

THIS WEEK:

- **Sentencing; Constitutional Challenges**
- **Right of Confrontation; Telephone Calls**
- **Statements; *Massiah***
- **Custodial Statements; *Miranda***
- **Evidence of Insurance; Motive**
- **Authentication; Texts and Social Media**
- **Motions for New Trial; Standards for Granting New Trials**

Sentencing; Constitutional Challenges

Jones v. State, S19A1248 (12/23/19)

Appellant was convicted of three counts of felony sexual battery. At the time of the offenses, he was 18 years old and the victim was 15 years old. He contended that the felony sexual battery sentencing scheme violates his right to equal protection under the Georgia and United States Constitutions because the statute fails to include a misdemeanor punishment provision for sexual contact between teenagers (what is sometimes referred to as a “Romeo and Juliet provision”) similar to Georgia’s statutory rape (OCGA § 16-6-3 (c)) and child molestation (OCGA § 16-6-4 (b) (2)) sentencing schemes. Conceding that his claim is subject to rational basis review, appellant argued that the failure by the General Assembly to include a Romeo and Juliet provision within the sexual battery statute creates an unconstitutional disparity in sentencing between teenage defendants accused of sexual battery and those accused of statutory rape or child molestation. The Court disagreed.

The Court stated that in general for equal protection purposes, criminal defendants are similarly situated if they are charged with the same crime. But here, appellant alleged he is being treated differently from teenage defendants charged with *different* crimes. Indeed, whereas felony sexual battery occurs when a person “intentionally makes physical contact with the intimate parts of the body of another person [under the age of 16] without the consent of that person,” OCGA § 16-6-22.1 (b and d), the State is not required to prove lack of consent for either statutory rape or child molestation, see OCGA §§ 16-6-3, 16-6-4. Thus, because appellant is not similarly situated to teenage defendants charged with statutory rape and child molestation, his equal protection claim failed.

Appellant also contended that the sentencing scheme for felony sexual battery violates the prohibition against cruel and unusual punishment. Specifically, he argued that because he was facing up to 15 years in confinement under OCGA § 16-6-22.1 (d), the statute, as applied to him, is grossly disproportionate to the severity of his crime. Again, the Court disagreed.

Here, appellant was charged with three counts of felony sexual battery, and the evidence showed that he groped the breasts, buttocks, and groin of a 15-year-old girl without her consent. For this, appellant received three concurrent 5-year probated

sentences as a first offender. Appellant nevertheless contended that his sentence is grossly disproportionate because, had he been charged under the Romeo and Juliet provision of the child molestation statute, he would have received a misdemeanor sentence. But, the Court noted, the Romeo and Juliet provision of the child molestation statute applies even to consensual behavior between teenagers, whereas, here, there was evidence that appellant touched the intimate parts of the victim without her consent.

Appellant also argued that the felony sexual battery sentencing scheme is too severe because he could have received a sentence of 15 years in confinement. The Court, however, found this argument was also unavailing because it does not review a claim of cruel and unusual punishment based upon a sentence a defendant could have received; instead, the Court reviews the sentence a defendant did receive. Under that standard, appellant's concurrent, 5-year probated, first offender sentences were not grossly disproportionate to the gravity of the offense of felony sexual battery. Accordingly, because appellant failed to meet the threshold inference of gross disproportionality, his claim of cruel and unusual punishment failed.

Right of Confrontation; Telephone Calls

Denson v. State, S19A1396 (12/23/19)

Appellant was convicted of malice murder and armed robbery in connection with the shooting death of Julian Hernandez. The evidence, very briefly stated, showed that Julian and his brother, Luis, were entertaining two women, Lindsey and Clark, in a motel room. Shortly before appellant entered the room with a gun, Clark took a call from Marcus Price, who was in jail at the time and the call continued during the commission of the armed robbery in which appellant repeatedly shot Julian.

Appellant argued that, because Price was not available to testify at trial, the trial court violated his Confrontation Clause right by introducing into evidence an audio recording of the phone call between Clark and Price that occurred during the commission of the crime. The Court noted that because appellant did not object to the admission of the audio recording at trial, review of his claim was only for plain error.

The Court stated that a Confrontation Clause violation occurs when an out-of-court “testimonial” statement is admitted into evidence and the declarant is unavailable at trial and was not previously subjected to cross-examination. A statement is testimonial if its primary purpose was to establish evidence that could be used in a future prosecution.

Here, the Court found, the recorded phone call contained statements from Price to Clark, but also statements from Price to unknown inmates and Price's friends and family whom Clark contacted using a three-way call feature. But, the Court noted, appellant did not identify which of Price's statements were objectionable, but even considering all of them, none were testimonial. Price's statements were made shortly before and during the crimes — before appellant was arrested for his involvement. Price's statements to Clark, family and friends, and unknown inmates at the jail were not made to assist a future prosecution and, thus, were not testimonial. Consequently, there was no error, much less plain error, in admitting the recording.

Statements; *Massiah*

Gebhardt v. State, S19A1582 (12/23/19)

Appellant was convicted in 2018 of malice murder and other offenses in connection with the torture and stabbing death of Coggins in 1983. In April of 2017, appellant was incarcerated on unrelated charges, and Vaughn, who was also incarcerated at that time, went into appellant's cell while wearing a recording device provided by police. Appellant had not yet been indicted or arrested for Coggins's murder. When Vaughn asked appellant about Coggins's murder, appellant initially denied knowing anything about it, but then he admitted that he did not know what he might have said about the murder while he was drunk at a party hosted by Willard Sanders (another man to whom appellant had earlier admitted that he and another man had committed the murder). Appellant was arrested for Coggins's murder in October of 2017, and, while he was incarcerated with Patrick Douglas, appellant told Douglas that he was a member of the Ku Klux Klan; that it was unfair that the sheriff could "get away with killing a ni**er," but he could not; and that he "didn't need no help killing that ni**er," as he was the one who "slammed him down and stabbed him in the back."

Appellant argued that the trial court erred by admitting into evidence the statements that he made to Vaughn and Douglas while he was incarcerated with them, because the statements were obtained in violation of his right to counsel. He contended that, because Vaughn and Douglas were acting as government agents at the time that appellant spoke to them, the trial court should have granted his motion to suppress (a) the recording that Vaughn made of his conversation with appellant while Vaughn was wearing a recording device, and (b) the statements that appellant made to Douglas while appellant was incarcerated with him. The Court disagreed.

The Court noted that under *Massiah v. United States*, 377 U.S. 201 (84 SCt 1199, 12 LE2d 246) (1964), the Sixth Amendment right to counsel is violated by the admission of incriminating statements that a government agent deliberately elicits in the absence of counsel after judicial proceedings have been initiated against the defendant. Furthermore, in order to be considered to be a government agent, the informant must (1) have some sort of agreement with, or act under instructions from, a government official, and (2) take action to deliberately elicit incriminating information.

As to the Vaughn statements, the Court found that it was undisputed that, at the time that appellant made his statements to Vaughn, appellant had not yet been indicted for Coggins's murder. At that time, appellant was in jail for an entirely unrelated offense. Accordingly, evidence supported the conclusion that there could not have been a violation of appellant's right to counsel when he began speaking with Vaughn about Coggins's murder, since under *Massiah*, the right to counsel is violated by the admission of incriminating statements which a government agent deliberately elicits after indictment and in the absence of counsel.

Next, with respect to Douglas, the Court found that the evidence supported the conclusion that Douglas did not satisfy either prong of the test to determine whether he was an agent of the government for purposes of his jailhouse conversation with appellant. Specifically, Douglas did not act under instructions from the police at the time that he spoke with appellant. Nor did he have any agreement with police to exchange any incriminating information that he received from appellant for payment, lenient treatment, or some other benefit. Douglas verified as much during his trial testimony. In addition, the record revealed that Douglas did not take any action designed deliberately to elicit incriminating information from appellant. To the contrary, appellant opened up to, and spoke with, Douglas before Douglas had any conversation with

the police about appellant's jailhouse admissions. Douglas went to police only *after* appellant told him about Coggins's murder, and he had never been recruited by police in any way to attempt to elicit incriminating statements from appellant. Thus, the Court found, because evidence supported the conclusion that Douglas did not meet either prong of the test to show that he was acting as a government agent at the time that appellant spoke with him, there was no abuse of discretion in the trial court's decision to allow Douglas to testify regarding appellant's statements to him.

Custodial Statements; *Miranda*

State v. Rumph, S19A0995 (12/23/19)

Rumph was indicted for the murder and other charges relating to the death of Rumph's coworker. The evidence, very briefly stated, showed that Investigator Whittle, first interviewed Rumph at Rumph's home concerning the coworker's death. The interview was audio-recorded. About an hour later, at the request of the police, Rumph accompanied the officers to a sheriff's office substation where a second interview occurred. This interview was also audio-recorded. The trial court suppressed the statements from both interviews on the ground that the police had failed to give Rumph *Miranda* warnings prior to interviewing him.

The State appealed, contending that the trial court erred in suppressing the statements because, as Rumph was not in custody, *Miranda* warnings were not required. The Court agreed and reversed.

With respect to the first interview at Rumph's home, the evidence showed that Whittle telephoned Rumph and asked for and received his permission to speak with him at home prior to going there. Whittle testified that he did nothing to intimidate or coerce Rumph into speaking with him. Further, the Court stated, even if it assumed that the trial court rejected Whittle's uncontradicted testimony entirely (even though the trial court did not state anything to that effect during the hearing or in its order), the audio-recording of the interview shows that Whittle did not use harsh, intimidating, or coercive language. Rather, he asked for Rumph's help because Rumph was the last person to see the victim alive. The interview was conversational and consisted primarily of Whittle's efforts to trace the victim's steps and to learn what, if anything, Rumph had witnessed while he was working with the victim. Nothing in the audio-recording suggested that a reasonable person in Rumph's situation would have perceived that he was in custody.

With respect to the second interview, Whittle testified that Rumph agreed to go with the investigators to the sheriff's office to give a statement. Again, even if the trial court rejected Whittle's testimony, the Court found that the video-recording of the interview did not support a finding that a reasonable person in Rumph's position would perceive that he was in custody. Rumph retained possession of his keys and his phone and was allowed to take phone calls and leave the interview room for breaks. Rumph was often left alone in the interview room, and the door of the room was often propped open. And, during the course of the interview, Rumph spoke with his mother on the phone and told her that he was *not* being forced to talk with the investigator and that he expected to leave the office soon. When Rumph asked if he was being charged with anything, Whittle said "no" and Rumph left the substation shortly thereafter.

Thus, the Court held, because the evidence did not authorize the trial court to conclude that Rumph had been formally arrested or that a reasonable person in Rumph's situation would perceive that he was in custody, *Miranda* warnings were not required. Consequently, the trial court erred in suppressing Rumph's statements on this basis.

Evidence of Insurance; Motive

Ballin v. State, S19A1087 (12/23/19)

Appellant was convicted of the malice murder of her husband. Prior to trial, the State moved in limine to admit evidence of life insurance policies for which appellant was the beneficiary and related testimony, arguing that her rights to the proceeds of such policies upon her husband's death provided a motive for her to kill him. At a pretrial hearing, appellant objected to any mention of life insurance policies naming her as beneficiary. The trial court ruled that there was sufficient independent evidence of a nexus between the offense and the life insurance policies such that evidence pertaining to the policies could be admitted at trial as evidence of motive.

Citing *Bagwell v. State*, 270 Ga. 175, 177 (1) (a) (1998), *Stoudemire v. State*, 261 Ga. 49, 50 (3) (1991) and other cases, the Court noted that it had previously held that evidence of insurance could be properly admitted where the State established some connection, or nexus, to the crime. However, each of those cases was decided before Georgia adopted the current Evidence Code. Under the current Evidence Code, all relevant evidence is admissible, with specific exceptions and relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice.

But here, the Court found, there was no indication that the trial court exercised its discretion in performing the balancing test under Rule 403. Rather, the trial court determined that there was "sufficient independent evidence of a nexus between the offense and [the] life insurance policies and that evidence requested by the State would meet the *Bagwell* test[.]" Even so, the Court determined that the trial court's failure to exercise its discretion under the proper standard was harmless. Even assuming that the trial court would have excluded the evidence if it had properly exercised its discretion, it was highly probable that any error in admitting the evidence did not contribute to the jury's verdict.

Authentication; Texts and Social Media

Nicholson v. State, S19A0992, S19A1006 (12/23/19)

Appellants Marques Nicholson and Ramon Nichols were tried together and convicted of malice murder and other crimes in connection with the gang-related shooting death of Derrick Linkhorn. The evidence showed that Nichols was the highest member of the gang and Nicholson was a high-ranking gang member. Wilson was a lower ranking gang member. The two directed lower members to kill Linkhorn, a gang member, for alleged disloyalty.

Nicholson contended that the trial court abused its discretion by admitting cell phone records that included a number of text messages that the State claimed he had sent. The State used a search warrant to obtain the records from AT&T, which also provided a verification of authenticity. Nicholson argued that the State did not sufficiently authenticate that the text messages were sent by him. The Court disagreed.

Under OCGA § 24-9-901 (a), authentication of evidence may be achieved through any of a variety of means affording evidence sufficient to support a finding that the matter in question is what its proponent claims. Documents from electronic sources are subject to the same rules of authentication as other more traditional documentary evidence and may be authenticated through circumstantial evidence, which may include the appearance, contents, substance, internal

patterns, or other distinctive characteristics of the documents, taken in conjunction with circumstances. Once the party seeking to authenticate evidence presents a prima facie case that the evidence is what it purports to be, the evidence is properly admitted, leaving the ultimate question of authenticity to be decided by the jury.

Here, the Court found, the gang expert testified that he had reviewed the cell phone records; that the subscriber address on the account matched an address listed for Nicholson on documents related to his 2009 arrest and on his driver's license; that text messages from the cell phone number used Bloods slang and terminology, which likely would not be used or understood by someone who was not associated with the gang; and that the number communicated with the phone numbers of Nichols, and other gang members. These communications included a text message from the number to Wilson's phone two days after Linkhorn was killed asking whether Wilson was searching for Linkhorn. The Court found that this was sufficient evidence to allow a reasonable jury to find that Nicholson sent the text messages in question, so the trial court did not abuse its discretion by admitting the challenged cell phone records.

Nichols also contended that the trial court abused its discretion by admitting Facebook records that included several private messages that the State claimed he had sent. The State used a search warrant to obtain the records from Facebook, which also provided a certification of authenticity. Nichols argued that the State did not sufficiently authenticate that the messages were sent by him. Again the Court disagreed.

The Court stated that the prima facie showing required to admit printouts from a Facebook account may be established by circumstantial evidence of distinctive characteristics of the account that identify its owner. At trial, the gang expert testified that he had reviewed the Facebook records; that the account contained Nichols's biographical information including his name, nicknames associated with him, and his birth date; that Wilson's name was listed in the friend's list of the account, and the owner of the account sent a message to Wilson's account wishing Wilson a happy birthday; that the IP address linked to the account was located in Decatur, where Nichols lived; and that in private messages sent from the account, the sender identified himself as "Smurf" and provided a phone number that belonged to Nichols.

The Court found this was sufficient evidence to allow a reasonable jury to find that Nichols owned the Facebook account and sent the private messages. Consequently, the trial court did not abuse its discretion by admitting the Facebook records.

Motions for New Trial; Standards for Granting New Trials

Wilkerson v. State, S19G0472 (12/23/19)

Appellant was convicted of ten aggravated assaults. The trial court granted his motion for new trial as to three of the assaults, concluding that the evidence was legally insufficient to prove beyond a reasonable doubt that he was guilty of those assaults, and concluding as well that a new trial was warranted upon the "general grounds." The State appealed, and in *State v. Wilkerson*, 348 Ga. App. 190 (2018), the Court of Appeals reversed the determination that the evidence was legally insufficient, and vacated the grant of a new trial on the general grounds. With respect to the general grounds, the Court of Appeals acknowledged that a trial court has substantial discretion to award a new trial under the general grounds, but it concluded that the trial court abused its discretion by improperly conflating the standard for the general grounds and the distinct standard by which the legal sufficiency of the evidence is assessed. The Court granted appellant's petition for writ of certiorari.

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 24, 2020

Issue 4-20

The Court stated that absent some indication in the record to the contrary, it generally presumes that trial judges understand the distinction between the legal sufficiency of the evidence under *Jackson v. Virginia* and the general grounds pursuant to OCGA § 5-5-20, and OCGA § 5-5-21. And here, the Court found, the record provided no reason to conclude that the trial court erroneously conflated the general grounds and the legal sufficiency of the evidence. Specifically, in its order granting the motion for new trial, the trial court cited *Jackson* for the standard by which the legal sufficiency of the evidence is to be assessed, and it cited OCGA §§ 5-5-20 and 5-5-21 for the standard under the general grounds. Separately applying these distinct standards, the trial court concluded that the motion should be granted under both standards: “The Court finds that the convictions for Counts 6, 7, and 8 are strongly against the weight of the evidence, are contrary to the evidence and the principles of equity and justice, and there was not sufficient evidence to allow a rational trier of fact to find [Wilkerson] guilty of these Counts.” That the trial court announced its separate conclusions in one sentence does not show legal error.

Therefore, the Court determined, nothing in the record supported the determination of the Court of Appeals that the trial court erroneously conflated the standards for the general grounds and the legal sufficiency of the evidence and did not properly exercise its discretion under the general grounds. Accordingly, the Court concluded, to the extent that the Court of Appeals vacated the grant of a new trial on the general grounds, its judgment was reversed.