court found, appellant filed a habeas petition in 2002, and the habeas court denied him relief. Although appellant did not plainly raise in the petition for writ of habeas corpus the issues he now raised, there was no reason he could not have. Therefore, because the trial court was precluded from considering this claim, it did not err in denying appellant's motion for an out-of-time appeal.

Reckless Conduct; Mistake of Fact

Collett v. State, S19A0324 (5/20/19)

Appellant was convicted of malice murder and concealing the death or another in connection with the death of a nine-year-old. Briefly stated, the evidence showed that appellant strangled the victim and then dumped the child's body in a brush pile behind his home.

Appellant first argued that the trial court erred in failing to give his requested charge on reckless conduct. The Court stated that reckless conduct is an act of criminal negligence, rather than an intentional act, that causes bodily harm or endangers the bodily safety of another. Appellant contended that the act of dropping the victim's body into the brush pile may have caused her injuries. But, the Court found, there was no evidence that dropping her body into the brush pile caused her death. Instead, all of the evidence shows that appellant inflicted the fatal injuries *before* she was moved. Therefore, there was no error.

Appellant also argued that the trial court erred in failing to give his requested charge on mistake of fact. The Court again disagreed. Mistake of fact is a defense where there is a misapprehension of a fact that would have justified the act by negating the mental state required to have committed the crime. Appellant contended that the victim was still breathing when he placed her in the woodpile. However, the Court found, the un rebutted testimony of the medical examiner showed that appellant's prolonged compression of the victim's neck ultimately caused her death. Appellant's ignorance of the exact moment of her death did not negate his mental state in performing the lethal act. Accordingly, like his request on reckless conduct, this charge was also not supported by the evidence.

Motions to Withdraw Guilty Pleas; Uniform Superior Court Rule 33.8 (d) (4)

Bradley v. State, S19A0384 (5/20/19)

Appellant entered a non-negotiated plea to murder, felony murder, criminal street gang activity and armed robbery. He filed a timely motion to withdraw his plea and appealed from its denial.

Appellant argued that the trial court improperly failed to advise him on the record of the direct consequences of entering a guilty plea to the offenses charged. Specifically, he argued that he was not advised on the record as to the “mandatory minimum” sentences for the crimes of murder and felony murder. Instead, he argued, he was “only advised, in a deceptive manner, that the ‘maximum’ sentence for [m]urder and [f]elony [m]urder was [l]ife” imprisonment, which left him confused regarding the sentencing options available to the trial court. Consequently, he contended, as a result of this failure, his guilty plea was not knowingly, intelligently, and voluntarily entered, thereby causing manifest injustice and prejudice to him. The Court disagreed.

The Court noted that the Uniform Superior Court Rules require that, before a court accepts a guilty plea, the defendant be informed on the record, inter alia, “of the mandatory minimum sentence, if any, on the charge.” USCR 33.8 (D) (4). The information that must be given to the defendant under USCR 33.8 “may be developed by questions from the judge, the prosecuting attorney or the defense attorney or a combination of any of these.” USCR 33.8. If a defendant on direct review challenges the validity of his guilty plea based on an alleged violation of the superior court rules prescribing the procedures for accepting a guilty plea, the State has the burden of showing substantial compliance with USCR 33, along with the constitutional requirements that underlie portions of that rule. As to any complaint by an appellant about the trial court’s failure to follow the letter of the applicable Uniform Superior Court Rules, the salient inquiry is the same, that is, whether the record, as a whole, affirmatively shows that the plea in question was knowing and voluntary.

The Court found that although the phrase used in USCR 33.8 (D) (4) (“the mandatory minimum sentence”) was not used during the plea hearing, appellant was present and participating in the hearing when his attorney asked that the court give him “the most lenient sentence that the Court can give,” which, as counsel specified, was “a life sentence” with the sentences for the other charges to run concurrently. The court also gave appellant multiple opportunities to ask any question he had about the sentencing options, including when the court expressly referred to its discretion to sentence him “to anything from the minimum to the maximum sentence authorized by law,” and appellant consistently denied having any questions.

The Court again stated that the essential question is not technical compliance, or noncompliance, with Uniform Superior Court Rule 33.8 (d) (4) – the question is whether the record as a whole shows that appellant’s plea was in fact entered with sufficient awareness of the likely consequences of pleading guilty. And here, the Court concluded, the trial court’s determination based on the record as a whole that appellant entered his plea with a sufficient awareness of the likely consequences was not clearly erroneous. Consequently, the trial court did not abuse its discretion in denying appellant’s motion to withdraw his guilty pleas.

Sufficiency of the Evidence; Financial-transaction Card Fraud

Carter v. State, S19A0409 (5/20/19)

Appellant was convicted of malice murder, financial-transaction card fraud, and other crimes in connection with the shooting death of the victim. The evidence, very briefly stated, showed that appellant texted the victim shortly after midnight and arranged to meet up at the victim's house for sex. At 12:41, 2:19, 2:23, and 2:48 a.m., calls were made from the victim's cell phone to Bank of America, which was the bank associated with his debit card. Cell-tower data indicated that the 12:41 a.m. call was placed from a location close to the victim's apartment, while the latter three were placed from a location near the residence where appellant was staying. Bank records and other evidence showed that five attempts were made—at 3:11, 3:59, 4:00, 4:03, and 4:05 a.m.—to use the account number associated with the victim's debit card to place one or more orders with Guitar Center. The order attempted at 3:11 a.m. was for the purchase of a microphone that cost \$3,874.98; it used appellant's e-mail address, and specified that the microphone was to be delivered to the address of the mother of appellant's child. The victim's wife found the victim when she returned home from her overnight work shift.

Appellant contended that the evidence was insufficient to support his conviction for financial-transaction card fraud. The Court agreed. To prove a violation of OCGA § 16-9-33 (a) (2) (D), the State had to prove that appellant, "with intent to defraud [any person], . . . [o]btain[ed] money, goods, services, or anything else of value by . . . [g]iving, orally or in writing, a financial transaction card account number to the provider of the money, goods, services, or other thing of value for billing purposes without the authorization or permission of the cardholder or issuer for such use." Although the State offered evidence that attempts were made to place one or more orders with Guitar Center using the account number associated with the victim's debit card, the Court found no evidence in the record that appellant obtained anything of value as a result of those attempts. The evidence therefore failed to prove an essential element of a violation of OCGA § 16-9-33 (a) (2) (D), and consequently, was insufficient to sustain his conviction for financial-transaction card fraud. Accordingly, the Court reversed the conviction on this count.

Motions for Change of Venue; Showing of Prejudice

Moss v. State, S19A0443 (5/20/19)

Appellant was convicted of malice murder. He contended that the trial court erred by denying his motion for change of venue. The Court disagreed.

The Court stated that to succeed on a motion for change of venue, a defendant must show either that the setting of the trial was inherently prejudicial or that the jury selection process showed actual prejudice to a degree that rendered a fair trial impossible. The decision to grant or deny a motion for change of venue will not be disturbed absent an abuse of discretion.

Here, the Court found, appellant made no showing of inherent prejudice, but argued only that the selection process evidenced actual prejudice. Appellant claimed that thirty-six percent of the jurors questioned had prior knowledge of the case, knew him or the victim, or were related to a State's witness. As to actual prejudice, however, the question is not the number of jurors who had heard about the case or had knowledge of those involved in the case, but whether those who had heard about the case could lay aside their opinions and render a verdict based on the evidence. Actual prejudice is thus

shown by the excusal percentage — the number of potential jurors excluded for cause based on bias compared to the total number of potential jurors questioned.

And here, the Court found, of the fifty-two potential jurors questioned in this case, nineteen were dismissed for cause. Although many potential jurors indicated they had knowledge of the case or those involved therein, of those excused, only twelve were dismissed on account of their inability to be impartial based on that knowledge. Thus, the excusal rate was only twenty-three percent, which the Court held was not indicative of such prejudice that the trial court's denial of a change in venue was an abuse of discretion.

Ineffective Assistance of Counsel; Opinion Testimony

Grier v. State, S19A0634 (5/20/19)

Appellant was convicted of the malice murder of Jerry Grier ("Jerry") (no relation to appellant) and Mills. The evidence, very briefly stated, showed that Tukes stopped by to purchase some marijuana from Jerry at the same time that Mills was walking up to Jerry's house. Tukes noticed that Jerry and appellant were playing a video game and gambling on the outcome. There was a large amount of cash on the television stand. Shortly after Tukes left the house, appellant called his friend Gibson, who was in a car with McDowell, and told Gibson not to come by Jerry's house because he had "just offed them boys." A few hours later, the Jerry's sister discovered the two bodies at the house.

Appellant argued that his trial counsel was ineffective in failing to object to McDowell's, Tukes's, and Gibson's "opinions" that appellant killed Jerry and Mills because this testimony invaded the jury's province and commented upon the ultimate issue. The record showed that during trial, Tukes testified that when appellant's picture was shown during news coverage of the shooting, he thought to himself that "this must be the guy that killed [Jerry]." Gibson then testified that when he and McDowell went to Jerry's house later that night after learning of his death, Gibson said to himself "[appellant] killed [Jerry]," based on the phone call he had received from appellant earlier that day. After Gibson, McDowell testified that he too "automatically thought . . . it had to be [appellant] because he said what he said [to Gibson] and . . . [the men] ended up dead."

First, the Court found that the ineffective assistance claim relating to Gibson's testimony was waived because appellant failed to allege the error, as it relates to Gibson's testimony, during his motion for new trial. As to the other two contentions, the Court found that trial counsel's failure to object was not ineffective assistance of counsel. Citing OCGA § 24-7-701 and Eleventh Circuit precedent, the Court found that both Tukes's and McDowell's opinions that appellant must have been the one to kill the victims were "rationally based on [their] perception and helpful to understanding their testimony." The Court stated that even though neither Tukes nor McDowell saw appellant shoot the victims, their opinions were inferences formed by events they had personal knowledge of on that day, including that Tukes saw appellant alone with the victims before they were killed and that McDowell knew appellant said he "offed them boys." "And even though their "opinion" about who killed the victims addressed an ultimate issue in the case, that alone did not make the testimony objectionable because Rule 704 (b)'s bar on ultimate issue evidence applies only to expert witness testimony and not opinion testimony by lay witnesses. Thus, trial counsel could not be deficient for failing to object to admissible testimony. Accordingly, the Court found this argument to be meritless.