

THIS WEEK:

- **Jury Instructions; *McClure***
- **Pro se Post-Conviction Motions; Duties of Defense Counsel**
- **Prior Convictions; Rule 404 (b)**
- **Prior Inconsistent Statements; Impeachment**
- **Search & Seizure; Fair Probability Standard**

Jury Instructions; *McClure*

Henry v. State, S19A0953 (10/21/19)

Appellant was acquitted of malice murder but convicted of felony murder and possession of a firearm during the commission of a felony. The evidence, very briefly stated, showed that appellant was with his two friends, Nikki Miller and Jamonie Williams. Appellant and Miller were walking and Williams was on a bicycle. The victim was in a vehicle parked at an intersection. When the three reached the intersection, the victim "obnoxiously" honked his horn at them and turned to follow them "real close," making them feel unsafe. The victim and appellant exchanged words. The victim tried to use his vehicle to knock Williams off his bicycle. The victim reached into his console and then got out of the car. Appellant reached into his backpack, pulled a pistol and shot the victim.

Appellant contended that the trial court erred in giving his requested jury instructions on justification by self-defense and defense of others. Citing its recent decision in *McClure v. State*, ___ Ga. ___ (Case No. S18G1599, decided Oct. 7, 2019), the Court agreed.

The Court found that the State presented more than slight evidence to support appellant's requested jury instructions. Both Williams and Miller testified that the victim was behaving aggressively and irrationally, causing them to feel unsafe and to fear that violence might occur. Their testimony was corroborated by evidence that the victim's blood alcohol content was nearly twice the legal limit and that he had .25 mg/L of cocaine in his system. After blowing his horn for no apparent reason, following appellant and his companions in a manner that made both Williams and Miller fearful, engaging in an extended argument with Williams or appellant, pulling suddenly in front of appellant and Miller, and attempting to run over Williams, the victim then reached into his console before getting out of his car to confront appellant and Miller "eye to eye." Assuming, for the sake of argument, that appellant was the shooter, only after this escalating series of events did appellant remove a weapon from his backpack and shoot the victim. Therefore, the Court concluded, the trial court erred in refusing to give the requested instructions.

Moreover, the Court found, the error was not harmless. Here, the trial court refused to allow appellant even to *argue* to the jury that the evidence presented at trial showed that he was justified in defending himself and his companions, agreeing with the State that appellant's failure to testify constituted abandonment of his affirmative defenses. As a result, appellant's closing argument was truncated and limited to arguing that Williams was the actual shooter and relying upon the State's

burden to prove its case. In effect, appellant was forced to choose between his right not to testify and the assertion of affirmative defenses supported by the State's evidence. As a result, he was deprived of significant defenses that he had outlined for the jury in his opening statement. Under these circumstances, the Court stated it could not say that it was highly probable that the trial court's instructional error did not contribute to the verdicts against appellant. Therefore, the Court reversed appellant's convictions.

Pro se Post-Conviction Motions; Duties of Defense Counsel

Dos Santos v. State, S19A1352 (10/21/19)

Appellant, while represented by counsel, entered a negotiated plea to felony murder and other offenses. Eight days later, appellant filed a pro se motion to withdraw her plea. The trial court's term of court ended two weeks later. Three weeks after her pro se motion, appellant's defense attorney filed a motion to withdraw as counsel. The trial court granted the motion a week later and appointed appellant new counsel. Over a year later, the trial court held an evidentiary hearing on appellant's pro se motion and denied it.

Relying on *White v. State*, 302 Ga. 315 (806 SE2d 489) (2017), the Court held that appellant's pro se motion to withdraw her pleas was unauthorized and without effect, because she had no right to represent herself at the same time she was represented by a lawyer. Thus, because the motion was a legal nullity, the trial court should have dismissed appellant's pro se motion rather than ruling on its merits. Therefore, the Court vacated the trial court's judgment and remanded the case with direction to dismiss the motion.

Nevertheless, the Court noted, in reviewing *White* and its progeny, the Court found that it did not specifically address the proper disposition of an appeal from a ruling on a pro se motion that was inoperative from the start because the appellant was represented by counsel when the motion was filed. Thus, those decisions were not precedential holdings that these sorts of appeals from rulings on legally nugatory motions should be decided on their merits. Having now focused on the issue, the Court stated that it will henceforth dismiss appeals from trial court orders that properly treat as legal nullities motions to withdraw guilty pleas filed pro se by defendants who are represented by counsel.

In so holding, the Court stated that defense lawyers generally have a constitutional duty to consult with their clients regarding post-conviction procedures and remedies. And the Court stressed, if it was not clear enough before, Georgia lawyers cannot simply abandon their criminal defendant clients immediately after the defendants enter guilty pleas and are sentenced. Defense attorneys are obligated to continue to represent their clients at least until the time these post-conviction remedies expire (and if such a remedy is timely pursued, until it is resolved) — unless the lawyer is properly authorized by the trial court to withdraw from the representation or is properly replaced by substitute counsel, events that should be reflected in writing in the record for the case. The time period for continued representation after a judgment on a guilty plea is entered will typically be the longer of 30 days (the deadline for filing a notice of appeal unless tolled or extended, see OCGA §§ 5-6-38 & 5-6-39), or the time until the end of the term of court in which the judgment was entered (the deadline for filing a timely motion to withdraw a guilty plea, which may be as short as the same day or as long as several months).

The Court recognized that these holdings may place difficult burdens on conscientious defense counsel. A guilty plea may be entered near or even on the last day of the court's term, leaving little time to consult with the defendant and to file a motion to withdraw the plea if warranted. Or a legal ground on which a motion to withdraw the guilty plea (or an appeal) would be based may create a conflict of interest for plea counsel, requiring plea counsel to be replaced by conflict-free counsel — a process that takes some time, both to identify new counsel and to comply with USCR 4.3. But before a guilty plea is entered, defense lawyers can explain to their clients the basic processes for (and limitations on) post-conviction challenges to guilty pleas, leaving only the decision to be made about whether to invoke such a process. And when time is tight, plea counsel may protect their client's interests by filing a timely, bare-bones "placeholder" motion to withdraw guilty plea, which — unlike an untimely motion or an inoperative motion filed pro se by the still-represented client — meets the filing deadline and might be amended later (by conflict-free new counsel if necessary).

Moreover, the Court recognize that, unfortunately, some criminal defense lawyers may not be as conscientious about their duties after their clients plead guilty and are sentenced. Defendants who are abandoned by their plea counsel have a remedy, however. If a defendant's right to appeal from a guilty plea (directly or after filing a motion to withdraw the plea) is frustrated by the constitutionally ineffective assistance of plea counsel in advising the defendant about or pursuing those post-conviction remedies, the defendant may seek an out-of-time appeal in the trial court or in habeas corpus.

Finally, the Court concluded that appellant's pro se motion to withdraw her guilty pleas, filed while she was still represented by plea counsel, was a legal nullity. The motion should have been dismissed on that ground by the trial court, rather than denied on the merits, and on remand the trial court must dismiss the motion. No appeal will be available from that dismissal order. Appellant has not yet sought a remedy for her plea counsel's possible abandonment of her after her guilty plea, and the Court expressed no opinion on whether any such remedy should be granted.

Prior Convictions; Rule 404 (b)

McKinney v. State, S19A0908 (10/21/19)

Appellant was convicted of malice murder for killing his former girlfriend by beating and strangling her. Appellant contended that the trial court committed plain error by admitting his conviction for a battery against the victim committed three months before the murder on the ground that he was not represented by counsel when he pled guilty and that the conviction was inadmissible hearsay which violated his right to confront the witnesses against him. The Court disagreed.

First, the Court found, the error cannot be plain where there is no controlling authority on point and here, the Court noted, appellant failed to identify any controlling authority — nor did the Court find any — supporting his argument that a conviction resulting from an uncounseled misdemeanor guilty plea not resulting in imprisonment is inadmissible hearsay or inadmissible under the Confrontation Clause.

Thus, because there is no controlling authority supporting appellant's argument, he failed to show a clear error.

Also, the Court stated, to show that an error affected his substantial rights, appellant must make an affirmative showing that the error probably did affect the outcome below. But here, the Court found, the battery conviction was cumulative of other testimony concerning the offense. The only information the conviction added was that appellant took responsibility and was punished for this battery of the victim. In addition, the jury heard substantial testimony about other prior

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difficulties between appellant and the victim, to which appellant did not raise any objection. Thus, the Court found, in light of the testimony about the battery as well as the other strong evidence that appellant killed the victim, the admission of his battery conviction did not probably affect the trial's outcome.

Next, appellant contended that the trial court erred in admitting Rule 404 (b) evidence. At trial, the State presented evidence of appellant's prior assault of a former girlfriend. The former girlfriend testified that she dated appellant and lived with him for about a year in 1999. Four days after she kicked him out of the house, he came to her and said that he wanted to talk. They walked down the street calmly talking for a while; then appellant suddenly grabbed her by the neck and dragged her down into nearby bushes. He held one arm around her neck in a choking manner and dragged her backwards, making her lie down. While appellant choked her with one hand, he tried to take off her clothes with the other. He stopped his attack when she said that they had not really broken up. Appellant later pled guilty to aggravated assault with the intent to rape, and a certified copy of that conviction was admitted into evidence.

The Court noted that of the three purposes for which evidence of the prior attack was admitted, the prosecutor focused most in his closing argument on the purpose of proving appellant's identity as the perpetrator in the charged attack against the victim. As to the first element of the Rule 404 (b) test, when extrinsic offense evidence is introduced to prove identity, the likeness of the offenses is the crucial consideration. The physical similarity must be such that it marks the offenses as the handiwork of the accused. Here, the Court found, the prior conduct and the charged offenses share several significant similarities. In both incidents, the assailant dragged a female victim off a walkway into nearby bushes, pulling her backwards and to the ground; choked her with his hand; and removed or tried to remove her clothes.

Appellant argued that these similarities are characteristic of many attacks on women, rather than being indicative of his handiwork. But the Court stated, even if he were right, his argument overlooks a crucial similarity — both victims were appellant's former girlfriends. And although the charged crimes and the prior attack occurred 15 years apart, each attack was committed after the victim's relationship with appellant ended. It is true that unlike in the prior attack, the assailant in the crimes charged in this case also hit the victim in the head and used not only his hand to choke her but also a ligature (likely the tights removed from the victim). However, under all of the circumstances, including the evidence that the prior victim talked appellant into stopping the attack against her, the Court found those differences did not constitute major dissimilarities.

In fact, the Court stated, comparison of the two incidents indicates that the possibility was quite remote that a person other than appellant committed the charged crimes of attacking one of appellant's ex-girlfriends in a very similar way as his 1999 attack on another ex-girlfriend. Thus, the trial court could properly conclude that evidence of the prior attack was relevant to prove identity.

Next, the Court found, the former girlfriend's testimony identifying appellant as her attacker and his subsequent conviction for aggravated assault undeniably met the third element of the Rule 404 (b) test by providing sufficient proof for the jury to find by a preponderance of the evidence that appellant committed the prior attack. Therefore, the Court concluded, the trial court did not abuse its discretion in admitting this evidence to prove identity.

Turning to whether the evidence was admissible under Rule 403, the Court found that the evidence that appellant had assaulted another woman was obviously prejudicial to him, but the trial court could reasonably conclude that this prejudice

did not substantially outweigh the significant probative value of the prior attack. Additionally, the trial court instructed the jury both when the prior act evidence was admitted and in the final jury charge that the jury should not consider the prior act evidence to prove appellant's character, but should consider it only to the extent that it was relevant to show his identity, intent, and motive in the charged crimes.

Prior Inconsistent Statements; Impeachment

Anderson v. State, S19A0682 (10/21/19)

Appellant was convicted of felony murder, aggravated assault, and a firearm offense in connection with the shooting death of Abron and the non-fatal shooting of Barnes. The evidence, briefly stated, showed that Barnes, Abron and Walker drove to a home to ask someone the phone number of a marijuana dealer. Barnes got out of the vehicle and walked onto the porch where he began talking to some people. Appellant approached Barnes and acted in an aggressive manner. Barnes became nervous when people on the porch began discussing a mask. Appellant followed Barnes off the porch. Appellant then went to a white van, retrieved a gun and shot Barnes a number of times. Abron tried to drive away. Appellant fired at the vehicle. Abron jumped out and appellant shot him in the back. Walker crawled into the driver's seat and drove away. After the shooting, appellant told his girlfriend, Cooper, that he shot Barnes because Barnes confronted him about some kind of set-up with a mask and "it was either [Barnes] or him." Cooper also owned a white van, which appellant borrowed on the day of the shooting.

Appellant argued that the trial court erred in admitting the video recording of a detective's interview with Cooper to impeach Cooper's trial testimony. The Court disagreed. The Court found that the recording was admissible to impeach Cooper by contradiction. After Cooper testified that the detective threatened her during the interview, playing the recording of the interview — during which the detective did not threaten her — was a permissible way to impeach Cooper's untruthful statement.

Nevertheless, appellant argued, the trial court should have granted a mistrial after the jury heard Cooper's recorded statement about a mask set-up and a possible robbery, because the statement indicated that appellant had been involved in another crime. But, the Court stated, that recorded statement was admissible as a prior inconsistent statement by Cooper. Cooper's statement about the mask set-up during the recorded interview was inconsistent with her trial testimony first that appellant did not tell her anything about the shooting and then that appellant said only that he shot at other people because "it was either him or them." Moreover, the evidence of the mask set-up as a reason for the confrontation between appellant and Barnes was significantly probative because it indicated appellant's motive for a shooting that otherwise had no obvious motive. And the reference to the robbery was not especially prejudicial given the oblique way in which it was made. Accordingly, the trial court did not abuse its discretion in denying a mistrial.

Appellant also contended that the trial court erred by excluding evidence of Barnes's more-than-ten-year-old criminal convictions under OCGA § 24-6-609 (b). The Court disagreed. Rule 609 (b) establishes a presumption against using convictions over ten years old to impeach witnesses and such convictions will be admitted very rarely and only in exceptional circumstances.

First, appellant argued that the trial court erred by failing to identify on the record what factors formed the basis of its conclusion that the probative value of the old convictions did not substantially outweigh their prejudicial effect. But, the Court stated, the trial court was not required to make such findings on the record because the court *excluded* the convictions. It is only when the court *admits* evidence of a conviction over ten years old that the court must engage in a balancing test on the record.

Second, appellant argued that the trial court should have automatically admitted Barnes's old convictions because they were for crimes of dishonesty. Appellant pointed to OCGA § 24-6-609 (a) (2), which provides that convictions for crimes requiring proof of dishonesty or making a false statement are admissible for impeachment of witnesses other than the defendant "regardless of the punishment," whereas convictions for all other kinds of crimes are admissible only "if the crime was punishable by death or imprisonment in excess of one year," OCGA § 24-6-609 (a) (1). But, the Court stated, even assuming that some of Barnes's excluded convictions were for crimes of dishonesty, Rule 609 (a) does not help appellant, because the convictions were excluded not based on their punishment level but based on their age. The age issue is governed by Rule 609 (b), which expressly applies to "[e]vidence of a conviction under this Code section," meaning convictions falling under Rule 609 (a) (1) or (2). Furthermore, merely showing that a conviction older than ten years involved a crime of dishonesty is not sufficient to prove that the probative value of the conviction substantially outweighed its prejudice.

Finally, Appellant contended that even if the probative value of the excluded convictions did not substantially outweigh their prejudicial effect initially, the convictions became admissible after the State made Barnes's criminal history an issue by offering into evidence certified copies of his 2008 convictions. But, the Court found, the State did not imply that the convictions it presented were Barnes's only convictions, so admission of his older convictions was not necessary to rebut an incorrect implication. Nor did appellant explain how evidence of Barnes's more recent convictions increase the probative value of his old convictions. To the contrary, the admission of Barnes's other convictions diminished the probative value of his much older convictions, because the jury was aware even without the old convictions that Barnes had a substantial criminal history. Thus, the Court concluded, the trial court did not abuse its discretion by excluding from evidence Barnes's convictions that were more than ten years old.

Search & Seizure; Fair Probability Standard

Leili v. State, S19A0541 (10/21/19)

Appellant was convicted of malice murder and associated offenses arising out of the death of his wife. The evidence, very briefly stated, showed that appellant and the victim were married in the late 1990s and during the course of their marriage, appellant was verbally abused and exhibited controlling behavior, some of which was physical. The victim disappeared on July 9, 2011. On July 16, two members of a search party found the victim's naked body hidden, face down, under a mound of loose dirt and vegetation at the front of the Leilis' neighborhood. Though an autopsy revealed no obvious cause of death, the medical examiner testified that she found no evidence that the victim died of a natural cause, disease, self-inflicted injury, or violent accident. The medical examiner found injuries consistent with strangulation, though the concealment and deterioration of the body frustrated a definitive finding, and concluded that the death was "highly suspicious of homicidal violence."

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Hours after the body was found, a search warrant was issued for the Leili's residence. However, the case went cold and appellant moved to Vermont. In 2012, a cold-case investigator developed additional evidence and appellant was arrested. Two months after his arrest, appellant's Vermont home was searched.

Appellant first contended that the trial court erred in denying his motion to suppress the July 16, 2011 search of his home. Specifically, he contended that there was insufficient probable cause for the issuance of the warrant. However, the Court stated, a warrant to search a murder suspect's home need not prove that the suspect was in fact the killer, only that there is a fair probability that contraband or evidence of a crime will be found in a particular place. And here, the Court found, the "fair probability" standard was met. The warrant plainly set out the concerning circumstances surrounding the victim's disappearance, appellant's delay in reporting her missing, the history of domestic incidents between the couple, the couple's recent fight, and the discovery of a woman's body in a wooded area close to the Leili residence matching the victim's description. The warrant also detailed that the house was equipped with surveillance equipment, that the cars were equipped with GPS devices, and that appellant owned at least one firearm. Based on the totality of the circumstances, the Court held that the magistrate was authorized to conclude that probable cause existed for the issuance of the search warrant.

Appellant also contends that, even if there were probable cause, the warrant was needlessly broad and that there was insufficient cause to justify the seizure of all of appellant's electronics. The Court disagreed. It is universally recognized that the particularity requirement must be applied with a practical margin of flexibility, depending on the type of property to be seized, and that a description of property will be acceptable if it is as specific as the circumstances and nature of activity under investigation permit. Here, at the time the warrant was sought and executed, investigators knew only that a possible murder had occurred in close proximity to the Leili residence; that the couple had fought immediately prior to the victim's disappearance; that the couple had a history of domestic discord; that appellant had failed to report his wife missing; and that certain surveillance equipment (both cameras and GPS-tracking devices) could hold evidence related to the crime. The magistrate was authorized to make the "practical, common-sense" determination that the surveillance cameras and GPS-tracking equipment may have captured evidence of the relevant crimes and that any such evidence would have been stored on electronic devices, though officers could not articulate exactly where those files would be found. Further, though the warrant permitted the seizure of all electronic equipment, when read as a whole, the warrant here must be understood as limiting the search to items (in addition to the items specifically mentioned in the warrant) reasonably appearing to be connected to the specific crimes delineated in the warrant. Accordingly, the Court held that the trial court correctly denied appellant's motion to suppress with respect to this warrant.

Next, appellant contended that the trial court erred in denying his motion to suppress the search warrant issued in Vermont two months after appellant was arrested where he lived. The Court again disagreed. In the affidavits supporting the application for a search warrant, investigators explained that appellant's daughter testified at appellant's bond hearing that she had access to certain computers and electronics belonging to her father and that those electronics contained, among other things, a clip of surveillance video pertaining to a domestic incident occurring just weeks before the murder, which had prompted the victim to contact law enforcement for help. The affidavit explained that investigators had been unable to recover surveillance video from around the time of the murder — because it had been deleted and rendered unrecoverable — and, further, that law enforcement was not previously aware of the existence of the video clip referenced by appellant's daughter. The affidavits also detailed jailhouse telephone calls from appellant to his daughter in which he asked her to hide certain computers and electronic devices or to copy or delete data from various devices. The warrant was issued, and it authorized the search of the Vermont residence and the seizure of "any data storage devices to include but

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not limited to cell phones, computers, UBS storage devices, zip drives, binders, and external hard drives.” Law enforcement seized numerous computer and electronic devices, as well as cellular telephones.

Appellant argued that the warrant lacked probable cause and was needlessly broad. However, the Court found again that the “fair probability” test was met here. The affidavits supporting the warrants plainly set out the real possibility that appellant had saved or hidden electronic devices containing digital data relevant to the murder of the victim (that had been previously unavailable to law enforcement) and that appellant was using his daughter to manage those devices. With respect to breadth, the affidavits also plainly established that there were numerous electronic devices at issue, some of which appellant had been attempting to hide. Accordingly, the Court concluded, the trial court did not err when it denied appellant’s motion to suppress items seized from the Vermont residence.