Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING JULY 5, 2019
Issue 27-19

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Recidivist Sentencing; Federal and Out-of-State Convictions

Nordahl v. State, S18G0947 (6/3/19)

Appellant entered a non-negotiated guilty plea to multiple counts of burglary on February 10, 2017, but he challenged the State's request for recidivist punishment, arguing that his federal conviction for conspiracy to transport stolen goods in interstate commerce was not a crime that would be a felony if committed in Georgia. The trial court rejected appellant's argument and sentenced him as a recidivist. The Court of Appeals affirmed. *Nordahl v. State*, 344 Ga. App. 686, 692 (2) (2018). It held that, in construing OCGA § 17-10-7 (a) and (c), the State bears the burden of showing that the foreign convictions were for *conduct* which would be considered felonious in Georgia. The court concluded that the State met its burden of showing that the conduct described in appellant's federal conviction, if committed in Georgia, is most closely related to felony theft by receiving under Georgia law. Accordingly, the Court of Appeals concluded, the trial court did not err in sentencing appellant as a recidivist under OCGA § 17-10-7 (a) and (c). The Supreme Court granted appellant's petition for a writ of certiorari.

The Court found that the Court of Appeals' "conduct" approach violates the Sixth Amendment to the Constitution of the United States and must, therefore, be disapproved. Under the Sixth Amendment, any fact — other than the fact of a prior conviction — that serves to enhance a sentence is considered an element of the crime that must be found beyond a reasonable doubt by the jury or admitted by the defendant when pleading guilty. Given these Sixth Amendment concerns, in determining whether a prior conviction qualifies as a predicate conviction under a recidivist sentencing scheme, the sentencing court is authorized to identify only those facts it is "sure the jury so found" in rendering its guilty verdict, or those facts as to which the defendant waived the right of jury trial in entering a guilty plea. In other words, an "elements only" approach: A sentencing court's role is limited to identifying those elements that were established by virtue of the prior conviction itself, that is, those facts the jury was necessarily required to find to render a guilty verdict or those facts the court was necessarily required to find to satisfy the factual basis for a guilty plea.

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The Court stated that in most instances when applying them to OCGA § 17-10-7 (a) and (c), a Georgia sentencing court parses the *elements* of the prior out-of-state or federal crime and determines whether those *elements* satisfy the statutory definition of a felony under Georgia law. When the out-of-state or federal offense sets out a single (or 'indivisible') set of elements to define a single crime, the sentencing court simply lines up that crime's elements alongside those of the foreign offense and determines if they match. This comparison of statutory elements is known as the "formal categorical" approach.

However, there is a narrow range of cases in which sentencing courts would need to look beyond the statutory elements of the crime to the charging instrument and jury instructions used in a case. The Court stated that sentencing courts would need to do this when confronted with a prior conviction for violating a statute that sets forth multiple crimes and is, thus, "divisible" (i.e. a statute which lists elements in the alternative, and thereby defines multiple crimes). This approach for evaluating the use of such convictions as predicate convictions is known as the "modified categorical" approach. However, the Court stated, the categorical and modified categorical approaches are not mutually exclusive alternatives. Rather, the "modified categorical" approach is a tool to help in effectuating the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction.

Applying this elements only approach, the Court found that the record showed appellant pled guilty to the crime of conspiracy, 18 USC § 371, in that he conspired to commit an offense against the United States, specifically, to violate 18 USC § 2314 as it pertains to the interstate transportation of stolen goods. Such a conspiracy is a Class D felony. The Court also found that both 18 USC § 371 and 18 USC § 2314 are divisible statutes. Therefore, the Court stated it must review the statutes, the judgment of conviction, and the charging instrument to determine the elements of the crime to which appellant pled guilty. A review of those documents showed that appellant pled guilty to an indictment in which the government averred that he "knowingly and intentionally conspired to transport in interstate commerce goods, to wit: … silver of a value exceeding $5,000, knowing the same to have been stolen, in violation of" 18 USC § 2314 and that, in furtherance of that conspiracy, appellant "committed" 18 overt acts of "possession of stolen goods," the cumulative value of which far exceeded $5,000. Therefore, by pleading guilty to the federal conspiracy charge, appellant admitted that he entered into an agreement to violate 18 USC § 2314. However, he did *not* admit that he committed that substantive offense. Consequently, the Court of Appeals erred because the substantive offense may not be used in support of an enhanced sentence under OCGA § 17-10-7 (a) or (c).

Nevertheless, the Court affirmed the sentencing decision under the right-for-any-reason doctrine because the elements of appellant's federal conspiracy conviction match those of felony conspiracy to commit a crime under Georgia law as defined in OCGA § 16-4-8. Specifically, a side-by-side comparison of the elements of appellant's federal conviction and the elements of Georgia's conspiracy statute shows that the elements match. Appellant admitted that he conspired with another to commit a felony offense and that he committed an overt act in furtherance of the object of the conspiracy. Further, the substantive offense forming the object of the federal conspiracy to which appellant pleaded guilty proscribes acts which, if committed within Georgia, would also constitute a felony in Georgia. The object of appellant's felony conspiracy conviction (knowingly transporting in interstate commerce stolen goods of a value exceeding $5000) would include, as a matter of law, the crime of felony theft by receiving under Georgia law (by knowingly possessing and controlling stolen goods of a value exceeding $500). Accordingly, the Court concluded, appellant's federal conspiracy conviction qualified as a predicate conviction under OCGA § 17-10-7 (a) and (c) and therefore, the trial court did not err in sentencing him pursuant to the general recidivist statute.

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Hearsay; Excited Utterances

Blackmon v. State, S19A0366 (6/3/19)

Appellant was convicted of felony murder and other crimes in connection with the shooting death of his wife Bobbie. At trial, Bobbie's niece, Christina Turner (hereinafter "Turner"), testified to the events leading up led to Bobbie's death. Appellant contended that the trial court abused its discretion by admitting Turner's hearsay testimony about certain statements that Bobbie made to her on the evening before the shooting. The Court disagreed.

First, the Court found that some of Bobbie's statements to Turner may not qualify as hearsay, because they may have been offered not to prove the truth of what she said (for example, whether Bobbie really loved Turner and Turner's brother) but rather only to show that Bobbie had made the statement (revealing her fear of appellant). But, the Court stated, it need not decide the exact nature of each statement, because to the extent the statements were hearsay, they were admissible, as the trial court ruled, under the excited-utterance exception to the hearsay rule.

The excited-utterance exception states that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" shall not be excluded by the hearsay rule. OCGA § 24-8-803 (2). Excited utterances need not be made contemporaneously with the startling event. Rather, a court should consider the totality of the circumstances in determining whether the statement was made while the declarant was still under the stress or excitement that the startling event caused.

Here, the Court found, the evidence indicated that after appellant argued with Bobbie about her supposed infidelity, took some pills, drank a bottle of cold medicine, and yelled and cried, Bobbie enlisted Turner's help to escape to her mother's house. But appellant unexpectedly intercepted them on the road just past their driveway, ordered Turner to take Bobbie home, and threatened to shoot Turner's car. During the short drive back to the mobile home, Bobbie said that she loved Turner and Turner's brother; that Turner should take care of Bobbie's daughters; that Turner and Bobbie's daughters needed to "stick together"; and that "this is it for her, that she was not leaving the house tonight."

From this evidence, the Court determined, the trial court could reasonably find that appellant's aggressive response to Bobbie's attempted escape, including his threat to shoot at the car she was in, qualified as a startling event. The court also could reasonably conclude that Bobbie's statements moments later during the drive back home were made while she was still under the stress of appellant's roadway threat. Bobbie's statements related to appellant's threat to shoot if Bobbie did not return home, because they indicated her belief that appellant was going to kill her that night.

Nevertheless, appellant argued, statements Bobbie made shortly after she and Turner arrived back at the mobile home were improperly admitted under the excited-utterance exception. The Court again disagreed. Turner testified that when she and Bobbie came home, appellant began throwing his tools off the front porch, saying that he did not need them because "he wasn't going to be working on nothing no more." Turner then asked Bobbie if she wanted Turner to call the police; Bobbie said no, but told her, "stay with me, don't leave me." The trial court could reasonably find that Bobbie was still under the stress of excitement caused by appellant's threat on the road when she made these statements, but even if that stress had dissipated, she was under the immediate and direct stress of appellant's startling and destructive behavior on the porch of their home, and her statements related to that threatening behavior.

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However, appellant contended, none of Bobbie's statements to Turner came under the excited-utterance exception because the evidence did not show that Bobbie was "confused or distraught" when she made the statements. The Court noted that while such displays of emotion may support application of the excited-utterance exception, the rule does not require that the declarant express any particular emotion when making the statement, only that she make the statement while still under the stress caused by the startling event.

Thus, the Court concluded, Bobbie's statements to Turner indicated that she was afraid of appellant and upset by her husband's chaotic and threatening behavior. Turner testified that Bobbie was scared even when she went to sleep later that night. The record therefore supported the trial court's conclusion that Bobbie was under the continuing stress of excitement when she made each of the statements about which appellant complained. Accordingly, the Court held, the court did not abuse its discretion in admitting them.

Miranda; Jury Charges

Rigsby v. State, S19A0172 (6/3/19)

Appellant was convicted of malice murder and other crimes in connection with the shooting death of his girlfriend. The evidence showed that the day after the victim's body was found, an investigator briefly interviewed appellant, but she stopped questioning him after he asked for a lawyer. The next day, the investigator met with appellant to complete his booking form for the jail. After asking appellant several biographical questions, she advised him that he would be charged with both malice murder and felony murder. Appellant asked her about the difference between the two charges, and she explained the basic elements of the crimes without referring to any information in his case. She then told appellant that she had done her best to explain it and that he should consult with his lawyer. Appellant asked why he would "get two murder charges," and when the investigator replied, "it's standard," he said, "I only killed — they said I only killed one person." The investigator testified about this statement at trial, and a video recording of the meeting during which appellant made the statement was played for the jury.

Appellant contended that the trial court erred by failing to suppress his statement, because the investigator's explanation of the murder charges was reasonably likely to evoke an incriminating response, was not necessary to complete his booking form, and therefore did not come within the "booking exception" to *Miranda v. Arizona*, 384 U.S. 436 (86 SCt 1602, 16 LE2d 694) (1966).

However, the Court stated, when a suspect makes an unsolicited statement without being questioned or pressured by an officer, the statement is admissible, even after the suspect has invoked his right to counsel. Here, the Court found, after appellant asked for a lawyer, the investigator had an obligation to stop interrogating him about the victim's murder, and the investigator complied with that duty. During the booking procedure the next day, however, appellant initiated a discussion about the difference between malice and felony murder, and the investigator merely tried to respond to his questions (while also telling him to consult with his lawyer). The record supported the trial court's finding that the incriminating remark by appellant that followed was spontaneous and voluntary, not the product of interrogation. The trial court therefore did not err in admitting the statement into evidence.

Appellant contended that the trial court's jury instructions on voluntary manslaughter in conjunction with the verdict form were confusing and prevented the jury from fully considering voluntary manslaughter verdicts, and that the verdict form was filled out improperly because the jury left blank the lines for voluntary manslaughter. The Court stated that it found no reversible error in these claims, but also, they fail for a more fundamental reason — appellant was not entitled to the jury's consideration of a voluntary manslaughter verdict at all.

The Court first considered appellant's theory that his cellmate's testimony that appellant said he shot the victim because she was planning to leave him entitled him to a voluntary manslaughter instruction. The Court noted that the revelation of adulterous conduct (or similar conduct as to unmarried partners), including by the victim's disclosure of such conduct to the defendant, may under some circumstances amount to serious provocation sufficient to excite sudden, violent, and irresistible passion in a reasonable person. However, the Court stated, it has consistently held that a victim's statement that she wants to end her relationship with the defendant is insufficient provocation to support a voluntary manslaughter charge. Thus, a jury instruction on voluntary manslaughter was inappropriate on this theory.

As for appellant's alternative claim that he was entitled to the instruction based on his impassioned response to the victim's supposed attempt to commit suicide, the Court noted that appellant cited no authority to support this argument. Furthermore, the Court stated, even accepting appellant's dubious assertion that slight evidence indicated that the victim attempted suicide by shooting herself in the side of her head, and even assuming that witnessing someone's suicide attempt could — under some exceptional circumstances — provoke a reasonable person to kill her (rather than render her aid), there was no evidence that the circumstances in this case would have provoked a reasonable person to kill the victim.

Thus, the Court found, appellant was not legally entitled to a jury instruction on voluntary manslaughter based on either of the theories he asserted in the trial court, and the Court found no other basis for such an instruction in the trial evidence. Therefore, the various errors appellant asserted with regard to voluntary manslaughter in the trial court's jury charge and the verdict form were harmless, as any possibility for the jury to return a verdict on that lesser offense could only have benefitted him.

Indictments; General Demurrers

State v. Williams, S19A0185 (6/3/19)

Williams was indicted for distributing heroin in violation of the Georgia Controlled Substances and felony murder predicated upon the unlawful distribution of heroin, both charges arising from the fatal overdose of Leslie Gregg Ivey. Williams filed a number of pleadings and motions, including a general demurrer, a plea in bar, and a motion to dismiss the felony murder charge upon constitutional grounds. In his general demurrer, Williams broadly asserted that the indictment failed "adequately to charge [Williams] with any offense" and failed to "sufficiently set out the charge or any violation of the law." In his plea in bar, he argued that his prosecution was barred by the Georgia Medical Amnesty Act, OCGA § 16-13-5. And in his motion to dismiss the felony murder charge, Williams argued that the felony murder statute is unconstitutionally vague. Following an evidentiary hearing, the trial court dismissed the indictment. In its order, the trial court explained that the evidence failed to show that Williams "distributed" heroin in violation of OCGA § 16-13-30 (b). The State appealed.

The State argued that the dismissal order amounted to an order sustaining the general demurrer, even though the order did not say so expressly. The Court agreed. The record showed that, when the trial court dismissed the indictment, only three pleadings and motions were before the court that would have authorized the trial court to bring an end to some or all of the prosecution before trial—the general demurrer, the plea in bar, and the motion to dismiss the felony murder charge on constitutional grounds. The dismissal order made no findings about the Medical Amnesty Act, which was the basis for the plea in bar, and, the Court noted, the order expressly dismissed the plea in bar as moot. And the dismissal order said nothing at all about the constitutionality of OCGA § 16-5-1 (c), which was the basis for the motion to dismiss the felony murder charge on constitutional grounds. Thus, by process of elimination, only the general demurrer was left as a possible basis for the dismissal of the indictment.

To assess the merits of a general demurrer, which challenges the sufficiency of the substance of the indictment, a court asks whether the defendant can admit each and every fact alleged in the indictment and still be innocent of any crime. If so, the general demurrer should be sustained. But if the admission of the facts alleged would lead necessarily to the conclusion that the accused is guilty of a crime, the indictment is sufficient to withstand a general demurrer. Moreover, as a general matter, a demurrer (whether general or special) must allege some flaw on the face of the indictment itself; a demurrer ordinarily cannot rely on extrinsic facts that are not alleged in the indictment. Here, in dismissing the indictment, the trial court relied on facts that are not alleged in the indictment, including that the sole basis for the distribution charge was that Williams injected Ivey with heroin, that Williams did not own the heroin in question, that Williams played no part in its acquisition, and that Williams only injected Ivey at Ivey's request.

Nevertheless, the Court stated, there is an important exception to the general rule that a court cannot go beyond the four corners of the indictment in considering a demurrer. If the State stipulates or agrees to the facts that form the basis for the charges in the indictment, a court can rely on those facts in its consideration of a demurrer, whether or not the facts appear on the face of the indictment. Here, however, the State never agreed or stipulated for purposes of a demurrer to a number of the facts upon which the trial court relied. First, the Court found, the hearing at which the trial court heard evidence was a hearing on the plea in bar, not a hearing on the demurrer, and any concessions-for-the-sake-of-argument made by the prosecuting attorney at that hearing were most naturally understood as concessions for the limited purpose of the plea in bar. In any event, the prosecuting attorney at most agreed that the charges against Williams were premised on his act of injection. Although the State presented no evidence at the pretrial hearing to counter the assertions that Williams injected Ivey only at Ivey's request and that Williams played no part in acquiring the heroin, the State was not required to do so; it never agreed to try its entire case against Williams at this pretrial hearing. Therefore, the Court concluded, because the State never agreed or stipulated to those extrinsic facts for purposes of a demurrer, the trial court was not authorized to consider them in connection with the general demurrer. Accordingly, the Court reversed the dismissal of the indictment and remanded the case for further proceedings.

Waiver of Claims of Error; Record on Appeal

Adams v. State, S18G0699 (6/3/19)

Appellant was convicted of DUI. He appealed, asserting as error the admission of evidence regarding a stipulation in an administrative license suspension hearing pursuant to OCGA § 40-5-67.1 and evidence of a 2011 arrest for DUI. The

Court of Appeals affirmed his convictions in *Adams v. State*, 344 Ga. App. 159 (2017), and the Court granted certiorari to consider both rulings.

The evidence showed that when arrested, appellant declined to take the state-administered blood test.
At an administrative hearing in the suspension proceeding, the trooper and appellant's counsel executed a written agreement, which provided that the trooper would withdraw the sworn report made pursuant to OCGA § 40-5-67.1, in return for appellant's promise to enter a guilty plea to the underlying DUI charge. When appellant reneged on the agreement, the State sought to admit the agreement into evidence at appellant's trial.

The Court noted that since appellant failed to object to the admission of the agreement at trial, its review was limited to whether there was plain error. Under that test, the Court must first look to whether there was an error or defect — some sort of deviation from a legal rule — that was not intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. And here, the Court found, when asked by the trial court if appellant objected to the admission of the agreement, appellant's trial counsel stated, "Judge, we don't object. *I think it is proper to come in*." (Emphasis supplied). Thus, the Court concluded, because appellant affirmatively waived any claim of error from the admission of the agreement, there was no plain error.

Next, the Court considered whether the Court of Appeals erred in holding that appellant "procedurally waived" his enumeration of error concerning OCGA § 24-4-403 ("Rule 403"). The Court noted that appellant filed a notice of appeal that was unusual because, rather than designating "those portions of the record to be *omitted* from the record on appeal" (emphasis supplied) as provided by OCGA § 5-6-37, it designated only the following specific portions of the record to be included: "Transcript of evidence and proceedings to include Pretrial rulings (similar transactions/ALS); State's opening; Officer Ashe direct; discussion after cross; Defense argument made before starting Thursday, May 4, 2017; Direct & cross of Trooper Talton; Discussion following 45 minutes of jury deliberation; and, State's closing will be filed for inclusion in the record on appeal."

The Court found that the record as designated by appellant omitted not only his opening and closing statements, while including those of the State; it also omitted appellant's cross-examination of the arresting officer in the 2011 DUI incident. Exhibits, even those discussed in the designated portions of the transcript, were not included either. In fact, the Court stated, the record did not reveal whether appellant presented any evidence or what that evidence, if any, may have been. The record also omitted the trial court's charge to the jury.

Thus, the Court held, in the absence of a substantial amount of the evidence presented at trial, an appellate court cannot consider all the circumstances surrounding the extrinsic act evidence. Potentially helpful materials also include portions of the record and transcript that could have shed light on appellant's theory of the case and the significance of other evidence, including the absent opening and closing statements of appellant's counsel, cross-examination of the arresting officer in the 2011 DUI incident, and the jury charges.

Therefore, the Court held, while it disagreed with the opinion of the Court of Appeals to the extent that it suggests that, in order to prevail on a Rule 403 claim, an appellant must transmit the *entire* record on appeal, it remains true that an appellant cannot prevail without those portions of the record that support his claim. The appellant bears the burden of proving error by the appellate record, and where, as here, insufficient information was preserved in the record for appellate

review, the trial court ruling must be upheld. Accordingly, in light of the need to consider all the circumstances surrounding the extrinsic offense in a Rule 403 analysis, appellant failed to meet his burden to demonstrate error by the partial record he designated on appeal.

Statements; Use of the Term "Victim"

Rowland v. State, S19A0289 (6/3/19)

Appellant was convicted of felony murder in connection with the shooting death of Whittle, one of his "dope buddies." The evidence, briefly stated, showed that on September 19, 2013, appellant's vehicle collided with that of the victim's son at a time when the police were looking for appellant in connection with the murder. An investigator arrived on the scene and arrested appellant for Whittle's murder and read him his rights under *Miranda*. Appellant declined to speak with the investigator and invoked his right to counsel. At 10:47 a.m., appellant filled out a jail "inmate request form," asking to speak with Investigator Scarborough. Minutes later, appellant met with Scarborough and another investigator, and agreed to make a statement.

Appellant contended that the trial court erred in admitting his Sept. 19 statement. Appellant did not dispute that the investigator ceased his efforts to question him after he invoked his right to counsel and his right to remain silent while he was seated in the patrol car. He also did not dispute that he was the one to initiate contact after earlier invoking his rights. The noted that the record clearly showed that appellant filled out an inmate request form asking specifically for Scarborough. Moreover, the transcript of the interview showed that appellant wanted to talk about the charges against him and the circumstances of Whittle's death. Thus, the Court stated, the question was whether, after having initiated contact with Scarborough, appellant's custodial statements were voluntary under the totality of the circumstances.

And here, the Court found, the record showed that appellant had been advised of his *Miranda* rights just a few hours before asking to speak with Scarborough. Prior to commencing the interview, the investigator reminded appellant that he had been read his *Miranda* rights and that he had asked for an attorney. After being so informed, appellant indicated that he had no problem making a statement. These circumstances supported the trial court's finding that appellant made a knowing waiver of his rights to remain silent and to have an attorney present.

Nevertheless, appellant contended, the evidence showed that his statement was involuntary because he was under the influence of drugs. The Court disagreed. The intoxication of the accused does not automatically invalidate his or her waiver of *Miranda* rights. If the evidence is sufficient to establish that the defendant's statement was the product of rational intellect and free will, it may be admitted even if the defendant was intoxicated when he made the statement. And here, the Court found, although appellant contended that he was high on pills, the investigators' testimony and the recorded interview indicated that, even if appellant had consumed intoxicants, his mind was nevertheless clear enough to make a knowing and voluntary waiver of his rights and to speak to the investigator without an attorney. Thus, considering all of the evidence regarding the voluntariness of appellant's statement, the Court concluded that the trial court's finding that those statements were admissible was not clearly erroneous.

Appellant also contended the trial court erred in denying his motion in limine to prevent the State from referring to Whittle as "the victim." He argued that in allowing the State to refer to Whittle approximately 25 times during the course of the

trial as "the victim," the court deprived him of a meaningful opportunity to present his theory of self-defense. If his actions were justified, appellant contended, then there was no crime and, hence, no victim.

The Court held that the word "victim" is not inherently prejudicial. And here, it was obvious from the evidence and argument presented to the jury that appellant admitted that he shot Whittle but nevertheless argued that it was not a crime because he acted in self-defense, thereby creating an issue for jury determination as to whether Whittle was the victim of a crime. Further, the trial court gave proper jury instructions on justification by reason of self-defense. Consequently, the Court held, appellant failed to demonstrate reversible error in this regard.

Statements; Invocation of Right to Counsel

Dozier v. State, S19A0095 (6/3/19)

Appellant was convicted of malice murder, aggravated assault, and theft by taking. He argued that the trial court erred in denying his motion to suppress the statement he made to police while he was under arrest. The Court disagreed.

The record showed that after waiving his *Miranda* rights, appellant was interrogated by police. He initially denied any involvement in the crimes and asked to speak to his wife multiple times "to let her know where I'm at" and "what's going on." The detectives initially refused his requests. However, about 55 minutes into the interview, the detectives allowed appellant to call his wife and instructed him to use the speakerphone because the handset was broken; they then left the room. When detectives re-entered the room and continued the interrogation, appellant continued to deny his involvement in the crimes. Approximately 1 hour and 14 minutes into the interview, Detective Shurley, who was apparently frustrated with appellant's refusal to provide detectives with any new information that police had not already shared with appellant, stated something that sounded like: "I'm done," and told appellant he would be charged with murder. Detectives left the room and appellant called his wife again, this time saying that he was being charged with murder and taken to jail. He stated, "I guess we're going to have to try to get a lawyer, baby"; asked her to look into a "paid attorney" or a court-appointed attorney; and remarked, "that's all I can do. I have to get a lawyer."

A different detective, Chapman, entered to take over the interrogation and told appellant that he wanted to give appellant one last chance to tell his side of the story. When appellant continued to deny his involvement, an obviously frustrated Chapman told appellant, ""It's over buddy, have a good one ok. If you decide you know, whatever, I don't, I'm done alright. You good with that. I just gotta feel like I've done everything. You good, are we done here?" Appellant replied, "Yes, sir." Chapman left the room, and appellant called his wife again. Detectives Shurley and Chapman re-entered the room while appellant was on the phone, and—after they told appellant that they would arrest his wife if she lied to them—appellant admitted to being involved in the crimes.

Appellant contended that the trial court erred when it determined that he did not invoke his right to remain silent during his interrogation when Chapman asked, "Are we done?" and appellant replied, "Yes, sir." But, the Court found, viewed in context, appellant's response to Chapman's question was not an invocation of his right to remain silent, let alone an "unequivocal and unambiguous" one. From the beginning, Detective Chapman used a strategy of giving appellant an opportunity to explain his side of the story, and then threatening to walk away when appellant refused. Thus, when Chapman asked, "Are we done here?" and appellant replied, "Yes, sir," it was reasonable for detectives to interpret that

exchange as confirming that Chapman's further efforts would be pointless—not as appellant invoking his right to remain silent.

Next, appellant contended that he asked his wife "to contact a lawyer at least twice during follow-up conversations with her," and that appellant's statements to his wife amounted to an invocation of counsel because police could hear those phone conversations. The Court agreed that the record confirmed that appellant mentioned a lawyer to his wife multiple times during the phone calls he made to her while he was in police custody. But these statements were not an invocation of the right to counsel. Indeed appellant asked to speak to his wife so that he could let her know "where I'm at, what was going on"—not so that she could contact an attorney. And at most, appellant's statements to his wife were made to help secure the future assistance of an attorney, not immediate assistance. Thus, because a reasonable officer would not have interpreted these statements as an invocation of appellant's right to counsel, the trial court did not err when it denied his motion to suppress on this basis.

Finally, appellant argued that under the totality of the circumstances, his statement to police was involuntary and that it therefore should have been suppressed. Specifically, he argued that the detectives' claim that they would arrest his wife if she lied to police amounted to coercion. The Court disagreed.

Here, the record showed that Detectives Shurley and Chapman re-entered the room during one of appellant's phone calls to his wife and told her over the speakerphone that they would send an investigator to pick her up, stating to her: "You say this man was with you. I'm willing to give you an opportunity to give that statement . . . And if you wanna provide a statement saying that your husband was with you I'll document it for you on his behalf, ok." Chapman ended the call and told appellant that he would arrest appellant's wife if she lied about appellant's whereabouts that morning—and that Chapman would know she was lying because police had video surveillance of appellant showing where he was. Appellant asked for "ten minutes" to call his wife again and "another cigarette." The detectives left the room and appellant called his wife. Among other things, he told her: "don't worry about" giving a statement; "I have to be a man and stand up for what I did"; and "I have to tell them the truth." When detectives re-entered the room, appellant admitted to his involvement in the crimes.

The Court again found that when viewed in context and as part of all of the circumstances surrounding appellant's interrogation, the detective's statement that he would arrest appellant's wife if she lied about appellant's whereabouts was a "mere truism" and not the type of statement that would necessarily render a confession involuntary. These tactics did not rise to techniques and methods offensive to due process or create circumstances in which the suspect clearly had no opportunity to exercise a free and unconstrained will. Accordingly, the Court concluded, the trial court did not err in denying appellant's motion to suppress on the theory that appellant's statement was involuntary.

Rule 404 (b); Jury Charges

Jackson v. State, S19A0343 (6/3/19)

Appellant was convicted of felony murder and a firearms offense. The evidence, very briefly stated, showed that in 2015, appellant's cousin was upset at the victim regarding the treatment of the cousin's teenage son. Unbeknownst to the victim, appellant and his cousin followed the victim home and appellant parked his vehicle so that it partially blocked the victim's

driveway. The cousin got out of the car and banged on the victim's car window, telling him to get out of his vehicle. The victim began to back his car back out of the driveway. Appellant then pulled a firearm and began shooting at the victim. The victim had to drive over his mailbox to get back to the street. As the victim drove away, appellant kept firing his weapon. The victim crashed his vehicle a couple of miles away and eventually died from gunshot wounds.

Appellant contended that the trial court erred by allowing the State to present evidence under OCGA § 24-4-404 (b) that he shot at someone else a decade before the shooting in this case. The evidence in that case showed that in 2005, appellant saw Jeffrey Swans leave the apartment of appellant's ex-girlfriend, and appellant then confronted her inside her apartment. Swans returned to the apartment when he saw appellant go inside, and the two men argued. Swans then left the apartment, and appellant followed him outside. After Swans got into his truck, appellant shot at him as he drove away. Swans was not hit, although one bullet hit his rear fender and another hit his back tire. Appellant pled guilty to aggravated assault under the First Offender Act, and received a 10-year probated sentence, which he completed before the shooting in this case.

The Court initially noted that because appellant did not dispute that he committed the other act evidence, it would address the other two aspects of the admissibility test. As to whether the evidence was relevant to an issue in the case other than the defendant's character, the Court found that appellant put his intent at issue by pleading not guilty, and he did not take any affirmative steps to relieve the State of its burden to prove intent. And, because the 2005 shooting and the aggravated assault (and resulting felony murder) charged in this case involved an assault with a deadly weapon, the 2005 shooting evidence was relevant to show intent.

The second part of the test requires a determination of whether the probative value of the evidence is not substantially outweighed by its undue prejudice. Factors to be considered in determining the probative value of other-act evidence offered to prove intent include its overall similarity to the charged crime, its temporal remoteness, and the prosecutorial need for it. As to similarity, both the 2005 shooting and the 2015 shooting involved appellant's firing a handgun toward a car while it was being driven away by a man who posed no immediate threat.

However, the Court stated, a major difference between Georgia's new Evidence Code and our old "similar transaction" case law is the need under OCGA § 24-4-404 (b) to consider the dissimilarities as well as the similarities between the extrinsic act and the charged act. Here, the Court found, in the 2005 shooting, the victim was a man who apparently was involved with appellant's ex-girlfriend, and appellant first argued with the man inside the ex-girlfriend's apartment before following him outside and shooting toward his truck as he drove away. By contrast, the victim here was a man who had a conflict with appellant's cousin and cousin's son; appellant appeared to have had no dispute with the victim before the shooting. And rather than occurring at a single location and acting alone as in 2005, here, appellant acted alongside his cousin and drove to two locations for the cousin to confront the victim. Thus, the Court found, these significant differences diminished the probative value of the 2005 incident.

The Court also found that the probative value was diminished by the temporal remoteness of the prior shooting, which took place a decade before the crimes charged here, with appellant not incarcerated during any of the intervening years. And, the Court stated, perhaps most telling, was the lack of any real prosecutorial need for the 2005 shooting evidence because all of the evidence at trial indicated that the person who repeatedly fired a gun toward the victim had the requisite general intent to commit an assault with a deadly weapon.

Therefore, the Court found, considering all of the circumstances, the probative value of the 2005 shooting evidence to prove appellant's intent was minimal at best. On the other side of the OCGA § 24-4-403 balance, it was undoubtedly prejudicial to be labeled a short-tempered shooter in a murder case based on an unprovoked shooting. And the prosecutor enhanced the prejudice by extensively questioning appellant about the 2005 incident. Indeed, the State's questioning seemed designed to use the evidence for reasons it was not admitted to be used — to establish appellant as someone with a violent character who was with his cousin and who shot at the victim simply because he has a bad temper and shoots at people in cars, which could not be, as the State stated at trial, "just a coincidence." In addition, the Court found no evidence was presented that appellant had been prosecuted, admitted his guilt, and served a 10-year term of probation for the 2005 shooting, which increased the risk that the jury would want to punish appellant for his past conduct rather than only for the charged crimes.

In sum, the Court held that the unfair prejudice from the other-act evidence clearly and substantially outweighed its minimal probative value, and the trial court therefore abused its discretion by admitting the evidence. However, Court found that the error was harmless given the overwhelming evidence of guilt.

Appellant also argued that that the jury was not properly instructed on how to consider the evidence of the 2005 shooting. Specifically, appellant contended first that the jury was never told that it could consider the evidence only to prove intent. The Court agreed that the trial court's initial limiting instruction, given just before the jury heard the evidence about the 2005 shooting, was obviously incomplete; it told the jurors that their consideration of the evidence was limited to a sole — but unidentified — purpose.

At the end of that instruction, however, the jury was told that it would receive additional instructions on the matter before beginning deliberations, and, as promised, the jury was instructed in detail in the final charge that it could consider the evidence only with regard to the issue of intent. Thus, the Court found, although it certainly would have been preferable for the trial court to identify the limited purpose of the evidence in the initial instruction, when considering whether error exists in the instructions to the jury as a whole, appellant's argument failed.

Appellant next argued that the trial court should have instructed the jury that, before considering the other-act evidence to prove intent, the jury must first find beyond a reasonable doubt that appellant committed the acts alleged in the indictment. The Court noted that appellant did not request such an instruction at trial, so review of this claim was only for plain error. And the Court stated, an error cannot be plain where there is no controlling authority on point. Thus, while appellant cited two federal cases in support of his argument, in both cases, the court approved in a footnote an instruction along the lines of the one appellant claimed was necessary, but in neither case did the court say (much less hold) that this specific instruction was *required*. See *United States v. Arbane*, 446 F3d 1223, 1226 n.4 (11th Cir. 2006); *United States v. Beechum*, 582 F2d 898, 917 n.23 (5th Cir. 1978). Also, the Court found no controlling precedent that so holds. Accordingly, the Court stated, although an instruction of this sort would not be an incorrect statement of law — and might even be helpful in clarifying the limited use of extrinsic evidence of intent — current Georgia law does not require that such an instruction be given, so appellant failed to show plain error.