Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING MARCH 27, 2020
Issue 13-20

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Closing Arguments; Future Dangerousness

Hamlette v. State, A19A1839, A19A2176 (2/14/20)

Tucker Hamlette and his brother, Timothy Hamlette were convicted of voluntary manslaughter, as a lesser-included offense of felony murder, and aggravated assault. The evidence, very briefly stated, showed that appellants and some of their friends engaged in a heated argument with the victim that escalated into a physical altercation in which they knocked the victim to the ground. Additional evidence demonstrated that the victim escaped from the fight by pulling a knife and cutting Timothy, and that Timothy and Tucker pulled handguns and fired at the victim as he tried to walk away, with three bullets striking and ultimately killing him.

Tucker contended that his trial counsel rendered ineffective assistance by failing to object when, during closing argument, the State allegedly made an improper remark regarding future dangerousness. The record showed that the prosecutor stated as follows: "Y'all are sitting here as the conscious of this county. This thing we call civilization is a thin veneer, very thin. It's a thin layer of anarchy, criminality, revenge, vendetta, going to shoot him, going to shoot some fellow in the back. If y'all want to live like that knock yourselves out. Turn him loose. Let them go. Their guns are still out there. I guarantee you they know where to find them. If you don't want to live like that, if you think we ought to live under the rule of law, like civilized people, then I ask you to convict them — guilty of felony murder, guilty of aggravated assault as charged. Thank you."

Tucker argued that these remarks—taken as a whole—constituted an improper comment by the State's prosecutor attributing future dangerousness to him and his brother and that his counsel should have objected. The Court disagreed.

The Court noted that under present authority, an argument that a defendant represents a future danger to society is impermissible when a jury is determining guilt or innocence. This is because such remarks are irrelevant to the question of

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whether, under the facts introduced into evidence, the defendant is guilty beyond a reasonable doubt of the crime charged. But general appeals to enforce the criminal law for the safety of the community have long been held to be within the bounds of permissible argument. And here, the Court found, the alleged offending remarks did not specifically assert that Tucker and his brother represented a future danger, but rather, implored the jury to not condone the "revenge" or "vendetta" based justice in which the defendants engaged but, instead, enforce the law for the safety of the community. Thus, as the State's closing argument was not improper, trial counsel's failure to object to it was not evidence of ineffective assistance. Accordingly, the Court concluded, the trial court did not err in denying Tucker's claim that his trial counsel rendered ineffective assistance.

Pleas in Bar; Prosecutorial Misconduct

Wilson v. State, A19A2014 (2/18/20)

Appellant was convicted of rape and aggravated sexual battery. The victim was appellant's stepdaughter and the sexual conduct occurred when the victim was thirteen and fourteen years of age.

Appellant's first trial ended in a mistrial. The record showed that the State called the victim's mentor from a church the victim frequented. In response to a question as to why the mentor asked the victim if she had been molested by her stepfather, the mentor stated, "Because there were rumors around the church that something was going on with her — " Defense counsel objected and moved for a mistrial. The State requested curative instructions but the court granted the mistrial.

The case was reassigned to a different judge and appellant filed a plea in bar alleging that the prosecutorial misconduct caused the mistrial. The court denied the motion and appellant was subsequently convicted at the second trial.

The Court stated that generally, if a defendant's motion for a mistrial is granted, double jeopardy does not bar a retrial. However, if a prosecutor goads the defense into making a motion for a mistrial in order for the prosecution to avoid reversal of the conviction because of prosecutorial or judicial error or to otherwise obtain a more favorable chance for a guilty verdict on retrial, the Double Jeopardy Clause will stand as a bar to retrial. Our courts have adopted the test set out in *Oregon v. Kennedy*, 456 U. S. 667 (102 SC 2083, 72 LE2d 416) (1982). The inquiry is whether the prosecutor intended to goad the defendant into moving for a mistrial and thus terminate the trial. What is critical is the objective of the prosecutor's conduct. Unless a prosecutor is trying to abort the trial, his or her misconduct will not prohibit a retrial. The question of whether the prosecutor intended to goad the defendant into moving for a mistrial is a question of fact for the trial court to resolve.

And here, the Court found, the trial court's conclusions were supported by the record. When the defense moved for a mistrial, the State asked for curative instructions as an alternative remedy, and argued against a mistrial. The first judge, who granted the mistrial, said that she was "not suggesting that [the prosecutor] intentionally elicited this response that there were rumors around the church. I think she was as surprised as everyone else[.]" The successor judge heard testimony, which she found credible, from the witness that she had not been told by the prosecutor that there were certain things she could not say on the stand at trial. The judge further found that under Georgia's prior Evidence Code, in effect at the time, the line of inquiry was not inappropriate and that the response by the witness was not "something [the prosecutor]

could have known because . . . [she] didn't talk to her before she testified." Thus, the Court stated, while an attorney's failure to prepare a witness may constitute poor trial preparation — which can lead to substantial delay and inefficiency, by potentially wasting years of citizen's lives and an indeterminate amount of public resources — the trial court found, and it is bound to accept, that the prosecutor's shortcomings were not undertaken with any intention to abort the proceedings. Therefore, the Court concluded, based on the totality of the evidence before both judges, the trial court's findings were authorized by the evidence in the record. Accordingly, the trial court properly denied appellant's plea in bar on the grounds of double jeopardy.

DFCS Safety Plans; Forgetful Witnesses

Hines v. State, A19A2405 (2/18/20)

Appellant was convicted of two counts or cruelty to children. The incidents occurred while appellant was living with Irving, who worked full-time with the military. Appellant first contended that the trial court erred in allowing the State to introduce evidence of the DFCS investigation of the child's injuries, the child's placement, and the DFCS safety plan because the potential for prejudice substantially outweighed any probative value of the safety plan and the accompanying testimony. The Court agreed and the State conceded the issue.

At trial, the DFCS investigator read from the safety plan, stated that the plan was to place the child with Irving to protect the child from appellant, that Irving would not allow any unsupervised visitations from appellant and that DFCS believed appellant caused the injuries to the victim. Thus, the Court found, the safety plan specifically referred to appellant as the "maltreater," which could give the jury the impression that appellant was guilty of the crime charged. Furthermore, the DFCS investigator's testimony regarding the court procedure coupled with evidence that the child had been removed from appellant's custody and that Irving had been instructed to "protect the child from [appellant]" could lead a jury to conclude that another court or agency already had determined that appellant was guilty. Accordingly, it was error for the trial court to admit evidence of the safety plan and placement of the child, and the admission of this evidence along with the testimony of the DFCS worker was not harmless in this case. Accordingly, the Court reversed appellants' convictions.

Appellant also contended that the trial court erred in allowing the investigating detective to testify to the contents of out-of-court statements made to him by Irving. The Court disagreed.

The Court stated that an out-of-court statement made by a witness is not hearsay if the witness testifies at the time of trial or hearing, is subject to cross-examination concerning the statement, and the statement is admissible as a prior consistent statement under OCGA § 24-6-613. However, a prior out-of-court statement of a testifying witness may not be used to bolster the credibility of a witness unless that credibility has been attacked. In this vein, a party may introduce a prior consistent statement of a forgetful witness where the witness testifies at trial and is subject to cross-examination. And here, the Court found, the record showed that after the 2010 incident, but prior to trial, Irving suffered multiple combat-related injuries, including a head injury. His mother testified that his injuries caused him to have "a hard time remembering a lot of things," and Irving repeatedly had trouble recalling certain details during his testimony, including what occurred on the day he discovered the child's injury. Accordingly, the Court concluded, the trial court did not err in admitting the testimony.

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Special Demurrers; Clergy Privilege

Picklesimer v. State, A19A2407 (2/18/20)

Appellant was convicted of aggravated sexual battery of his granddaughter, S. P., three counts of child molestation of S. P., and one count of child molestation of a second granddaughter, M. P.

Appellant contended that the trial court erred in denying his special demurrer as to the dates and place of the offenses contained in the indictment. The Court disagreed.

First, the Court noted that it reviews a trial court's denial of a special demurrer de novo. However, the Court applies different standards when it reviews rulings on special demurrers pretrial and post-trial. When reviewing a ruling before trial, the Court considers whether the indictment is perfect in form and substance, but when reviewing it after trial, the Court considers whether the defendant suffered actual prejudice from alleged deficiencies in the indictment.

And here, the Court found, even assuming the State could have further specified the dates or place of the offenses in the indictment, appellant was not actually prejudiced by any alleged deficiencies. The only evidence before the jury of the dates of the offenses came from either the forensic interviews of the victims — which were available to appellant before trial — or the statements given by appellant himself to police. Moreover, the only evidence of the location of the offenses, both from the victims and appellant, is that the abuse occurred in appellant's home. Accordingly, there was no evidence that the form of the indictment impaired appellant's ability to present his defense.

Appellant also contended that the trial court erred in admitting his statement to police as such was protected by the clergy privilege. The Court again disagreed.

Here, appellant engaged in small talk with the detective prior to the investigator asking appellant about the allegations against him concerning S. P. During the conversation, appellant told the detective that appellant is a pastor at a particular church. Appellant then asked "And you're a preacher, too; right?" The detective responded, "I have, yeah. I have. I haven't for a long time. But I've got to, (Inaudible)."

The Court stated that it would strain credulity to consider the above exchange to be evidence of appellant's attempt to profess religious faith or seek spiritual comfort or counseling. The statements were made to a detective in a police station who informed appellant that he was investigating allegations of child sexual abuse. The mere fact that the detective at some point in the past was a pastor to people other than appellant did not attach the clergy privilege to appellant's subsequent admissions of abusing S. P. and M. P. Accordingly, the Court concluded, the trial court did not abuse its discretion in admitting appellant's statements.

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Mutually Exclusive Verdicts; Theft Crimes

Turner v. State, A19A1828 (2/20/20)

Appellant was convicted of two counts of theft by receiving stolen property (Counts 3 and 7), one count of armed robbery (Count 4), and one count of battery (Count 6). He contended that the verdict finding him guilty of both armed robbery in Count 4 and theft by receiving in Count 7 was barred because those crimes were mutually exclusive. The Court agreed.

The Court stated that a verdict is mutually exclusive where a guilty verdict on one count logically excludes a finding of guilt on the other. Mutually exclusive verdicts, which cannot both stand, result in two positive findings of fact which cannot logically mutually exist. The offense of theft by receiving is intended to catch the person who buys or receives stolen goods, as distinct from the principal thief. An essential element of the crime of theft by receiving is that the goods had been stolen by some person other than the accused.

Here, the Court found, the theft by receiving conviction at issue involved the victim's purse and cellphone, which were taken during the armed robbery. By finding appellant guilty of armed robbery, the jury necessarily found that appellant was the person who had stolen the victim's purse and cellphone during the armed robbery. As such, appellant was the principal in the theft of the stolen property. But, one cannot be a principal thief of stolen property and at the same time be convicted of theft by receiving the same property. Therefore, the Court concluded, because the crimes were mutually exclusive, appellant's convictions on the crimes of armed robbery in Count 4 and theft by receiving in Count 7 were reversed. However, appellant's convictions for theft by receiving in Count 3 and battery in Count 6 remained intact.

Ineffective Assistance of Counsel; Guilty Pleas

Youngblood v. State, A19A2343 (2/20/20)

Appellant was convicted of multiple counts of family violence battery and other offenses. The trial court sentenced him to a total of 20 years, 15 to serve. Appellant contended that he received ineffective assistance of counsel during the plea bargaining process because his counsel failed to inform him that even if the witnesses recanted in their live testimony, the witnesses' pre-trial statements could be used against him and would carry the same weight as their trial testimony. Specifically, he argued that if he had been properly informed, he would not have chosen to proceed to trial. The Court disagreed.

The record showed that at the motion for new trial hearing, appellant testified that he was aware that the State's witnesses, including the victim, the victim's sister, and his own sister had previously made statements against him to law enforcement officials. According to appellant, if his counsel had told him that the witnesses' prior statements would have the same "weight" as their trial testimony, he would not have gone to trial. However, the Court noted, appellant conceded that he was present at the preliminary hearing and his probation revocation hearing where the witnesses recanted, but the State was able impeach those witnesses with their prior statements to law enforcement. Based on that evidence, appellant's probation was revoked.

Appellant's trial counsel also testified that he met with appellant at least six times prior to trial and went over the evidence that he believed the State would produce, including the victim's and other witnesses' pre-trial statements. They also

discussed the various inconsistent statements that had been given and whether any of the witnesses might recant at trial. Counsel recalled that the State had initially offered appellant 15 years to serve, with some additional term of probation. With appellant's consent, he eventually negotiated an offer of fifteen years, with four to serve. However, when he returned with the offer, appellant changed his mind, stating that his mother did not want him to take the deal.

Counsel further testified that he informed appellant regarding the total minimum and maximum prison time he faced on the charges if he went to trial. He also explained to him that they did not necessarily know what the witnesses were going to say at trial and that they certainly did not know what a jury was going to do. Counsel denied telling appellant that the State would not be able to confront the witnesses with their prior statements. He further testified that he informed appellant about "all the risks inherent in going to a jury trial." However, he stated that he would never "twist [a client's] arm and tell them they have to take a plea offer."

The Court stated that a defendant is entitled to be fully informed of certain consequences of his decision to accept or reject a plea offer, including the right to the informed legal advice of counsel regarding the possible sentences that could be imposed following a conviction at trial. And when considering claims of ineffectiveness of counsel, the trial judge determines witness credibility and is not required to accept the defendant's version of events. Thus, the Court found, the trial court was authorized to find that appellant's trial counsel provided him with informed legal advice regarding the consequences of his decision to accept or reject the State's plea offer and that appellant was aware, based on the pretrial hearing and probation revocation hearing, that the witnesses' prior statements could be used against him even if they testified in his favor at trial. Accordingly, the Court concluded, the trial court did not err in denying appellant's motion for new trial.

Burglary; Sufficiency of the Evidence

Showers v. State, A19A1945 (2/20/20)

Appellant was convicted of burglary in the first degree. He contended that the evidence was insufficient to sustain his burglary conviction because the house did not constitute a dwelling under OCGA § 16-7-1 (a) (1). Specifically, he argued that because the house was under construction at the time of the burglary and had not been occupied, it did not fall within the statutory definition of "dwelling".

The Court noted that the house was under construction at the time of the crime and, without dispute, no one had lived in the house yet. However, the victim was in the process of building his home and had completed the house's framing, and installed the windows, doors, roofing, plumbing, electrical and HVAC systems. The statute's plain language states that a dwelling is any building "designed or intended for occupancy for residential use." OCGA § 16-7-1 (a) (1) (2016). The victim intended to live in the house with his family and was building the house over time as he was able to afford to purchase construction materials.

Thus, the Court stated, whether the construction of the house was complete or whether the victim had begun living in the home does not preclude a finding that the house was a dwelling at the time of the burglary. The house was designed for use as a dwelling pursuant to the plain language of the statute, and therefore it falls within the meaning of a "dwelling." Accordingly, the evidence was sufficient to authorize his conviction for burglary.

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Jury Charges; Deliberate Indifference

Matos-Bautista, A19A2134 (2/20/20)

Appellant was convicted of trafficking in heroin. The evidence, very briefly stated, showed that law enforcement officers used wiretap information to listen to a negotiation for a half a kilogram of heroin. Based on the information, a police officer initiated a traffic stop of appellant's vehicle in connection with the investigation (and for alleged traffic violations). Appellant was the vehicle's driver and sole occupant. The officer asked appellant for consent to search the vehicle, and appellant consented. The officer opened the center console next to the driver's seat and found inside a brown tin "Buchanan" liquor container. He opened the container and found a chunky white substance inside cellophane (a large zip-loc bag, as described by the lead investigator). Crime lab testing later showed the substance to be a mixture of heroin and fentanyl, weighing 489.65 grams. The officer held up the bag and asked appellant, who was then about 12 feet away, "Is this drugs?" Without hesitating, appellant replied, "[Y]es," and lowered his head.

The record showed that the trial court told the jury as follows: "I charge you that the elements of *knowledge or intent* may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact. Again, whether or not you draw any such inference is a matter solely within your discretion." (Emphasis supplied.) Appellant contended that the trial court erred by giving the State's requested jury charge on "deliberate ignorance," contending that the jury charge "excused the State from having to prove *intent*, an essential element present in every … criminal prosecution … and an element central to [his] defense." (Emphasis supplied.)

The Court stated that a charge on deliberate ignorance is appropriate when the facts support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution. A court should not instruct a jury on deliberate ignorance when the evidence points to actual knowledge or no knowledge on the defendant's part. Thus, the deliberate ignorance instruction, when appropriate, provides another way to satisfy the knowledge element of a criminal offense, not the intent element. Consequently, a charge on deliberate ignorance that equates intent with knowledge, or which tends to confuse those concepts, is erroneous and the trial court erred by instructing the jury that the element of intent could be satisfied by inferences drawn from proof that appellant "deliberately closed his eyes to what would otherwise have been obvious to him."

However, the Court stated, the trial court's giving of an erroneous jury instruction does not necessarily require reversal. An erroneous jury instruction is not judged in isolation, but rather is considered in the context of the entire jury charge and the trial record as a whole, and does not constitute grounds for reversal unless the error causes harm. And here, the Court concluded, viewing the trial court's entire jury charge and the record as a whole, the error was harmless. In so holding, the Court noted that although the trial court's deliberate ignorance instruction initially stated that "knowledge or intent may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes" to what would have otherwise been obvious, the court then added: "Stated another way, a defendant's *knowledge* of a fact may be inferred," thus omitting the erroneous "or intent" language. (Emphasis supplied.)

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Venue; Merger

Terrell v. State, A19A2349 (2/20/20)

Appellant was convicted of three counts of furnishing prohibited items to inmates (OCGA § 42-5-18). The evidence showed that around 11 p. m. one evening, a portal sergeant at Telfair State Prison was patrolling the prison perimeter. The area is often used by persons attempting to throw contraband over the prison fence and is lit by floodlights. The portal sergeant saw a woman near the prison fence. He called his supervisor, who contacted the sheriff's department to report that someone was trying to throw items over the fence. At trial, he testified that he saw the woman lying down near the fence, attempting to conceal two white "net bags," and that when he approached, she jumped up and ran, carrying the bags. The sergeant lost sight of her, but then found appellant coming out of a ditch, and apprehended her. When he asked about the bundles she had been carrying, she said she had dropped them in a field. When the sergeant returned to the area where he had seen appellant running, he found the net bags, which were torn, as well as other bundles scattered around. An inventory showed that the bags or bundles contained items including a Gerber knife, cell phones and chargers, hacksaw blades, glue, J-B Weld, dental floss, a tool kit, sewing needles, lighters, SD cards, earbuds, and tobacco. T-shirts, bandannas, and other clothing items also were found. Appellant admitted to law enforcement that she had agreed to take the packages to the prison and planned to throw them over the fence, but could not because they were too heavy.

The Court noted that the version of OCGA § 42-5-18 in effect at the time of the crimes, provided, in pertinent part, that: "(b) It shall be unlawful for any person to obtain for, to procure for, or to give to an inmate a gun, pistol, or any other weapon; any intoxicating liquor; amphetamines, biphetamines, or any other hallucinogenic drugs or other drugs, regardless of the amount; any telecommunications device; or any other article or item without the authorization of the warden or superintendent or his or her designee."

Appellant argued that the State failed to prove venue because it presented no evidence that, pursuant to the language of OCGA § 42-5-18 (b), she "obtained" or "procured" the items at issue in Telfair County. Rather, she contended that while the State presented a Wal-Mart receipt showing the purchase of some of the items, it did not prove who purchased the items or the county in which the Wal-Mart was located. The Court disagreed.

The indictment, in all three counts at issue here, charged in pertinent part that appellant "did unlawfully obtain and procure for inmates at Telfair State Prison" the various items at issue "*by bringing* the said [item or items] to Telfair State Prison property." (Emphasis supplied.) According to the Oxford English Dictionary (OED Third Edition, March 2004), "obtain" means, in pertinent part, "[t]o come into the possession of; to procure[,]" and "procure" means "[t]o obtain; to bring about." Thus, the Court found, the evidence clearly showed that appellant had "come into the possession of," and thus obtained or procured, the items as charged in the indictment. The portal sergeant testified that he saw her on prison property, holding the bundles, and that he reported her attempt to throw them over the prison fence. The bundles were shown to contain the items as charged in the indictment. The portal sergeant testified that the actions underlying the charged crimes took place in Telfair County. The indictment did not charge appellant with obtaining or procuring the items by purchasing them at Wal-Mart or by packaging them in a motel room in Dodge County, contrary to appellant's argument.

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Appellant also argued that the trial court erred in failing to merge, for sentencing purposes, her convictions on all three counts of furnishing items to inmates. The Court again disagreed.

The Court stated that this issue requires a determination of the "unit of prosecution," or the precise act or conduct that is being criminalized under the statute." Without evidence of a legislative intent to allow multiple punishments for the same course of conduct, acts that constitute a continuing criminal course of conduct are not punishable separately.

The Court found that with respect to the three counts of furnishing items to inmates, the plain language of the prior version of OCGA § 42-6-18 (b), criminalizes more than one act. Each of the three counts under which appellant was sentenced included allegations regarding a distinct category of contraband, which the statute prohibited appellant from obtaining or procuring for inmates: methamphetamine (Count 2); a variety of items including telecommunications devices (cell phones) (Count 3); and a weapon (a Gerber knife) (Count 4). The statute's plain language separately criminalized the obtaining or procuring of these distinct items.

Nevertheless, appellant argued, the Court should read the statute as simply prohibiting any item not authorized by the warden. But, the Court found, the statute unequivocally lists a variety of specific items, separated by semicolons, and appellant was sentenced related to crimes involving distinct, separate items, identified in different statutory clauses. Reading the statute as appellant suggested would mean that there was no need to list them separately, and the Court stated, it avoids interpreting statutes in a manner that renders any portion of them surplusage or meaningless. A statute is to be construed to give sensible and intelligent effect to all its provisions. Therefore, the trial court did not err in sentencing appellant on all three counts.

Rule 404 (b) Evidence; Prior Sexual Conduct

Cross v. State, A19A2291 (2/20/20)

Appellant was convicted of rape and aggravated sodomy. The evidence, very briefly stated, showed that in 2009, the victim woke up to find appellant, dressed only in his boxer shorts, standing over her in her bedroom. Appellant told her he had been watching her through a window. Appellant then forced the victim to have oral sex by placing his mouth on her vagina, despite her pleading with him not to "do this," and that she "didn't want to do it." Similarly, he had vaginal intercourse with her despite her repeated pleas for him to stop.

Appellant contended that the trial court erred in admitting evidence of two other offenses pursuant to OCGA §§ 24-4-404 (b) and 24-4-403. In 2008, appellant was seen by a police sergeant looking through someone's window and apparently masturbating. In a 2015 incident, a female detention officer at the jail observed appellant through a glass window "with his pants down masturbating."

The Court noted that the first prong of the Rule 404 (b) analysis requires a showing that the evidence was relevant to an issue other than defendant's character. And here, the Court found, not only did appellant place intent at issue by pleading not guilty to the charges of rape and aggravated sodomy, but the defense portrayed the interaction as a consensual sexual encounter and alleged that the victim fabricated the rape allegation in order to bring a civil lawsuit against the apartment complex to recover damages. Thus, the Court found, in light of appellant's attacks on the credibility of the victim, the

other acts had the tendency to bolster the credibility of the victim by demonstrating that her circumstances were not unique. First, with respect to the 2008 act, the sergeant testified that it appeared that appellant was masturbating while looking into the window of a private residence. Similarly, in this case, the victim testified that appellant had told her that he had looked into her window prior to entering the apartment, thereby suggesting that appellant was sexually motivated when he looked into the victim's window and entered her apartment with the intent to force the victim to engage in sexual acts against her will. Similarly, the 2015 incident was relevant to show intent because appellant continued to masturbate, even after being ordered to stop by the female detention officer. Here, the victim testified that appellant forced her to engage in oral and vaginal sex despite her repeated pleas with him to stop. Consequently, the trial court did not abuse its discretion in concluding that evidence of the 2008 and 2015 acts was admissible for a relevant purpose under Rule 404 (b).

As to the prejudice prong, the Court found that as noted by the trial court, the probative value of the other acts was "great" because the State had a strong need for the evidence to combat appellant's attacks on the victim's credibility and to negate appellant's defense that the encounter was consensual. The only witness to the incident was the victim herself, and although the other acts were not overly similar to the charges offenses, each involved appellant's attempt at non-consensual sexual gratification with women he did not know. Moreover, these extrinsic acts were not of such a heinous nature that they were likely to incite the jury to an irrational decision. As for the time span between the two other acts in 2008 and 2015, and the instant offense, which occurred in 2009, the Court found that appellant failed to cite to any authority to support his assertion that such a span in time was too remote for admissibility. In any event, the Court found that the temporal nexus was not too remote to erode the probative value of the two other acts. And, notably, the trial court repeatedly gave limiting instructions that applied to all extrinsic evidence testimony, and cautioned that this evidence could only be considered as to the issues of intent, motive, and to negate consent and not for any other purpose.

Finally, with respect to the issue of proof, which appellant challenged with respect to the May 2008 incident, in light of the testimony of the sergeant, the jury could have properly found by a preponderance of the evidence that appellant committed the 2008 act of masturbating outside the townhouse.

Accordingly, in light of appellant's attacks on the victim's credibility, the strong presumption in favor of the admission of evidence under Rule 403, and the trial court's limiting instructions to the jury, the Court concluded that the trial court acted within its discretion in permitting the State to introduce evidence of appellant's other acts.