Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING AUGUST 21, 2020
Issue 34-20

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- **Jury Charges; Lesser Included Offenses**
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- **Juveniles; Burden of Proof**

Statute of Limitations; Actual Knowledge of Criminal Activity

Countryman v. State, A20A0556 (6/18/20)

Appellant was convicted of computer theft based on the alleged act of altering her grades in the National Guard's computer network, so as to avoid repaying tuition assistance. The April 26, 2018 indictment contained a tolling provision that stated: "Pursuant to [OCGA §] 17-3-2 (2), the Grand Jurors aforesaid also find that the aforementioned crime was unknown until on or about January 13, 2015." According to the indictment, appellant's offense was committed "on, about and between the 28th day of July 2007 and the 1st day of October, 2011." She filed a plea in bar alleging that the National Guard knew of her theft in 2012 and thus, her indictment was barred by the statute of limitations. The trial court denied her motion.

The facts, very briefly stated, showed that appellant worked as a tuition-assistance manager for the National Guard's education office. The National Guard offers its soldiers $4,500 per year for school and pays that money directly to the school they attend. But to enroll in the next semester and qualify for further tuition assistance, the soldier must maintain a 2.0 grade point average, make a passing grade in each class, and attend their classes. And while employed as tuition-assistance manager, appellant was in charge of tuition assistance and tasked with implementing a process called recoupment. Under the recoupment policy, the school retains any tuition assistance it has been paid, but a soldier who fails a class or fails to attend a class is required to repay those funds to the National Guard.

On October 12, 2012, the National Guard began using a new computer program called GoArmyEd, and the tuition-assistance history in iMarc, the old system, was transferred to that system. Unlike iMarc, GoArmyEd revealed the identities of employees who entered grades into iMarc, as well as the time and date those grades were entered. And one of the biggest differences between the two systems is that for GoArmyEd, the schools submitted student grades *directly* into the system, rather than having them manually entered by the National Guard's education-office employees (as required by iMarc).

During her time as tuition-assistance manager for the National Guard's education office, appellant was also a student receiving tuition assistance and was subject to recoupment. And in 2012, appellant first contacted Sheila Schofield—the central assistant tuition manager at St. Leo University—during the fall term, regarding a class she had taken at the school. In 2015, to aid appellant in receiving tuition assistance, Schofield noticed invalid course numbers or titles for appellant's classes. Schofield researched further and discovered that there were also grade discrepancies between appellant's GoArmyEd

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records and her official St. Leo transcript. Then, on January 13, 2015, Schofield submitted a GoArmyEd "help desk ticket," explaining the issue because these discrepancies had to be corrected before appellant could move forward with her degree. Schofield also provided the National Guard with an unofficial copy of appellant's transcript. As a result of this request, the National Guard determined that appellant owed recoupment to the National Guard for 10 courses, totaling $5,700. And there was no way to reconcile the discrepancies in appellant's records other than to conclude that she entered incorrect grades to "just plain avoid recoupment."

Appellant contended that the trial court erred in denying her plea in bar because the National Guard had actual knowledge of her alleged computer theft by 2012 at the latest, and therefore, her prosecution was barred by the applicable four-year statute of limitation. Specifically, she contended the statute of limitation began to run on October 1, 2012, at the latest, when the National Guard switched to the GoArmyEd system. And while appellant did falsify her grades prior to the National Guard's switch to the GoArmyEd system, the iMarc system did not reveal who entered each student's grades (even though information was embedded in the system). But the GoArmyEd system, which the National Guard began using on October 1, 2012, revealed which employee entered grades into iMarc, along with the dates and times of those entries. Given the foregoing, appellant argued that, regardless of whether the National Guard thought it was a crime for her to enter her own grades, it had actual knowledge of its own database on October 1, 2012, which showed that she did so. The Court disagreed.

The Court stated that it applies the "probable-cause-to-arrest" standard set forth in *Riley v. State*, 305 Ga. 163 (2019) for determining when appellant's crime was known to the State. As a result, under the *Riley* Court's interpretation of OCGA § 17-3-2 (2), appellant's computer theft was actually known to the National Guard, and, therefore, the State, when the State possessed sufficient probable cause to authorize her lawful arrest for the crime. And here, the Court found, it was undisputed that the National Guard did not *actually know* that appellant entered her own grades in October 2012 merely because that information became available in GoArmyEd; and it was irrelevant whether the National Guard *should have known* all of the contents of its database. Indeed, under OCGA § 17-3-2 (2), the statute of limitation does not run while the crime or the person who committed the crime is "unknown"—it does not say "and could not have been discovered through the exercise of reasonable diligence." Thus, the Court concluded, the National Guard lacked knowledge of appellant's crime until 2015 and therefore, the statute of limitation was tolled until that time under OCGA § 17-3-2 (2).

In its brief, the State argued that the Court should disapprove of certain cases, some of which are relied upon by appellant and all of which were decided before *Riley*. The Court noted that these pre-*Riley* decisions suggest or expressly hold that a victim has actual knowledge of a crime when he or she becomes aware of the act effectuating the crime, regardless of whether he or she had knowledge that the act was illegal. These cases stem from the Court's 1974 decision in *Holloman v. State*, 133 Ga. App. 275 (1974). The Court agreed and disapproved of *Holloman* and its progeny, but only to the extent that these decisions conflict with the probable-cause-to-arrest standard established by our Supreme Court in *Riley*. These cases include *State v. Robins*, 296 Ga. App. 437 (2009), *State v. Bragg*, 332 Ga. App. 608 (2015) (physical precedent only) and *State v. Crowder*, 38 Ga. App. 642 (2016).

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Sentencing; Imposition of Special Conditions

Chaney v. State, A20A0287 (6/23/20)

Appellant was convicted of one count each of aggravated assault (OCGA § 16-5-21), aggravated battery (OCGA § 16-5-24), and cruelty to children in the first degree. The evidence showed that appellant inflicted severe punishment on her 3-year-old stepson by burning him with what appeared to be an iron, taping his mouth shut, and keeping him locked in a room. The court imposed a twenty year sentence to be followed by twenty years of probation. As a part of the probation, the court also imposed a special condition providing that appellant "shall have no contact of any kind, in person, or by telephone, mail, or otherwise, with ANY CHILD UNDER THE AGE OF EIGHTEEN (18) YEARS OF AGE."

Appellant contended that the "no contact" condition was overbroad. The Court agreed. The Court noted that in previous cases it has rejected as overbroad special conditions that do not provide sufficient notice to probationers of the groups and places that must be avoided. In contrast, the Court has approved of certain special conditions of probation limiting contact with an individual or a particular cohort as long as the condition is reasonably tailored. And here, the Court found, the special condition of probation imposed by the trial court contains no such limitations. First, the condition fails to provide appellant notice of the groups and places she must avoid. To the contrary, the condition could be applied to prohibit her from shopping at virtually any store, visiting any restaurant, or literally going to any other location in which she would come into contact with the general public.

Second, the trial court's condition violates the principle that conditions must not be so broadly worded as to encompass groups and places not rationally related to the purpose of the sentencing objective. Inasmuch as appellant was convicted of cruelty to children for the severe abuse of her 3-year-old stepson, the trial court's broad special condition of probation prohibiting any contact with minors, regardless of whether the contact was initiated or uninitiated, necessarily includes groups and places not rationally related to the purpose of the sentencing objective. Consequently, the trial court abused its discretion in imposing against appellant a blanket prohibition against any contact with minors.

Accordingly, the Court concluded, because it is clear that Georgia law does not support the kind of universal special condition of probation, prohibiting contact with an individual or particular cohort without limitation, imposed by the trial court in this case, the special condition of Probation was vacated and the case remanded for resentencing.

Jury Charges; Lesser Included Offenses

Castro-Moran v. State, A20A0450 (6/23/20)

Appellant was indicted on one count of felony murder and one count of cruelty to children in the first degree (OCGA § 16-5-70 (b)). The jury found her guilty of the lesser included offenses of second degree murder and cruelty to children in the second degree. The trial court merged the cruelty to children in the second degree conviction with the second degree murder conviction and sentenced appellant to ten years' imprisonment.

The evidence, very briefly stated, showed that on December 26, 2015, Santos, who occasionally took care of Yessica, appellant's 17-month-old daughter, noticed that the child had a fever and told appellant to give her Tylenol. Two days later, appellant told Santos that Yessica was still sick and Santos told her to take Yessica to a doctor. Perez, appellant's

roommate and a neighbor also observed Yessica and both told appellant to seek medical help for her. Appellant took Yessica to the health department. After an examination, a nurse practitioner advised appellant to take the child to the emergency room. Although appellant took Yessica to the emergency room, she ultimately refused treatment for Yessica because of financial concerns, and she left the hospital with Yessica. In the days that followed, Yessica continued to have a fever and Santos told appellant to take Yessica to a doctor. On December 31, 2015, appellant knocked on Perez's bedroom door and said, "I think my baby died." The police were called and EMS later arrived and took Yessica to a hospital, where hospital personnel declared Yessica deceased.

Appellant argued that the trial court erred by refusing to charge the jury on involuntary manslaughter predicated on reckless conduct as a lesser included offense of felony murder. The Court agreed. The Court found that a nurse practitioner at the health department who initially examined Yessica testified that she told appellant that, based on her observations, Yessica was dehydrated and that she "really needed to go to the emergency room." Although appellant took Yessica to the emergency room, she refused treatment for Yessica because of financial concerns. Based on this evidence, a jury could have reasonably concluded that appellant endangered Yessica by consciously disregarding a substantial and unjustifiable risk that her failure to seek medical treatment for Yessica would endanger her and lead to her death. Therefore, because there was some evidence to establish involuntary manslaughter predicated upon reckless conduct, the trial court should have charged the jury in this regard.

Nevertheless, the State argued, the trial court was not required to charge the jury on involuntary manslaughter because the evidence adduced at trial showed that appellant was guilty of the "completed" offense of felony murder predicated on cruelty to children in the first degree. But, the Court noted, while it has held that, if the evidence shows the completed offense, as charged, or no offense, the trial court is not required to charge the jury on the lesser included offense where a case contains some evidence, no matter how slight, that shows that the defendant committed a lesser offense, then the court should charge the jury on that offense. And here, there was at least slight evidence at trial which showed that appellant was guilty of the lesser included offense of involuntary manslaughter predicated on reckless conduct, and the trial court therefore erred by refusing to charge the jury in this regard. Moreover, the Court found, based on the evidence, the error was not harmless.

Appellant also argued that the trial court erred in failing to charge the jury on reckless conduct as a lesser included offense of cruelty to children in the first degree. The Court noted that the trial court merged her conviction for cruelty to children in the second degree with her conviction for second degree murder. But, because the Court reversed her conviction for second degree murder her guilty verdict for second degree cruelty to children was "unmerged" from her conviction for second degree murder. Thus, if the second degree cruelty to children verdict is permitted, the trial court would be authorized on remand to enter a judgment and impose sentence for that conviction. Also, it is well settled that if a defendant raises an issue on appeal that, on remand, would bar entry of a conviction on a verdict that was merged or vacated, it is appropriate to address that issue. Accordingly, the Court addressed appellant's claim regarding the trial court's failure to instruct the jury on reckless conduct as a lesser offense of cruelty to children.

The Court stated that reckless conduct may be a lesser included offense of cruelty to children, if the harm to the child resulted from criminal negligence rather than malicious or willful conduct. And here, there was some evidence establishing appellant's guilt for reckless conduct. Accordingly, the Court concluded that the trial court erred by failing to charge the

jury on reckless conduct as a lesser offense of cruelty to children, and thus, appellant's conviction for that offense also could not be sustained.

Ineffective Assistance of Counsel; Prosecutorial Misconduct

Parham v. State, A20A0229 (6/23/20)

Appellant was convicted of aggravated assault, armed robbery, and possession of a firearm during the commission of a felony. The evidence showed that in a three-hour period on April 22, 2014, appellant and an accomplice engaged in a crime spree, committing or attempting to commit three armed robberies targeting Hispanic victims and Hispanic communities.

Appellant contended that his trial counsel rendered ineffective assistance by failing to object when the prosecutor called him a racist in his opening statement. The Court noted that after stating that the evidence would show that appellant "went on an armed robbery spree, targeting the Hispanic community," the prosecutor stated: "This case is about racism. Now, many of you may be surprised or maybe even raise an eyebrow. Why am I talking about racism? Because that's who the victim is in this particular case, racism that has impacted one individual, starting at 6:00 a.m. on April 22nd."

Trial counsel did not object, but he later moved for a mistrial because of the reference to racism. The trial court admonished the prosecutor that although he could argue that the evidence showed appellant targeted Hispanic people and communities, he could not refer to racism again. The court warned the prosecutor that "I'll dress you down in front of the jury if this happens during closing statements." The prosecutor did not mention racism again.

The Court stated that assuming that trial counsel's failure to object to the prosecutor's use of the word "racism" in his opening statement amounted to deficient performance, appellant failed to show prejudice. The State's theory in this case was that appellant and his accomplice engaged in a crime spree targeting Hispanic people and communities. It introduced evidence to support this theory, including that, as the victim's assailants retreated, one of them said to the victim, "Mexican, why are you here?"

Furthermore, the Court noted, before opening statements, the trial court instructed the jury that an opening statement is not evidence and what the lawyers say is not evidence. In his final charge, the trial court reiterated that opening statements are not evidence. Therefore, the Court concluded, even if it was error for appellant's counsel not to object [to the prosecutor's use of the word "racism" in his opening statement, there was no reasonable likelihood that the outcome of the trial would have been different if he had objected.

Juveniles; Burden of Proof

In Re A.G., A20A0054 (6/24/20)

Appellant was adjudicated delinquent for acts which, if committed by an adult, would have constituted financial transaction card theft and theft by taking. The evidence showed that a teacher noticed that his wallet had been taken from his desk. The wallet contained a debit card, a credit card, and $1,000 in cash. The wallet was later found in appellant's

backpack, although the cards and cash were missing. An internal school tribunal determined that appellant did not violate any school rules as a result of the allegations and "found her not guilty."

Following the parties' closing arguments at trial, the trial court remarked that "[w]ell, I — you know, I — I'm following the argument and — and I'm right there with the tribunal until the wallet's found in her book-bag. I — I'm not convinced. I think there's still *some evidence* that she committed the acts, Theft by Taking and Financial Transaction Card Theft. I'm going to adjudicate her of both." The court then issued a written order finding that appellant committed the acts "within the meaning of the law."

Appellant contended that the juvenile court applied an erroneous standard of proof. The Court agreed. Because "some evidence" is a different and lesser standard of proof than beyond a reasonable doubt, the trial court did not apply the correct standard of proof in evaluating the evidence. Thus, the Court vacated the trial court's judgment and remanded the case for the juvenile court to consider the evidence under the proper standard.