

## THIS WEEK:

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### Rule 404 (b) Evidence; Gang Membership

*Worthen v. State, S19A0924 (8/19/19)*

Appellant, who was indicted with Armstrong, Armstrong's brother, and Young, was convicted in the shooting death murder of Parrish. The evidence, very briefly stated, showed that Parrish's son went to a party where one of his friends got into a fist fight with Armstrong's brother. Armstrong's brother lost decisively. Three days later, Parrish's son was at a cookout in a park. At some point, appellant approached Parrish's son and accused him of "jumping" Armstrong's brother at the house party in an unfair two-on-one fight; Parrish's son denied the charge. Appellant said that he had "some boys coming" to the park, and "we're going to find out what really happened" at the party. Parrish's son viewed appellant's statements as a threat and called his father for help. Parrish came to the Park. So did Armstrong, Armstrong's brother and Young. Armstrong, who had a blue bandanna hanging out of his back pocket, twice said to appellant, "let's just go on and do this n\*\*ger," referring to Parrish. As the argument continued and Parrish turned away, appellant loudly asked Armstrong, "you got that heat cuz[?]" Armstrong immediately pulled out a gun and shot Parrish in the back of the head. He then shot him twice more. All four of the co-indictees were members of the "Circle of Ten" sub-group of the Crips street gang.

Appellant contended that the trial court abused its discretion in admitting, over his objection, other acts evidence under OCGA § 24-4-404 (b) showing gang membership. The Court disagreed.

Appellant did not dispute that the third part of the Rule 404 (b) test was satisfied, i.e., that there was sufficient proof for the jury to find by a preponderance of the evidence that appellant, Armstrong, Armstrong's brother, and Young engaged in the other acts showing that they were all members of the same street gang. Appellant argued, however, under the first part of the Rule 404 (b) test, that the evidence of the other acts showing gang membership was not relevant to any issue in the case other than his character. But, the Court stated, when a defendant is on trial for murder, the motive for the homicide is a relevant fact. And here, the Court found, the other acts evidence showing gang membership helped to establish a motive for appellant to encourage Armstrong to shoot Parrish.

Appellant also contended, under the second part of the Rule 404 (b) test, that the probative value of the other acts evidence showing gang membership was substantially outweighed by the danger of unfair prejudice to him. The Court noted that the admission of evidence showing gang membership often presents a danger of unfair prejudice. Nevertheless, such evidence also can be highly probative of facts that are of consequence in a criminal prosecution, such as the defendant's motive for involvement in a crime. When other acts evidence is offered to prove motive, there is no requirement of overall similarity between the crimes charged and the other acts. To be admissible as proof of motive, however, the other acts evidence must be logically relevant to the crimes charged and necessary to prove something other than the defendant's propensity to commit the charged crimes.

And here, the Court found, the prosecutorial need for the other acts evidence showing gang membership was high. The evidence against appellant, aside from the other acts evidence, was legally sufficient to support a jury finding that appellant was a party to the shooting, but it was far from overwhelming. In particular, without the other acts evidence, it was unclear what motive appellant would have had to engage Parrish's son or Parrish about the incident at the house party in the first place, much less to intentionally encourage Armstrong to pull out a gun and start shooting at Parrish in a crowded park. The other acts evidence showing that appellant, Armstrong, Armstrong's brother, and Young were fellow gang members, in combination with the expert testimony that gangs consider standing up to them to be an act of disrespect, provided evidence of appellant's motive to encourage Armstrong to shoot Parrish. Moreover, appellant failed to show how the admission of the other acts evidence created a danger of unfair prejudice in this case.

Thus, the Court concluded, the trial court acted within its discretion in determining that the probative value of the other acts evidence showing gang membership was not substantially outweighed by the danger of unfair prejudice to appellant. Accordingly, the trial court did not abuse its discretion in admitting the evidence under Rule 404 (b) over appellant's objection.

## **Child Molestation; Merger**

*Scott v. State, S18C1644, S18G1644 (8/19/19)*

Appellant was convicted of four counts of child molestation. The evidence showed that the victim, an 11 year old, awoke to see appellant standing next to her bed; as she put her head back down to go back to sleep, she felt appellant reach under her clothes to fondle her breasts (Count 2), buttocks and anal area (Count 3), and vagina (Count 4), inserting his finger into both her anus and vagina. The other count arose when shortly after these acts, appellant followed the victim to the bathroom and without her consent, opened the door and watch her urinate.

The Court of Appeals, in an unpublished opinion, rejected appellant's claim that Counts 2, 3 and 4 merged for sentencing purposes. The court, using the "required evidence" test set forth in *Drinkard v. Walker*, 281 Ga. 211, 217 (2006), reasoned that to convict appellant on Counts 2, 3, and 4, the State had to prove different facts, namely, the State had to prove that appellant touched three different and distinct parts of the victim's body. In so holding, the Court of Appeals relied on *Daniel v. State*, 292 Ga. App. 560, 565-566 (2008), and *Frazier v. State*, 241 Ga. App. 125, 126 (1999).

Appellant then petitioned for a writ of certiorari, arguing among other things that the Court of Appeals erred in applying the "required evidence" test to the merger question presented by this case. The Supreme Court agreed.

The Court stated that "merger" refers generally to situations in which a defendant is prosecuted for, and determined by trial or plea, to be guilty of multiple criminal charges but then, as a matter of substantive double jeopardy law, can be punished — convicted and sentenced — for only one of those crimes. Merger analysis often involves counts charging two different crimes and it is in this context that *Drinkard's* "required evidence" test is applied.

But, the Court stated, merger questions may also arise when a defendant is charged with multiple counts of the same crime — which was the situation here, where appellant was charged with and found guilty of four counts of child molestation. In this context, the merger analysis requires careful interpretation of the criminal statute at issue to identify the "unit of prosecution" - "the precise act or conduct" that the legislature criminalized.

And here, the Court found, the Court of Appeals failed to engage in the applicable unit-of-prosecution analysis in its unpublished opinion, in the published *Frazier* opinion that it cited, and in its other published opinions holding that multiple counts of child molestation did not merge, see, e.g., *Carver v. State*, 331 Ga. App. 120, 122 (2015); *Chalifoux v. State*, 302 Ga. App. 119, 119-120 (2010); *Metts v. State*, 297 Ga. App. 330, 336 (2009); *Parker v. State*, 283 Ga. App. 714, 721-722 (2007); *Lunsford v. State*, 260 Ga. App. 818, 820-821 (2003); *Eggleston v. State*, 247 Ga. App. 540, 543 (2001). The Court noted that in some of those cases, where the acts of child molestation appear to have occurred in discrete incidents, precisely identifying the applicable unit of prosecution may not affect the merger decision. See, e.g., *Carver*, 331 Ga. App. at 120, 122; *Metts*, 297 Ga. App. at 336. But where, as here, the acts of molestation alleged in different counts were part of a single course of conduct occurring in a relatively short time frame, the unit of prosecution could determine if the defendant faces multiple, consecutive 20-year sentences or only one sentence. See, e.g., *Chalifoux*, 302 Ga. App. at 119-120; *Parker*, 283 Ga. App. at 714-715, 721-722; *Lunsford*, 260 Ga. App. at 819-821; *Eggleston*, 247 Ga. App. at 541, 543; *Frazier*, 241 Ga. App. at 125-126. Accordingly, the Court stated, it is important to conduct the applicable analysis, and it is appropriate for the Court of Appeals to do it in the first instance.

Consequently, the Court vacated Division 2 of the Court of Appeals' opinion, and remanded the case for that court to determine and apply the unit of prosecution for child molestation to the merger issue presented.

## Ultimate Issue Testimony; Prosecutorial Misconduct

*Mack v. State*, S19A0947 (8/19/19)

Appellant was convicted of malice murder and a firearms offense. He argued that the trial court erred in failing to redact the comments made by a detective during a video interview of Bryant, an eye witness, because the comments touched on the ultimate issue in the case: whether the shooting was an accident. The Court disagreed.

The Court noted that appellant did not testify at his trial. His counsel acknowledged that appellant shot the victim but claimed that the shooting was unintentional. Testifying as a witness for the State, Bryant indicated that appellant was only "playing" with the gun when it went off accidentally. To counter this aspect of Bryant's testimony, the State sought — through the testimony of the detective — to introduce a video of his interview of Bryant in which, the State argued, Bryant

described the incident differently. During the interview, Bryant told law enforcement that appellant's gun fired as he was racking the slide, holding the gun sideways and close to his chest. The defense unsuccessfully sought redaction of a portion of the video in which the detective told Bryant, "See, I look at this and I can't think of any need to be pointing a gun ... at [the victim]. He shot him in the face and at five feet away or six feet away. [Gesturing] That's how I would shoot you in the face, not like this. Not like that. Not like this. I shoot you in the face."

The Court stated that OCGA § 24-7-704 governs the admission of opinion testimony of both lay and expert witnesses. In the case of lay witness testimony, "an opinion or inference otherwise admissible shall not be objectionable because it embraces an ultimate issue[.]" OCGA § 24-7-704 (a). Also, the federal case law is equally unequivocal: "[Federal Rule 704 (a)] has abolished the prohibition on [lay] opinion testimony concerning the ultimate issue in a case." *Carter v. Decision One Corp.*, 122 F3d 997, 1005 (11th Cir. 1997) (punctuation omitted). Thus, because the detective was a lay witness, and Rule 704 (a) does not bar the admission of his comments even if they touched on the ultimate issue in the case, the trial court did not err in refusing to redact them from the interview.

Appellant also argued that his trial counsel was ineffective for failing to object to the prosecutor's closing argument, which mentioned the trial court's options in sentencing. The record showed that immediately after the prosecutor finished his closing argument, trial counsel objected to the State's implication that felony murder carries a lesser sentence, and he requested an instruction that the jury is not to concern itself with punishment and that malice murder and felony murder have the same punishment. The judge overruled the objection and stated that the standard charge that "they are not to consider punishment should resolve the issue." Thus, the Court found, trial counsel was not deficient because he did in fact object.

Nevertheless, the Court stated, to the extent that appellant complained that his trial counsel did not raise the right objection — that he should have also objected to the implication that the judge would resolve any sentencing issues, diminishing the consequences of the verdicts in the mind of the jurors — he failed to show prejudice. Specifically, the Court found no prejudice in the light of the overwhelming evidence of appellant's guilt, and the fact that the jury found him guilty of malice — not felony — murder.

But, the Court concluded, "let there be no misunderstanding: if the prosecutor's statements did imply that the punishment for felony murder was less than for malice murder, they would have been plainly inappropriate. See OCGA § 16-5-1. On this cold record, we cannot easily determine whether that is the best interpretation, and resolving [appellant's] claims does not require us to decide the question. We simply remind the State of its responsibility to avoid such arguments in future cases."

## **Voir Dire; McCollum**

*Daniels v. State*, S19A0695 (8/19/19)

Appellant was convicted of malice murder and other crimes. He argued that the trial court erred by sustaining the State's challenge to two of his peremptory strikes under *Georgia v. McCollum*, 505 U. S. 42 (112 SCt 2348, 120 LE2d 33) (1992).

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING SEPTEMBER 27, 2019

Issue 39-19

The record showed that appellant used all of his peremptory strikes against white jurors. Specifically, the State challenged appellant's strikes of two jurors: Juror No. 27 and Juror No. 30. The defense explained the strike of Juror No. 27 on the basis that the juror lived in a gated community and her husband had been a longtime school teacher. The State argued that living in a certain area was not a race-neutral explanation and stated that teachers and other school employees had been placed on the jury. Counsel defended the strike of Juror No. 30 on the basis that he was a first sergeant in the military with 27 years of service and had undergone expert firearms training, predicting that if he were placed on the jury "he will be the foreperson and he will run the show. He's been doing it for 27 years." The State responded that a black woman selected for the jury (Juror No. 4) indicated that she had been in the military as well and had firearms training.

The trial court ruled that the defense explanation as to its strike of Juror No. 27 was "a subterfuge for a racial strike" because gated communities in the county "are typically predominantly Caucasian communities," and other educators were placed on the jury. And, noting Juror No. 4's responses, the trial court said that it could not find the defense's explanation as to Juror No. 30 "to be race neutral based on the circumstances of this case." The trial court put both Juror No. 27 and Juror No. 30 back on the jury, replacing two other white jurors who previously had been selected.

The Court first questioned certain statements by the trial court to the extent that they suggested that the defense did not offer race-neutral reasons for striking those jurors. Setting aside the racial housing patterns in the county referenced by the trial court — something the Court stated it could not evaluate on the existing record — appellant argued that residing in a gated community correlates with attitudes about crime or those accused of it and thus that his stated reason for striking Juror No. 27 was not based on race. The Court agreed. To the extent that this reflects an erroneous stereotype, it is a stereotype about residents of gated communities, not a stereotype about a particular racial group. Similarly, the Court found that Juror No. 30's experience as a senior noncommissioned military officer, which defense counsel speculated could lead him to bring outsized influence into the jury room, as well as his experience with firearms, are race-neutral reasons, as well.

But, the Court stated, notwithstanding the trial court's statements that the strike of Juror No. 27 was a "racial strike" and that the reasons given for striking Juror No. 30 were not "race neutral," it was clear that the trial court nonetheless reached the third step of the *McCollum* inquiry and concluded that the defense had acted with discriminatory intent in striking the two jurors. After the defense team offered its explanations for striking each of the jurors, the trial court told the prosecutor that the burden shifted back to her to show pretext. After the prosecutor attempted to do so, the trial court stated that the explanations offered for Juror No. 27 were "subterfuge" in part because "there were other people who were educators who were placed on the jury." As to Juror No. 30, the trial court stated that it had a "problem" with the defense's explanation in that that juror was similar to Juror No. 4, who also had military experience and firearms training. Furthermore, the Court noted, the trial court also stated in its order denying appellant's motion for new trial that it found "no error in its ruling that the State met its burden in showing that there was *discriminatory intent* for both of these strikes" (emphasis added). The trial court thus at least implicitly found that the defense's stated reasons for striking the two jurors were pretextual.

And, the Court noted, appellant did not challenge the trial court's factual findings that the defense failed to strike jurors who were educators and failed to strike a black juror who had military experience and firearms training. Instead, when the trial court pointed out the similarity between Juror No. 30 and Juror No. 4, the black juror with military experience, the

defense responded by misattributing comments to Juror No. 4. Thus, the Court concluded, it could not, based on this record, hold that the trial court's finding of discriminatory intent was clearly erroneous.

## Motions to Exclude Jury Pool

*Cox v. State, S19A0791 (8/19/19)*

Appellant was convicted of felony murder and possession of a firearm during the commission of a felony. He contended that the trial court erred in denying his motion to exclude the jury pool. The Court disagreed.

The record showed that prior to the start of appellant's trial, the court transferred his case from Lamar County to Monroe County because of the publicity surrounding the case. On the morning of trial, and before the jurors were officially qualified to sit and hear the case, the trial court asked the jury pool if "anything occurred today prior to us getting started that may have [a]ffected your ability to serve as a juror" in the case. The trial court received no response. Defense counsel then approached the bench and moved the court to excuse the jury, arguing that three protestors standing outside the courthouse with signs "poisoned" the entire jury pool. The State opposed the motion, and contended that there was only one person outside the courthouse with a sign. The trial court withheld ruling on the motion and continued to qualify the jury, asking the potential jurors whether they had formed an opinion as to the guilt or innocence of the accused and if they had any prejudice or bias in the case.

At this time, trial counsel re-approached the bench and renewed his motion, once again arguing that the pool was "tainted by the protestors out front" and that "some of [the jury] may have been intimidated." The State responded that "everybody was asked ... if they had any knowledge or [had] heard [anything about] this case and ... nobody said they were intimidated or knew anything about this case." The trial court agreed and denied the motion.

The Court found that there was nothing in the record showing a basis for excusing any of the jurors based on potential bias or exposure to the protestors outside the courthouse on the first day of jury selection. The record showed that the protestors were limited in number, and no evidence was presented to the trial court to show that any of the jurors saw or interacted with any of these protestors. In fact, prior to the start of voir dire, the trial court asked the jury pool if anything had occurred that morning that affected their ability to be impartial, and the court received no response. Thus, the Court stated, because there was only trial counsel's speculation that the presence of the protestors affected the jurors and their ability to remain fair and impartial, the trial court did not abuse its discretion in denying appellant's motion to excuse the entire jury pool.

## Void Sentences; Motions to Withdraw Plea

*Hood v. State, A19A0952 (8/20/19)*

In 2011, appellant entered a negotiated guilty plea to statutory rape and child molestation. In 2017, the Court of Appeals reversed the trial court's denial of appellant's motion to vacate his sentence. The Court found that appellant's child molestation sentence did not comply with the split sentence requirement of former OCGA § 17-10-6.2 (b). *Hood v. State*, 343 Ga. App. 230, 234 (1) (2017).

Upon remittitur, appellant moved to withdraw his guilty plea to the child molestation charge, arguing that he had a statutory right under former OCGA § 17-7-93 (b) to withdraw his guilty plea prior to being resentenced. The trial court denied the motion.

The Court held that as a rule, a defendant has an absolute right to withdraw his plea before sentence is pronounced. Since a void sentence is the same as no sentence at all, the defendant stands in the position as if he had pled guilty and not been sentenced, and so may withdraw his guilty plea as of right before resentencing, even following the expiration of the term of court in which the void sentence was pronounced. Therefore, because the court imposed a void sentence, appellant stood in the position as if he had pled guilty but not yet been sentenced, and thus had the absolute right to withdraw his plea before resentencing. Accordingly, the Court concluded, the trial court's denial of appellant's motion to withdraw his guilty plea to child molestation prior to resentencing was erroneous.

### **Rule 404 (b); Rule 403**

*State v. Jackson, A19A1478 (8/20/19)*

Jackson was indicted on three counts of aggravated assault (family violence), one count of battery (family violence), one count of simple assault (family violence), and one count of criminal trespass. The State filed a “Notice of Intent to Present Other Acts Evidence” seeking to admit evidence of prior bad acts pursuant to OCGA § 24-4-404 (b) through the testimony of three witnesses. The trial court denied the State's motion.

The State contended that the trial court applied an improper standard when it excluded the evidence. The Court agreed. The Court stated that prior to the enactment of the new evidence code, Georgia had no direct statutory equivalent to Rule 403, but case law on the issue generally required that a trial court merely balance the probative value of evidence with its prejudicial effect without requiring that the objecting party establish substantial prejudice. In stark contrast, the plain meaning of OCGA § 24-4-403's text makes clear that the trial court may only exclude relevant evidence when its probative value is “substantially outweighed” by one of the designated concerns. And, the Court noted, the exclusion of evidence under Rule 403 is an extraordinary remedy which should be used only sparingly.

Here, the trial court found only that the probative value of the other acts evidence was not outweighed by the danger of unfair prejudice and failed to analyze whether such prejudice substantially outweighed any probative value. Accordingly, the trial court erred when it performed its analysis of the issue under OCGA § 24-4-403. Therefore, the Court vacated the judgment and remanded the case for reconsideration in light of the correct standard under OCGA § 24-4-403.

### **Sufficiency of the Evidence; Other Acts Evidence**

*Espinosa v. State, A19A1391 (8/21/19)*

Appellant was convicted of four counts of child molestation and one count of criminal attempt to commit child molestation (as a lesser-included offense of child molestation - Count 5), for acts involving three children (R. C., E. C. and C. C.) his girlfriend was babysitting. Appellant contended that the evidence was insufficient to prove Count 4 of the indictment. The Court agreed.

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING SEPTEMBER 27, 2019

Issue 39-19

OCGA § 16-6-4 (a) provides, in relevant part, that "[a] person commits the offense of child molestation when such person: (1) [d]oes any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person[.]" Count 4 alleged that appellant committed the offense of child molestation by touching the vaginal area of R. C., a child, with his hand.

Here, the Court found, R. C. testified at trial that appellant had tried to touch her vaginal area, but never actually did so because she moved his hand. And in her forensic interview, she stated that appellant had attempted to touch her vaginal area and buttocks but that he was unable to do so. R. C.'s mother testified that R. C. told her that appellant had tried to touch her. Thus, there was no evidence that appellant touched R. C.'s vaginal area. Given this lack of evidence, the Court concluded that the conviction for child molestation involving R. C. could not stand.

Appellant also alleged that trial counsel was ineffective because she failed to object to the admission of his alleged prior bad acts. Specifically, he argued that the alleged prior bad acts were not relevant to the child molestation charges and that any probative value of the evidence was substantially outweighed by its prejudicial value.

The record showed that in her forensic interview, E. C. stated that appellant was "mean" because he always hits his girlfriend (the babysitter); when asked to explain, E. C. said that she saw him hit the babysitter's arm and that he broke the babysitter's finger. R. C. stated in her forensic interview that the babysitter witnessed some of the acts of molestation and said she was going to report appellant to the police. R. C. said that "every time [the babysitter] says that, she forgets."

The Court found that evidence that appellant physically abused the babysitter could have explained why she did not report him to police. Further, R. C. told her mother that she was happy that the babysitter was going to call the police, and that statement immediately led to the children's outcry to their mother. Evidence involving appellant's treatment of the babysitter pertained to the chain of events in the case and was linked by time and circumstances with the charged offenses. Thus, the Court found, the evidence was inextricably intertwined with the charged offenses and was admissible as intrinsic evidence. Consequently, the trial court would not have abused its discretion in finding that the evidence was relevant and that its probative value was not substantially outweighed by its prejudicial value. And, since the evidence was not barred by Rule 404 (b), and trial counsel was not ineffective for not objecting.