

## THIS WEEK:

- **Criminal Contempt; Multiple Punishments**
- **Juror Replacement; Jury Charges**
- **Sufficiency of the Evidence; Cruelty to Children**
- **Statutes of Limitation; Pleas in Bar**
- **Rule 404 (b); Intrinsic Evidence**
- **Statements; Law Enforcement Deceptions**
- **Child Pornography; Double Jeopardy**
- **Rule 404 (b); Uncharged Offenses**

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### **Criminal Contempt; Multiple Punishments**

*Taylor v. State, S19A1476 (1/27/20)*

Appellant was indicted for malice murder and attempted rape of Madison. During a preliminary hearing, he proclaimed that "I ain't killed that b\*tch; that b\*tch killed herself." The trial court then cautioned, "Wait a minute." Appellant, however, immediately launched into an uninterrupted (albeit brief), profanity-laced tirade in which he denied killing Madison. The tirade culminated in him saying, "Y'all can kiss my black a\*\*." The trial court found appellant guilty of 13 instances of criminal contempt, one for each of the obscene words that he used during the outburst.

Appellant contended that the trial court erred by finding him guilty of multiple instances of contempt. The State and Court agreed. The Court noted that criminal contempt is a crime in the ordinary sense and the trial court imposed multiple punishments for criminal contempt under OCGA § 15-1-4 (a) (1), which permits a trial court to impose such punishment for "[m]isbehavior . . . in the presence of [a] court[] or so near thereto as to obstruct the administration of justice." But here, even assuming that each of the 13 obscene words appellant uttered during his outburst could warrant a conviction for contempt if used at different times during his criminal proceedings, the same is not true when the words are uttered during one continuous—and very brief—outburst. Thus, the trial court erred in finding appellant guilty of 13 instances of contempt. Accordingly, the Court vacated appellant's convictions and sentences and remand the case for the trial court to convict and resentence appellant for only one instance of contempt.

### **Juror Replacement; Jury Charges**

*Smith v. State, S19A1148 (1/27/20)*

Appellant was convicted of felony murder based on cruelty to children in connection with the death of her two-year-old son. She argued that the trial court abused its discretion when it dismissed a juror and replaced her with an alternate on the second day of the trial. The Court disagreed.

The Court stated that OCGA § 15-12-172 gives a trial court the discretion to discharge a juror and replace him or her with an alternate at any time so long as the trial court has a sound legal basis. And here, the Court found, Juror A.H. was late for the first day of the trial, delaying the proceedings by 35 minutes. She was again late for the second day by over 15 minutes, even after the court had reminded the jury to be punctual. Thus, the Court stated, it was not an abuse of discretion for the court to conclude that waiting for Juror A.H. to arrive would unnecessarily delay the trial and that replacing her with an alternate juror was appropriate.

Appellant also argued that she was entitled to a jury instruction on good character based on testimony about her treatment of her children. Again, the Court disagreed.

The record showed that appellant's adult son testified that he and appellant had a "very good relationship" and that she was his "go-to person." He also said that appellant had "never laid a finger" on him when disciplining him. Appellant's mother and teenage daughter both testified that they had never seen appellant physically abuse her children, although she would sometimes spank them. Based on this testimony, appellant submitted a request for a jury instruction showing good character for the trait of "being a good mother." The trial court refused to give such a charge.

On appeal appellant abandoned her argument that the jury should have been instructed about her character trait of "being a good mother" generally. Instead, she identified two other character traits — peacefulness and temperance — that she believed the jury should have been told to consider. The Court noted that because appellant did not request an instruction on those traits at trial, its review of the trial court's failure to give such an instruction was limited to plain error.

But here, the Court stated, although it doubted that there was an obvious legal error in not giving an instruction *sua sponte* on appellant's peacefulness or temperance, there was no doubt that a good character instruction would not have changed the outcome of appellant's trial. Specifically, the jury heard the evidence to which appellant now points as demonstrating her peacefulness and temperance — that she "never laid a finger" on one of her children and sometimes spanked but did not physically abuse others. The jury also heard appellant's mother's statement that appellant had slapped the victim hard enough to knock him down a week or two before his death and appellant's teenage daughter's testimony that the victim got strange bruises when he was left in appellant's care. The jury was instructed to "giv[e] consideration to all the facts and circumstances of this case" and "determine the facts of the case from all of the evidence presented." Thus, the Court concluded, it was unlikely that the jury would have reached a different result if it had been expressly told that it could consider the nebulous and somewhat conflicting evidence of appellant's peacefulness or temperance.

## **Sufficiency of the Evidence; Cruelty to Children**

*McCluskey v. State, S19A1397 (1/27/20)*

Appellant was convicted of malice murder and other charges, including two counts of cruelty to children in the third degree. The evidence, very briefly stated, showed that appellant went to a birthday party for a cousin, but when Lisa, his wife, went to pick him up, they found him in a very inebriated condition at a "street party." Appellant refused to leave the party, and eventually five men picked him up and put him in the back seat of the car. Lisa then drove home. At home, appellant and Lisa began arguing, and at some point, appellant pressed the muzzle of a pistol to Lisa's face and fired, killing

her. When the police arrived, they found two teenagers, later identified as the appellant's grandchildren, outside the house, crying hysterically.

Appellant argued that the evidence was insufficient to support his convictions on Counts 7 and 8, the two counts of cruelty to children in the third degree, one for each grandchild who was in the home at the time of the shooting. The Court agreed.

The Court noted that OCGA § 16-5-70 (d) (2) provides: "Any person commits the offense of cruelty to children in the third degree when ... [s]uch person, who is the primary aggressor, having knowledge that a child under the age of 18 is present and *sees or hears the act*, commits a forcible felony, battery, or family violence battery." (Emphasis supplied).

At trial, the 16-year-old grandson testified that he was upstairs in his room when "something just told me to go downstairs, and I did," and that he was walking downstairs when he smelled "something weird" and then saw "just chaos." He testified that he had been upstairs in his room "the whole time" and that he did not know that his grandparents had returned home. He specifically denied that he heard any arguing downstairs, or a gunshot. The Court found that the ambiguous statement that "something just told" the grandson to go downstairs, without more, cannot establish that the grandson heard the act constituting the underlying offense, particularly in light of his specific and uncontradicted testimony that he did not hear a gunshot. Thus, the Court concluded, the evidence was insufficient to support appellant's conviction on this count.

The Court also held that the evidence was insufficient to support appellant's conviction on the child cruelty count involving the appellant's 14-year-old granddaughter. At trial, the granddaughter testified that she was upstairs in her room wearing headphones when the shooting happened, and that she did not know that anything was wrong until her brother came upstairs and told her that "granddaddy shot mama." The State presented no evidence of any pretrial statements or any other evidence inconsistent with the granddaughter's trial testimony. Thus, the Court held, the evidence was insufficient to allow a rational jury to find beyond a reasonable doubt that appellant committed the offense of cruelty to children in the third degree with respect to the granddaughter.

In so holding, the Court stated that while the trial court in denying appellant's motion for a new trial found that the children experienced the immediate aftermath of the shooting — the gory scene of their grandmother's death and their grandfather's agitated and belligerent conduct — and that it was "an experience these children will be unlikely to ever forget," the Code section, by its plain terms, requires that the child *see or hear* the act of committing the underlying offense, not its aftermath.

## Statutes of Limitation; Pleas in Bar

*Davis v. State, S19G0394 (1/27/20)*

In June 1996, a woman was assaulted, sodomized, and raped, and her residence was burglarized. No suspect was identified until 2009, when a DNA match identified appellant as the alleged perpetrator. At that time, appellant was serving a twenty-year prison sentence for another crime. The police obtained arrest warrants for appellant for burglary, aggravated assault, aggravated sodomy, and rape. However, they did not serve the warrants until appellant was released from prison in 2016, seven years after the warrants were initially obtained. In June of 2016, appellant was arrested and transferred to the county

jail. Appellant filed and later amended a plea in bar arguing that his prosecution was barred by the statute of limitations for the various crimes. Though still not indicted on any of the offenses, the trial court held a hearing in 2017 and granted the motion as to the burglary and aggravated assault charges, but denied it as to the aggravated sodomy and rape charges. Appellant then appealed, but the State did not cross appeal.

In *Davis v. State*, 347 Ga. App. 757 (820 SE2d 791) (2018), the Court of Appeals affirmed the trial court's denial of appellant's plea in bar. The court, however, did not address appellant's statute of limitation argument. Instead, the court held that "there can be no challenge to an indictment through a special plea in bar until there is an indictment filed," and that, because appellant alleged that he was being unlawfully detained, he should file a petition for a writ of habeas corpus. The Court granted appellant's petition for writ of certiorari.

Appellant argued that a plea in bar, and not a petition for habeas corpus, is the only appropriate method through which an individual can challenge pre-indictment detention as barred by the statute of limitation. The Court disagreed.

The Court stated that a plea in bar based on the statute of limitation is one in confession and avoidance, as its premise rests upon the assertion that, even if all the facts as alleged in the indictment are true, the defendant cannot be held liable due to the expiration of the statute of limitation. Under Georgia law, a prosecution commences with the return of an indictment or the filing of an accusation. OCGA § 16-1-3 (14). This provision is consistent with the common law principles of pleading, which required a plaintiff to state his case in a pleading before a defendant responds with his own pleading. Thus, the Court stated, it stands to reason that a prosecutor must initiate an action, through an indictment or formal accusation, before a person can file a pleading challenging such action. Thus, until either an indictment or an accusation is filed, a prosecutor's action has not commenced and there is nothing for a plea in bar to defeat. Therefore, the Court concluded, the Court of Appeals was correct in stating that appellant's plea in bar was improper prior to indictment.

Nevertheless, the Court added, distinguishing between challenging one's prosecution and one's pre-indictment detention, the Court of Appeals also opined that appellant was not without a remedy, concluding that he could challenge his pre-indictment detention through a writ of habeas corpus. And, the Court noted, although various mechanisms may exist to challenge one's pre-indictment detention, including preliminary hearings, motions for bond and, in some cases, writs of habeas corpus, it was expressing no opinion as to the propriety of these remedies in appellant's case. Here, with regard to only trial court order, appellant sought only to bar his prosecution in the trial court with a plea in bar, not to challenge his detention with a writ of habeas corpus. Therefore, the issue of whether habeas relief is available to address appellant's detention was not before the Court of Appeals and was also not before the Supreme Court.

## **Rule 404 (b); Intrinsic Evidence**

*Allen v. State*, S19A1266 (1/27/20)

Appellant was convicted of felony murder and aggravated assault for killing Patton. The evidence, briefly stated, showed that appellant and his girlfriend, Morgan, met the Pattons for dinner at a restaurant. Appellant and Morgan got into an argument. Over the course of the dinner, appellant drank and became more agitated with Morgan. After dinner the group decided that Morgan and appellant would go home to change clothes, then drive to the Pattons' home before continuing the night elsewhere. But, when they got home, appellant again argued with Morgan and when the Pattons' called on the

phone, Morgan asked to be picked up. The Pattons drove toward Morgan's home and saw Morgan and appellant in the street in front of their house. Morgan tried to get into the Pattons' car, but appellant pulled her away, shoved her against the car, and threatened her. Patton got out and intervened. A brief tussle occurred before appellant pulled a gun and shot Patton.

Appellant argued that the court erred by admitting evidence of his behavior after the shooting in violation of OCGA § 24-4-404 (b). The evidence at issue, introduced through Morgan's testimony, showed the following: Morgan and appellant walked home after the shooting. Initially, appellant was not irate, but after entering the house, he started "fussing" with Morgan's brother. When police arrived, appellant was aggressive, visibly intoxicated, and would not comply with police demands until police aimed a Taser at him. The trial court admitted the testimony, finding that it was intrinsic to the charged offenses and thus outside the scope of Rule 404 (b). The Court agreed.

The limitations and prohibitions on "other acts" evidence set out in OCGA § 24-4-404 (b) do not apply to "intrinsic evidence." Evidence is admissible as intrinsic evidence when it is (1) an uncharged offense arising from the same transaction or series of transactions as the charged offense; (2) necessary to complete the story of the crime; or (3) inextricably intertwined with the evidence regarding the charged offense.

Here, the Court found, Morgan's testimony concerning appellant's demeanor was inextricably intertwined with the evidence regarding the charged offense. The evidence, related to events immediately following the shooting and prior to appellant's arrest, was linked in time and circumstances with the charged crime; the events in question occurred within minutes of the shooting and in the immediate location of the shooting. The evidence was relevant to show appellant's state of mind following the shooting, particularly because appellant requested a jury charge on accident. Because appellant initially behaved calmly, then continued to show signs of anger, rather than regret, a reasonable juror could conclude that the evidence suggested that appellant lacked remorse, and that he did not accidentally shoot the victim.

Appellant also argued that if the evidence was admissible under Rule 404 (b), notice was required. But, the Court stated, because this evidence was intrinsic to the crimes charged, it was neither barred by Rule 404 (b) nor subject to the Rule's notice requirement. Thus, the trial court did not abuse its discretion in admitting Morgan's testimony concerning the events following the shooting.

## **Statements; Law Enforcement Deceptions**

*Mann v. State, S19A1256 (1/27/20)*

Appellant was convicted of malice murder and two counts of first degree cruelty to children in connection with the death of seven-year-old Ethan. Appellant contended that the trial court erred when it did not suppress incriminating custodial statements that he made to law enforcement. Specifically, he contended that his statements were involuntary and inadmissible under OCGA § 24-8-824 because they were induced by a "hope of benefit."

The relevant evidence showed that appellant was interviewed by Investigator Stewart and Lieutenant Oliver. Before beginning the interview, Investigator Stewart read appellant the *Miranda* warnings; appellant thereafter signed a "*Miranda* Rights — Waiver Form" and agreed to speak with the investigators. After approximately 20 minutes, appellant invoked

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING FEBRUARY 21, 2020

Issue 8-20

his right to counsel; Investigator Stewart and Lieutenant Oliver told appellant that Ethan had woken up and had told investigators that appellant was responsible for his injuries, although in actuality, Ethan never woke up. The interview concluded, and appellant was taken to be booked.

Approximately 40 minutes after the first interview ended, appellant reinitiated contact with Investigator Stewart and Lieutenant Oliver via an inmate request form. Appellant was returned to the interview room, and Investigator Stewart again advised appellant of his *Miranda* rights. Appellant signed a second waiver form and again expressed his desire to speak with the investigators. After being asked by the investigators to “walk [them] through ... what happened,” appellant made his inculpatory statements but maintained that Ethan’s injuries were unintentional. Later in the interview, appellant asked the investigators whether they had lied to him during the first interview when they told him Ethan had woken up. Both Investigator Stewart and Lieutenant Oliver denied lying to appellant but refused to give him any further information about Ethan’s state.

Appellant argued that the investigator’s representations about Ethan’s medical condition and availability to give a statement to law enforcement amounted to a hope of benefit, in that appellant believed, based on those representations, that he would not be charged with murder. To support his position, appellant relied solely on *State v. Ritter*, 268 Ga. 108 (1) (485 SE2d 492) (1997). The Court noted that in *Ritter*, the interrogating officer told the defendant that the victim would “be okay” except for “a bad headache.” The investigator failed to inform the defendant that the victim had, in fact, died and that the interrogating officer had obtained a warrant for the defendant’s arrest on charges of murder and armed robbery. And perhaps most importantly, the *Ritter* Court concluded that the investigator’s “representation regarding the victim’s state of health constituted an implied promise that Ritter could not be charged with murder if he gave a statement to the police, but could only be charged with aggravated assault.” *Id.* at 110.

However, the Court stated, the facts of appellant’s case are distinguishable from those in *Ritter*. Here, though the interrogating officers falsely told appellant that Ethan had woken up and told them that appellant caused his injuries, the statement that Ethan was still alive was truthful; indeed, Ethan was not declared dead until the day after appellant’s confession, and investigators did not obtain a warrant for appellant’s arrest on charges of murder until four days later. It is well established that artifice and deception do not render a statement involuntary so long as they are not calculated to procure an untrue statement. Throughout the interview, the officers exhorted appellant to be honest with them and to tell them the truth about what happened on the morning Ethan sustained his injuries.

Additionally, the Court stated, unlike the defendant in *Ritter*, appellant seemed to place little, if any, reliance on the statements regarding Ethan’s health and simply wanted to explain that Ethan’s death was an accident. Appellant continued to express his disbelief of their earlier statements regarding Ethan’s improvement and asked the investigators numerous times whether they were being truthful with him. He also stated that he did not “want [Ethan] laying [in the hospital] about to die” and that he had administered CPR on Ethan to “try to save his life,” indicating that he was aware of the severity of Ethan’s injuries, regardless of what the investigators told him. Accordingly, the Court concluded, there was no merit to appellant’s contention that his second statement was involuntary as being induced by a hope of benefit.

## Child Pornography; Double Jeopardy

*Williams v. State, S19G0125 (1/27/20)*

Appellant was indicted on 48 counts of sexual exploitation of children under OCGA § 16-12-100 (b) (8). All counts in the indictment alleged that, on the day of the search, appellant “did knowingly possess and control a photographic image depicting a minor engaged in sexually explicit conduct.” Each count separately described a different image possessed by appellant. The trial court granted appellant’s motion to dismiss all counts other than Count 1, finding that the indictment subjected him to multiple punishments for the same offense, thereby exposing him to double jeopardy.

The State appealed and the Court of Appeals reversed. The Court of Appeals held that OCGA § 16-12-100 (b) (8) allows “a charge and conviction on each and every image possessed.” *State v. Williams*, 347 Ga. App. 183, 183-184 (2018). The Court granted certiorari.

The Court stated that the doctrine of double jeopardy has two components: the “procedural” bar on double jeopardy, which places limitations on multiple prosecutions for crimes arising from the same conduct, and the “substantive” bar, which protects against multiple convictions or punishments for such crimes. When a court is presented with the question of whether a single course of conduct can result in multiple convictions and sentences under the same statute, the doctrine of substantive double jeopardy is implicated, and the “unit of prosecution,” or the precise act criminalized by the statute, must be identified.

Appellant argued that his multiplicity challenge invoked the *procedural* aspect of double jeopardy. The Court disagreed. Procedural protections against double jeopardy apply only to “multiple prosecutions,” meaning multiple or successive indictments or criminal proceedings. These procedural protections do not apply to a single indictment that contains multiple counts, even if those counts are deemed multiplicitous. Because appellant is not faced with multiple or successive prosecutions, the procedural bar on double jeopardy does not apply. Rather, to the extent double jeopardy provisions apply at all, appellant’s claim must be analyzed under the rubric of substantive double jeopardy, which prohibits multiple punishments for the same offense.

However, the Court stated, the substantive bar on double jeopardy is of no help to appellant at this stage of the proceedings because he has not yet been convicted and sentenced on any of the counts that he claims are multiplicitous. The doctrine of substantive double jeopardy—concerned as it is with multiple convictions and sentences—does not come into play until *after* the defendant has been found guilty on multiplicitous counts. Therefore, the Court stated, because the substantive bar on double jeopardy applies only after the defendant is found guilty, it does not warrant the pretrial dismissal of the charges against appellant, even if those charges are multiplicitous.

Nevertheless, appellant argued, his motion to dismiss was in the nature of a pretrial “special demurrer” which, he contended, is the proper vehicle for challenging an indictment based on multiplicity. The Court again disagreed. A special demurrer is a pretrial remedy that allows the defendant to challenge the form of the indictment (as opposed to its substance) and to seek greater specificity or more information about the charges. But, the Court noted, it has never held that a special demurrer may be used to address *substantive* double jeopardy concerns and obtain a pretrial dismissal or consolidation of multiple counts simply to prevent the possibility of multiple convictions and sentences for the same offense. To the

contrary, the Court stated, it has stated that substantive double jeopardy protections do not come into play until after trial and so cannot form the basis for the pretrial remedy that appellant has sought.

Thus, the Court held, the Court of Appeals erred when it based its decision on the merits of appellant's multiplicity claim. In doing so at this pretrial stage of the proceedings, the Court of Appeals implied that a meritorious multiplicity claim would justify the dismissal of Counts 2 through 48. This implication was erroneous, as it effectively would have created a new rule of criminal procedure — a rule that allows pretrial dismissal of multiplicitous counts on the ground of substantive double jeopardy. Such a rule is nowhere to be found in the Georgia Code or in our own jurisprudence. Instead of addressing appellant's claim on the merits, the Court of Appeals should have reversed the trial court's order on the ground that the trial court lacked authority to dismiss or consolidate Counts 2 through 48 of appellant's indictment before trial. Nevertheless, the Court stated, because the underlying judgment of the Court of Appeals that reversed the trial court's order was correct, the Court affirmed the judgment of a lower court as right for any reason, even if it was based upon erroneous reasoning.

## **Rule 404 (b); Uncharged Offenses**

*Moseley v. State, S19A1301 (1/27/20)*

Appellant was convicted of numerous offenses, including the murder of Carter and the attempted murder and attempted armed robbery of Knight. The facts, very briefly stated, showed that late in July 2014, appellant and his co-indictees, Brown and Jackson, arranged a rendezvous with Carter that was actually a robbery setup. Brown got into Carter's vehicle when it arrived. Appellant then approached the driver's side of the vehicle. A tussle ensued and appellant shot and killed Carter. The trio then left in Carter's vehicle and went to stay with a woman named Singleton. Later that week, Brown placed a telephone call to Knight and arranged to meet him near Singleton's residence. When Knight arrived, Brown got "halfway" into Knight's truck; appellant approached the vehicle on the driver's side and placed a firearm to Knight's head, instructing him not to do anything. Knight pressed the accelerator and sped away, and shots were fired at his truck.

Appellant argued that that trial court erred when, over his objection, the trial court permitted the State to present evidence and testimony concerning two uncharged offenses — the burglary of Owens and the armed robbery and aggravated assault of Jackson. The trial court concluded that evidence of the uncharged offenses was admissible "as intrinsic evidence of the same series of transactions as the crimes charged in the instant indictment."

The Court stated that while OCGA § 24-4-404 (b) ("Rule 404 (b)") generally controls the admission of other acts evidence, also known as "extrinsic evidence," evidence of criminal activity other than the charged offense is not "extrinsic" under Rule 404 (b), and thus falls outside the scope of the Rule, when it is (1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense. Evidence pertaining to the chain of events explaining the context, motive, and set-up of the crime is properly admitted if it is linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.

The Court found that as to the burglary, the jury heard testimony that, in late July 2014 — around the same time as the other charged offenses — Brown contacted Owens asking to be picked up at a local apartment complex. Owens arrived at the meeting spot and contacted Brown by phone; although Brown advised Owens that she would be “out in a minute,” she never appeared. Owens eventually returned home and discovered that his home had been burglarized. The jury learned Owens again attempted to reach out to Brown, but a male answered the call, and, further, that the telephone number used to contact Owens was also used to contact Carter, the murder victim.

That same week, Jackson was driving in the vicinity of Singleton's residence when he heard someone call out his name and then saw people on bicycles steer in front of his vehicle; Jackson stopped his SUV and two individuals jumped into his vehicle. One of the individuals, a woman, brandished a gun and demanded that Jackson turn over his keys. Following a struggle for the firearm, Jackson escaped on foot; his cellular telephone and car keys were taken from the vehicle. Jackson later identified Brown in a photo array, indicating that she “favored” the woman from the incident, and Jackson's keys were found hidden under the mattress in Singleton's residence.

The Court found that although Brown and appellant were not charged with all of the same offenses, the evidence suggested that Brown and appellant engaged in a week-long crime spree. The burglary of Owens was a link in the chain of events leading up to Carter's murder. Likewise, the incident involving Jackson occurred within days of Carter's murder and the day before the armed robbery of Knight; the incident involving Jackson occurred just blocks from Singleton's residence, and Singleton's telephone number was used in both offenses. Further, evidence from the incident involving Jackson was discovered alongside evidence from both Carter's murder and the incident involving Knight. Therefore, the Court found, the evidence of the uncharged offenses was, as the trial court concluded, evidence of the same series of transactions as the crimes charged in the indictment.

Next, the Court addressed whether the evidence was admissible under Rule 403. The Court found that although the intrinsic evidence indirectly implicated appellant in additional criminal acts and had only minimal evidentiary value, it could not say that the trial court abused its discretion in concluding that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. Consequently, the Court found that the admission of this evidence was not error.