

THIS WEEK:

- **Inmate Telephone Calls; OCGA § 24-9-923 (c)**
- **Search & Seizure; Consent to Enter Residence**
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Inmate Telephone Calls; OCGA § 24-9-923 (c)

Beene v. State, A19A2311 (2/10/20)

Appellant was convicted for conspiring to possess methamphetamine. Recordings of telephone calls to him from appellant's jailed co-conspirator brother were a significant part of the state's evidence against him. The trial court allowed the State to present to the jury the recordings of the telephone calls. Appellant argued that this was error because the State did not establish the necessary foundation for admission of the calls. Specifically, he contended that the State did not show several foundational factors set out in cases decided under our former Evidence Code. The Court disagreed.

The Court stated that the specific factors described in those cases do not apply under our new Evidence Code. Instead, to obtain admission of evidence of an automated jailhouse recording, the State must meet the requirements of OCGA § 24-9-923 (c), which pertinently provides that, “[s]ubject to any other valid objection, ... audio recordings produced at a time when the device producing the items was not being operated by an individual person or was not under the personal control or in the presence of an individual operator shall be admissible in evidence when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered[.]”

And here, the Court found, to demonstrate the required foundation for the recordings, the State presented testimony from an investigating officer who had reviewed the recordings. The officer described how the jail's automatic recording system worked and how he retrieved those particular recordings. He stated that he was familiar with the voices of both appellant and his brother and identified their voices in the recordings. He testified that, in his experience, the jail's system records calls accurately, and he stated that he discerned no breaks, skips, or deletions in the specific recordings at issue. He also explained that, at the beginning of any call, the system notifies the participants that the call is being recorded. Thus, the Court held, because this competent evidence would tend to show reliably that the automated recordings were in fact

recordings of the phone calls that appellant's brother made to appellant from jail, there was no error in the trial court's determination that this evidence was admissible.

Search & Seizure; Consent to Enter Residence

Appellant v. State, A19A1758 (2/10/20)

Appellant was convicted of several counts of VGCSA. He contended that the trial court erred in denying his motion to suppress. The Court agreed and reversed his convictions.

The facts, briefly stated, showed that appellant was convicted in a different county in 2008 and was on probation when agent Campbell received information in 2017 from an unidentified source that appellant "was moving large amounts of methamphetamine." Campbell and two other agents drove to appellant's camper and knocked on his door. When appellant opened the door, appellant "turned white" and started shaking. Campbell identified himself and the other agents, told appellant what they had heard, and asked if the agents could enter the camper to speak with him. Appellant backed up into the camper, and the agents followed him in. As the agents followed him in, appellant turned around and began walking away while trying to empty his pockets. Once inside, the agents saw drug paraphernalia and brass knuckles in plain view. Appellant was placed in handcuffs and told he was not under arrest. Appellant stated that his sister was in the camper and at Campbell's request, she came out of a back room. When the officers learned that she too was on probation, they had her empty her pockets and she produced a small baggie with what appeared to be methamphetamine. Campbell then requested and received permission from appellant to search the camper which resulted in the discovery of the drugs which formed the basis for the charges against appellant.

Appellant contended that the trial court erred when it denied his motion to suppress because the agents' warrantless entry into his camper was unauthorized by either the conditions of his probation or his purported consent. The Court agreed.

The Court found that no evidence was presented that the officers identified themselves before appellant opened the door, and the record did not indicate that appellant was aware of the officers' presence or identity before he opened the door. Consequently, the act of opening the door, by itself, was not indicative of consent for law enforcement to enter. Moreover, viewed in the light most favorable to the State, the evidence showed that, when the agents subsequently requested permission to enter, appellant made no effort to engage in any discussion of the matter and instead continued to back up into the camper and turn his back on the agents. Nothing in Campbell's testimony indicated that appellant affirmatively or voluntarily granted consent for the agents to enter. His actions rather showed — at most — a submission to or acquiescence in the express or implied assertion of authority. Thus, the Court concluded, the evidence was insufficient for the State to meet its burden of showing voluntary consent to entry.

Moreover, pretermitted whether the conditions of appellant's probation potentially authorized the agents to enter his home without his consent, any such conditions did not support the entry at issue here because the State presented no evidence that any of the agents were aware that appellant was subject to any such conditions as part of his probation when they entered his home. Consequently, the Court held, the State did not meet its burden of showing that an exception to the warrant requirement authorized the agents' entry into appellant's home, and the trial court erred by ruling otherwise.

Nevertheless, the State argued, appellant's consent to the search of the camper following the agents' entry authorized the ensuing search. The Court disagreed. Instead, the Court found that appellant's consent to search was inextricably intertwined with the agents' illegal entry and their immediate observation of drug paraphernalia and weapons in plain view. This was especially true because of appellant's offer that "he could help [the agents] if [they] could help him," which appeared to be an immediate response to what the officers saw upon entry. Moreover, the Court noted the State pointed to no intervening events between the agents' initial entry into appellant's home and the subsequent collection of evidence that would attenuate the taint of the initial entry. Consequently, the discovery of all evidence in plain view inside the camper, as well as evidence obtained from appellant's consent to search the camper and his ensuing incriminating statements, were the product of and tainted by the illegality of the initial entry. Accordingly, the Court reversed the trial court's order denying appellant's motion to suppress and reversed appellant's convictions.

Motions for New Trial; Scheduling Orders

Whipkey v. State, A19A2388 (2/12/20)

Appellant was convicted of rape, enticing a child for indecent purposes, aggravated child molestation, and aggravated sexual battery. Trial counsel filed a boilerplate motion for new trial and two weeks later, newly appointed appellate counsel filed a boilerplate motion for new trial. On September 11, 2018, the trial court issued a scheduling order directing appellant to file his amended motion for new trial and a list of hearing witnesses by September 17, 2018. On the same date as the scheduling order was filed, appellant filed a motion to amend the scheduling order to allow an amended motion for new trial to be filed by October 1, 2018 or, in the alternative, for a continuance of the hearing until November 2018. Appellant filed his amended motion for new trial on October 1, 2018, which included claims for ineffective assistance of counsel. The trial court denied his motion for modification of the scheduling order and/or a continuance.

Nevertheless, the trial court granted the State a continuance from the motion for new trial hearing even though it reiterated that appellant would only be allowed to argue the general grounds that were filed in his first two boilerplate motions for new trial. The hearing was then continued until January 18, 2019. Prior to the January motion for new trial hearing, appellate counsel filed a second motion for new trial raising claims of ineffective assistance of counsel. But, at the motion for new trial hearing, the trial court declined to allow appellant to raise any grounds not raised in the first two motions for new trial and, thereafter, entered a written order denying his motion for new trial.

Appellant contended that the trial court erred by striking his amended motion for new trial and thus, failing to consider his claim of ineffective assistance of counsel. The Court agreed.

Pursuant to OCGA § 5-5-40 (b), a motion for new trial "may be amended any time on or before the ruling thereon." Additionally, "[t]he grounds of the motion need not be approved by the court." OCGA § 5-5-40 (d). Thus, the trial court erred by issuing a scheduling order which was in direct conflict with appellant's statutory right to amend his motion for new trial at any time prior to the trial court's ruling on the motion. Accordingly, the trial court erred by failing to consider appellant's first amended motion for new trial, and the Court remanded the case to the trial court for it to conduct a hearing on appellant's first amended motion for new trial.

Nevertheless, in so holding, the Court stated that it appreciated the trial court's recognition that pursuant to *Owens v. State*, 303 Ga. 254, 258 (4) (2018), motions for new trial be dealt with expeditiously.

Indictments; Returns in Open Court

Chapman v. State, A19A2042 (2/12/20)

Appellants were indicted on multiple sexual offenses. After the return of their indictment, they filed motions to quash and pleas in abatement, arguing that the indictment was not returned in open court. The trial court denied the motions, but gave them a certificate of immediate review. The Court granted the appellants' application for an interlocutory appeal.

The record showed that on August 4, 2014, the trial court judge was called to the courthouse to receive indictments from the grand jury. The grand jury bailiff unlocked the public access door to Courtroom A at 4:56 p.m. Prior to that time, Courtroom A was locked because no proceedings were scheduled that day for the courtroom. The judge, grand jury bailiff, clerk of court, and district attorney then convened in the courtroom. The bailiff returned several indictments to the judge, including the indictment at issue here. The four officials finished around 5:30 p.m. and the bailiff re-locked the courtroom. On the date the indictment was returned, a security log for the courthouse reflected that, at 5:00 p.m., the courthouse was "closed for business, remaining open for grand jury indictments." At 5:30 p.m., the log reflected "[c]ourthouse closed."

Appellants argued that the indictment was not returned in open court. They contended that an indictment is returned in open court only when a court is "in session," and a court is in session only after a formal case call with a sheriff's deputy and judge in attendance. They also argued that the proceeding was not truly open to the public because the deputies did not perform their standard security sweep and no courtroom proceedings were scheduled for that day. The Court disagreed.

The Court noted that Georgia case law has long held that an indictment must be returned in "open court." It is a fundamental part of our judicial system that the general public be permitted to witness court proceedings sufficiently to guarantee that there may never be practiced in this State secret or star-chamber court proceedings. A failure to return the indictment in open court is per se injurious to the defendant.

The term "open court," as far as returning the indictment is concerned, means that the indictment is returned in a place where court is being held open to the public with the judge and the clerk present. And the Court stated, definitions of the term which differ would confuse, rather than aid, the court in its effort to ascertain the true meaning of the term as used in the rule.

And here, the Court found, the indictment was properly returned in open court. The judge, grand jury bailiff, and clerk of court were present in a courtroom open to the public. The courtroom doors were unlocked, and the courthouse remained open even after normal business hours. Only offices such as the clerk's office or tag's office closed at 5:00 p.m. Court proceedings regularly went past 5:00 p.m., and the deputies would keep the courthouse open until all court proceedings were complete. While the security plan provided for a detailed sweep of the courtroom prior to allowing the public inside, the deputies would not have barred a member of the public from entering a courtroom open for indictments, and would have provided assistance to any potential spectator requesting directions. A potential spectator could have proceeded unimpeded from the open courthouse entrance to the unlocked courtroom. According to security cameras, no

one on August 4 attempted to access Courtroom A while the bailiff returned the indictments. Accordingly, the Court affirmed the trial court's order denying appellants' motions to quash the indictment and pleas in abatement.

Rule 404 (b); Relevance

Watkins v. State, A19A2462 (2/12/20)

Appellant was convicted of felony possession of marijuana. The record showed that appellant and two others were charged "individually and as parties concerned in the commission of a crime" with possessing marijuana hidden within a couch in the upstairs common room of a home occupied by appellant and his co-defendants.

Appellant argued that the trial court erred in admitting Rule 404 (b) evidence. Specifically, appellant's 2008 conviction for possession of marijuana, which included evidence of family violence battery and his 2012 conviction of possession of cocaine. Appellant argued that the trial court erred in finding the evidence relevant and more probative than prejudicial. The Court disagreed.

The Court stated that because no evidence showed appellant in actual possession of the marijuana concealed in the couch, the State was required to prove constructive possession, i.e., that he knowingly had both the power and intention at a given time to exercise control over it. Appellant placed intent at issue by pleading not guilty and by arguing at trial that the marijuana was not his. Also, the necessary state of mind was the same - an intent to possess and control the illegal substance. The fact that one of the prior offenses involved possession of cocaine, rather than marijuana, was immaterial to the analysis. Furthermore, appellant was not in actual possession of the drugs recovered in 2008 and 2012. A finding of constructive possession was required. And like the marijuana hidden in the couch, the contraband in the prior cases was concealed or discarded, arguably to avoid detection. Given these factual similarities, as well as the identical intent requirement governing the crimes, the trial court was authorized to conclude that appellant's 2008 and 2012 drug offenses were relevant to and probative of whether he intended to possess and control the marijuana hidden in the common-room couch. And finally, the Court found that the trial court did not err in determining that the probative value of the evidence was not outweighed by any undue prejudice that might have been created by the evidence.

However, the Court stated, it was "constrained to reach a different conclusion" regarding appellant 2008 arrest and conviction for family violence battery. The intent requirement for marijuana possession was not related to the state of mind needed for a family violence battery conviction. And there was no factual similarity between the 2008 battery offense and this case, which did not involve a domestic dispute or any claim of violence. Nor did the State attempt to demonstrate the relevance of this specific prior crime. Thus, the 2008 family violence offense proved nothing with respect to appellant's intent to possess the marijuana hidden in the couch. Therefore, the Court found, the trial court abused its discretion in admitting evidence of this crime at trial.

Nevertheless, the State argued, the admission of this evidence in the case was harmless error. The Court disagreed. The evidence was sufficient to link appellant to the marijuana hidden in the couch, authorizing the jury to find him in constructive possession of the drugs. But, the Court stated, this link was hardly overwhelming. No evidence directly connected appellant to the marijuana, which was found in the common living space of a house containing other illegal drugs and occupied by multiple residents. Furthermore, one of the other residents had already pled guilty to possessing the

marijuana at the time of trial. And the Court stated, since the State at trial, citing this dearth of evidence, argued it had a "compelling need" for the admission of extrinsic acts in this case, the State's effort on appeal to characterize the trial evidence as "substantial" was disingenuous.

Accordingly, the Court held, evidence of the 2008 family violence battery offense served no proper purpose at trial and revealed inflammatory facts regarding appellant's prior physical abuse of a female. Under these circumstances, it was highly probable that the error contributed to the verdict. Therefore, the Court reversed appellant's conviction.

Sufficiency of the Evidence; Evidence of Gang Activity

Simpson v. State, A19A1670 (2/12/20)

Appellant was acquitted of four of the six charges against him, but convicted of second-degree criminal damage to property, and criminal gang activity. The relevant evidence, briefly stated, showed that appellant was part of five or six people who crashed a party. They were identified at trial as members or hangers-on of the gang "1800 Migos" and/or "Black Migo Gang," also known as "BMG." The hostess recognized one of them and told him that he could stay, but the others had to go. An argument ensued between a gang member and a friend of the hostess. One gang member pointed an AK-47 rifle at the hostess's friend, appellant had a nine-millimeter handgun, and at least one other gang member also had a handgun. A brawl then erupted. The friend got punched, dropped his iPhone and a gang member picked it up and took it. Appellant picked up a chair or other item and threw it into a front window. Someone used an iron plant holder from the porch to "beat" on the front door. Meanwhile, appellant was yelling "1800 Migos." Other gang members yelled, "We're the Migo Gang. We get in anywhere."

Appellant argued that the evidence was insufficient to support his conviction for second-degree criminal damage to property. The Court agreed.

Here, the hostess (the daughter of the homeowner) testified that the iron-frame door had been custom-made and that it cost roughly \$5,000 when her parents purchased it prior to moving into the home. As of the time of trial, the door had not been replaced, but the hostess testified that she had "plexiglass over it currently," which she thought cost "around \$300."

The Court noted that the State conceded that the evidence of value was insufficient. However, the Court found, the evidence was sufficient on the lesser included offense of criminal trespass because the hostess testified as to the extent of the damage, and there was evidence that appellant had picked up a small chair or similar item from the porch and thrown it at the front of the house, breaking a window. Accordingly, the Court vacated appellant's conviction for second-degree criminal damage to property and remanded for the trial court to impose a conviction for the lesser included offense of criminal trespass.

Appellant also contended that the trial court erred by allowing the State to introduce improper evidence of alleged criminal offenses committed by gang members, in violation of appellant's right to confront witnesses against him under the Sixth Amendment. But, the Court noted, appellant did not make a contemporaneous objection at trial. In arguing the motion in limine, appellant contended only that the gang evidence improperly brought his character into issue. Thus, since

appellant did not raise a constitutional challenge, the Court's review was limited to whether the admission of the evidence amounted to plain error.

OCGA § 16-15-9 provides: "For the purpose of proving the existence of a criminal street gang and criminal gang activity, the commission, adjudication, or conviction of any offense enumerated in paragraph (1) of Code Section 16-15-3 by any member or associate of a criminal street gang shall be admissible in any trial or proceeding. Evidence offered under this Code section shall not be subject to the restrictions in paragraph (22) of Code Section 24-8-803." But, the Court noted, in 2017, after appellant's trial and conviction, the Supreme Court of Georgia in *State v. Jefferson*, 302 Ga. 435 (2017), held that OCGA § 16-15-9 is unconstitutional on its face to the extent that it authorizes the admission of the convictions of non-testifying non-parties as evidence of a criminal street gang. Specifically, the statute unconstitutionally allowed the State to confront the defendant with the record of another criminal prosecution, with which he had no connection and the evidence which was not given in his presence.

Here, appellant contended that his constitutional rights were violated when a gang investigator testified that over the years, he had made approximately 200 arrests of BMG members. The investigation also explained that gang members were often aspiring musicians and would "commit crimes [to] have enough money to pay for a studio, [file] all the copyrights and so forth[.]"

The Court stated that appellant failed to cite, and it had not found any testimony regarding the *convictions* of non-testifying non-parties. Thus, even assuming that the gang investigator's expert testimony included some impermissible hearsay — although experts may sometimes rely on and testify about otherwise inadmissible hearsay regarding their opinions under OCGA § 24-7-703 — much of his testimony was based on his personal knowledge. This testimony was admissible under OCGA § 16-15-9 and not prohibited by the Confrontation Clause under *Jefferson*. Therefore, appellant failed to show error, much less error that was clear and not open to reasonable dispute. Accordingly, the Court affirmed his conviction for criminal gang activity.

Character Evidence; Circumstances of Arrest

McCloud v. State, A19A1944 (2/13/20)

Appellant was convicted of possessing both methamphetamine and marijuana with intent to distribute. He was also charged with a turn signal violation, fleeing or attempting to elude a police officer, and failing to stop at a stop sign. The evidence, briefly stated, showed that appellant's vehicle was stopped for failing to use a turn signal. The officer noticed drug paraphernalia in the vehicle and asked appellant to step out of his car. Instead, the defendant drove away. The officer gave chase. Appellant eventually stopped the vehicle and took off on foot. The officer again gave chase, but did not catch appellant. A search of the vehicle revealed methamphetamine and marijuana. When appellant was arrested in his home two months later, officers found various items in plain view in appellant's bedroom, including marijuana in a small plastic bag, marijuana seeds, clear plastic bags, and a box for a digital scale.

Appellant contended that that the trial court erred in admitting evidence of the marijuana and marijuana seeds found in his room incident to his arrest. The Court disagreed.

The Court stated that as a general rule, the circumstances connected with a defendant's arrest are admissible, even if such circumstances incidentally place the defendant's character in issue. And the admission or exclusion of such evidence lies within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent a clear abuse of discretion. A trial court generally does not abuse its discretion in admitting evidence of the circumstances surrounding the defendant's arrest unless the evidence is wholly unrelated to the charged crime, the arrest is remote in time from the charged crime, and the evidence is not otherwise shown to be relevant.

Here, the Court found, the marijuana and marijuana seeds found during the arrest were not wholly unrelated to the charged crimes. While the evidence found in appellant's room did not constitute the basis for the charges, it was both probative of the general circumstances of appellant's arrest and highly relevant to the possession of marijuana with intent to distribute charge, which was committed with the same type of drug in similar packaging. Accordingly, the Court concluded, the trial court did not abuse its discretion in admitting evidence of the marijuana and marijuana seeds found during appellant's arrest.

Continuing Witness Rule; Severance

Nix v. State, A19A2377 (2/13/20)

Appellant was convicted of one count of child molestation and fourteen counts of sexual exploitation of children. The evidence, very briefly stated, showed that appellant molested his nephew, J. N. from 2008 when J. N. was twelve years old, until J. N. was eighteen years old. J. N. did not report these activities until July 2015. In March 2016, appellant's wife handed over two fanny packs to the police, which she found in their garage, which contained various electronic devices including appellant's cell phone and a flash drive. The flash drive contained various videos and images of young pre-teen boys engaging in sexual activities. The flash drive also contained multiple naked "selfies" of appellant. These same "selfies" were also found on appellant's cell phone. The flash drive also contained various short stories depicting sexual relationships between adult men and underage boys.

Appellant argued that the trial court erred in applying the continuing witness rule when it refused to allow the jury to have access to the record of text messages between him and J.N. during their deliberations. The Court stated that generally, documentary or demonstrative evidence admitted without objection goes out with the jury when it retires for deliberations. However, in Georgia the "continuing witness" objection is based on the notion that written testimony is heard by the jury when read from the witness stand just as oral testimony is heard when given from the witness stand. But, it is unfair and places undue emphasis on written testimony for the writing to go out with the jury to be read again during deliberations, while oral testimony is received but once. Thus, what should be withheld from the jury is "written testimony," which merely duplicates a witness' oral testimony or substitutes as a written record of his testimony. The proscription on the jury's possession of "written testimony" does not extend to documents which are themselves relevant and admissible as original documentary evidence in a case.

The Court found that the trial court erred by concluding that it would violate the continuing witness rule for the jury to be provided with the 455 pages of text messages sent between appellant and J.N. from 2008 until 2015. The text messages were "original documentary evidence" demonstrating the type of relationship that appellant and J.N. had during the time frame when the crime was committed. There was no indication that the text messages contained testimonial evidence or

constituted written versions of each person's testimony, such as would be the case with an affidavit, deposition, or sworn statement. Therefore, the continuing witness rule did not apply, and the text messages should have been sent back with the jury for their review during deliberations.

Nevertheless, the Court noted, appellant argued that the jury should have been allowed to review the text messages during deliberations because the texts supported his theories that no sexual relationship occurred and that the allegations were made just after appellant requested payment of a loan from the victim. During trial, however, the defense elicited testimony establishing that the victim's reporting of the allegations of a sexual relationship with appellant occurred at or around the time appellant asked the victim to repay a loan. Details about the nature of the relationship between appellant and the victim were extensively aired during the victim's testimony. The defense also extensively impeached and attacked the victim's credibility and the credibility of the allegations during trial. Finally, the Court found, many of the relevant text messages between appellant and the victim discussing the victim's motivations to report the allegations were read for the jury during trial. Thus, the text messages would have been largely cumulative of all of the evidence presented at trial and would not have added to the jury's deliberations. In light of this and the other evidence presented at trial, the Court concluded, the error in prohibiting the text messages from being sent to the jury during their deliberations was harmless.

Appellant also argued that the trial court wrongly denied his request for a bifurcated trial and to sever the charge for child molestation from the charges for sexual exploitation of a child. The Court disagreed.

The charges were not merely joined due to their similar character but were factually connected. The offense underlying the sexual exploitation charges was appellant's possession of the flash drive, and that flash drive was turned over to the police by appellant's wife during the investigation into the offense underlying the child molestation charge. Also, the circumstances underlying the charges of sexual exploitation of a child and child molestation were relevant similar transactions such that evidence of appellant's commission of either type of offense would be admissible as other acts evidence in the trial of the other offense under OCGA § 24-4-414 (a). Thus, severance in this case was not mandatory, and the decision to sever the charges was instead entirely within the trial court's discretion.

Appellant contended that the State presented similar transaction evidence demonstrating other incidents where appellant allegedly had sexual contact with other underage boys, and he argued, such evidence was only admissible for the jury's consideration of the child molestation charge and not the sexual exploitation charges. However, the Court found, the trial court's order allowing this similar transaction evidence made no such distinction or limitation, and the Court found no indication in the record that the trial court only allowed this evidence for the jury's consideration of one charge but not the others. Furthermore, given the broad statutory rule of OCGA § 24-4-414 (a) allowing similar transaction evidence of other offenses involving child molestation, appellant failed to show that any such distinction would have been warranted.

Nevertheless, appellant argued, the ability of the State to compel his wife to testify against him provided a justification for severance. The Court again disagreed. Normally, a person cannot be compelled to testify against his or her spouse in any criminal proceeding, OCGA § 24-5-503 (a), but an exception is made when the defendant is charged with a "crime against the person of a child under the age of 18." OCGA § 24-5-503 (b) (1). Because all of the charges against appellant fell under this exception, the State could have compelled appellant's wife to testify against him for any of these charges, and so a severance would not have made a difference in this respect. Thus, the Court concluded, the trial court did not abuse its discretion when it denied appellant's request for a severance.

Crimes; Attempted Felony Murder

Jenkins v. State, A19A2183, A19A2184, A19A2185 (2/13/20)

Appellant and two co-defendants were tried together. Appellant was convicted of criminal attempt to commit felony murder, armed robbery, two counts of aggravated assault, and two counts of possession of a firearm during the commission of a felony. Appellant contended that the trial court erred in denying his motion for directed verdict of acquittal on the attempted felony murder count because attempted felony murder is not a crime in Georgia. In a case of first impression, the Court agreed.

The felony murder statute provides: "A person commits the offense of murder when, in the commission of a felony, he or she causes the death of another human being irrespective of malice." OCGA § 16-5-1 (c). Thus, felony murder does not require intent to kill; rather, the defendant only must have intended to commit the underlying felony.

The attempt statute provides: "A person commits the offense of criminal attempt when, with intent to commit a specific crime, he performs any act which constitutes a substantial step toward the commission of that crime." OCGA § 16-4-1. Attempt is a specific intent crime in that it requires a showing that the actor intended to commit the substantive offense.

The Court noted that the intent required to support a conviction of felony murder is the intent to commit the underlying felony that unintentionally results in the victim's death. The felony murder statute does not require the state to prove that a defendant intended to commit felony murder. But as set out in the attempt statute, OCGA § 16-4-1, the intent required to support a conviction of criminal attempt is the intent to commit the specific crime. Thus, the offense of attempt requires an intent to commit a specific offense, while felony murder does not involve an intention to kill. Therefore, attempt to commit felony murder would entail intent to perpetrate an unintentional killing, which is a "logical impossibility" because there is no such criminal offense as an attempt to achieve an unintended result. Accordingly, the Court concluded that attempted felony murder is not a crime in Georgia.

Residual Hearsay; Rule 807

Davis v. State, A19A2178 (2/14/20)

Appellant was convicted of rape. The evidence showed that the victim was a 23-year-old woman who was diagnosed with moderate mental retardation, microcephalus, and paranoid schizophrenia, among other medical and mental conditions, which caused her to function at the capacity of a young child. The victim's physician, who treated her for over ten years, testified that she functioned at a seven- or eight-year-old level, is easily swayed, does not have the mental capacity to comprehend the nature of sexual acts or to intelligently consent to them, and that her disabilities are readily apparent to others. The victim's mother testified that the victim is incapable of functioning as an average adult. The lead investigator testified that, based on his observation of the victim's mental abilities, he arranged for her forensic interview at a child advocacy center.

Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE

WEEK ENDING MARCH 20, 2020

Issue 12-20

Appellant argued that the trial court erred by admitting into evidence the victim's forensic interview under the residual hearsay exception, OCGA § 24-8-807 ("Rule 807"), because the interview was not more probative than other evidence at trial. The Court disagreed.

The Court noted that Rule 807 provides, in pertinent part, “[a] statement not specifically covered by any law but having equivalent circumstantial guarantees of trustworthiness shall not be excluded by the hearsay rule, if the court determines that: (1) The statement is offered as evidence of a material fact; (2) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (3) The general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.”

The Court further noted that the rule was designed to be used very rarely, and only in exceptional circumstances. The rule applies only when certain exceptional guarantees of trustworthiness exist and when high degrees of probativeness and necessity are present.

Appellant contended that the trial court erred under the second prong of Rule 807, arguing that the interview was not more probative than any other evidence because the victim testified at trial. However, the Court stated, appellant conceded that the unavailability of the declarant is not a prerequisite to admissibility under Rule 807. And, here, the trial court expressly found that the victim was unavailable "for all practical purposes" because she was unable to offer meaningful testimony about the rape. At trial, the victim responded readily to the State's general questions, but once the inquiry reached the events of the rape, the victim had an episode requiring a break in the proceedings. When the examination continued, the victim was largely unresponsive, requiring the prosecutor to ask only leading questions. In light of these circumstances, the Court found, the forensic interview was necessary to fill in the gaps in the victim's testimony, and was thus more probative than her testimony alone. As such, the Court found that the trial court did not abuse its discretion in finding the victim's forensic interview satisfied the second prong of Rule 807.