

## THIS WEEK:

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### Impeachment; *Elliott*

*Dunbar v. State, S20A0167 (6/29/20)*

Appellant was convicted of murder and possession of a firearm during the commission of a felony. She contended that the trial court abused its discretion by admitting into evidence an AK-47 rifle and ammunition, which were not connected to the murder. The record showed that the trial court initially ruled that the AK-47 and the ammunition for various types of handguns, which were found during a search of appellant's home conducted four days after the murder, were inadmissible, as they were not relevant to any issue in the case. During appellant's cross-examination, the prosecutor asked appellant what happened to the gun she used to shoot the victim. Appellant said that she did not know what had happened to the gun. She testified that her husband took it from her, because she "never wanted to see a gun in [her] life." Immediately following this testimony, the prosecutor sought to introduce the AK-47 and the ammunition to impeach appellant's statement. Appellant's counsel argued that the items were not relevant and that their prejudicial effect outweighed their probative value. Over Appellant's objection, the trial court ruled the items admissible for impeachment purposes.

The Court found that in light of appellant's testimony that her husband had removed the murder weapon from the home because she "never wanted to see a gun in [her] life", the State was entitled to show that — just days later — an AK-47 and ammunition for various types of handguns were found in her home and she was aware of their presence. And, the Court stated, although appellant argued that, even if admissible for impeachment purposes, the evidence should have been excluded pursuant to OCGA § 24-4-403 ("Rule 403"), under the circumstances of this case, the trial court did not abuse its discretion in determining that the probative value of the evidence outweighed the danger of unfair prejudice. Appellant asserted that the admission of this evidence created "a subconscious suggestion of propensity for violence." However, the Court found, it was only after appellant herself opened the door for its admission that the State introduced the evidence to contradict appellant's statement that she had never wished to see a gun again. And, during its closing argument, the State only referred to the AK-47 and ammunition in the context of appellant's truthfulness. At no time did the State suggest to the jury that the evidence demonstrated appellant's propensity for violence, and the trial court gave a limiting instruction that the evidence was only to be used for impeachment purposes.

Appellant also argued that the trial court erred by allowing the State to elicit testimony about the withdrawal of consent to search her home. She contended that this testimony violated her right against self-incrimination protected by the Fifth Amendment and Article I, Section 1, Paragraph XVI of the Georgia Constitution (“Paragraph XVI”). The Court noted that appellant objected to the testimony regarding withdrawal of consent to search her home on grounds of hearsay, relevancy, and improper character evidence. Thus, because she did not object to the trial court on constitutional grounds, the Court’s review was limited to whether it was plain error.

First, the Court stated that it is well-established that the Fifth Amendment’s protection against self-incrimination is limited to *testimonial* evidence. But, law enforcement’s request to search appellant’s home did not seek testimonial evidence from appellant. Therefore, her Fifth Amendment argument was unavailing.

However, the Court stated, Paragraph XVI of the Georgia Constitution does not limit its protections to testimonial evidence. And, citing *Elliott v. State*, 305 Ga. 179 (2019), appellant argued that gathering evidence through a search of her home equates to compelling her to be a witness against herself, and therefore, admission of her refusal to consent to that search violated her right against self-incrimination. But, the Court found, *Elliott* was of no help to appellant. While it is true that *Elliott* held that admission of a refusal to consent to a breath test violated the defendant’s right against self-incrimination under Paragraph XVI, the holding did not extend to the refusal to consent to any search. *Elliott* held that, because Paragraph XVI protects against self-incrimination through certain types of compelled acts, admission of the refusal to consent to a breath test (which requires the compelled act of deep-lung breathing) would violate the defendant’s constitutional right against self-incrimination. *Elliott* and the Court’s underlying decision in *Olevik v. State*, 302 Ga. 228 (2017), were careful to distinguish that their scope does not extend to all types of searches, but is limited to breath tests. Thus, appellant failed to show that the trial court’s admission of this testimony was plain error, as her argument would require extending the existing precedent embodied in *Elliott* and *Olevik* beyond its current scope. Thus, the Court concluded, given that appellant could not point to controlling precedent showing that the search of her home — and, by extension, her withdrawal of consent to search — fell within the protections against self-incrimination embodied in Paragraph XVI, the trial court did not committed “clear or obvious” error.

## **Rule 404 (b); Rule 404 (a)**

*Strong v. State*, S20A0270 (6/29/20)

Appellant was convicted of felony murder, aggravated assault, and knife-possession offenses based on the fatal stabbing of his wife’s son, Maurice, and the stabbing of her grandson, Deandre. The evidence, very briefly stated, showed that appellant and his wife, Felicie, came home from a three-day trip to the home they shared with Maurice and his son, Deandre. Appellant, who did not get along all that well with the pair, started an argument with them because neither one of them washed the dirty dishes while he and Felicie were gone. At one point, Deandre went to his bedroom, but appellant “busted the door open.”

Day, Maurice’s friend, heard the commotion and came over. He suggested that Maurice and Deandre come to his house until appellant calmed down. Maurice and Deandre went back inside the house to get some of their things. Day stayed outside in the yard. Appellant stayed on the front porch. A few minutes later, Maurice came back out of the house. As

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Maurice walked by appellant, appellant shoved him into a corner of the porch and began stabbing him with a large hunting knife. When Deandre tried to intervene, appellant began stabbing him as well.

At trial, the State presented extensive evidence — through seven witnesses and comprising about one-fourth of the transcript of the State's case — about nine other violent acts allegedly committed by appellant, which the trial court admitted under OCGA § 24-4-404 (b) (“Rule 404 (b)”). This evidence included six alleged assaults and threats against appellant's former domestic partner Connie Evans between 1991 and 1997; an alleged shooting of Anthony Fortson in his back as he fled down a street in 1994, which resulted in his hospitalization for a month; an alleged assault of appellant's then-wife Gracie Brown Strong in 2001, which broke her neck and left her permanently paralyzed; and an alleged beating of appellant's employee Ashanti Magee in 2012. The State did not present any evidence that appellant had been charged with or convicted of any crimes related to these incidents. Appellant also testified extensively on both direct and cross-examination about the many other alleged but uncharged acts of violence that the State had presented during its case. The Court noted that his testimony about the evidence admitted under Rule 404 (b) constituted almost a third of his time on the witness stand, including over 40% of the State's cross-examination of him.

Appellant argued that the trial court abused its discretion in admitting the evidence of his other violent acts under Rule 404 (b). The Court agreed.

First, the Court addressed the trial court's finding that the evidence was admissible to prove intent and disprove self-defense. The Court stated that although appellant put his intent at issue by pleading not guilty, the State's need for evidence to prove his intent was “extremely low” because appellant's sole defense at trial was self-defense. The fact that appellant may have committed violent crimes against other people many years earlier had nothing to do with his reason for stabbing the victims and really had no purpose other than to show appellant's propensity toward violence. Furthermore, the other acts had few similarities to, and major differences from, the charged crimes. And, the Court found, any probative value of this extensive other-act evidence was wholly outweighed by its extreme and unfair prejudicial impact. Thus, the Court concluded, the trial court abused its discretion by admitting evidence of these other violent acts to show appellant's intent or to negate self-defense.

Second, the Court addressed the trial court's finding that the evidence was admissible to prove motive. The State argued that the evidence of appellant's other violent acts was relevant to show that his “motive is to control other people” with violence — “whenever a person doesn't submit to his control, he reacts with violence.” But, the Court found, this “is a classic improper propensity argument, focusing on [a]ppellant's violent ... character and identifying his motive to act in far too generic a fashion.” Accordingly, the trial court also abused its discretion by admitting the other-act evidence to show appellant's motive.

The trial court also admitted the other-act evidence to disprove mistake and accident. But, appellant's sole defense theory was self-defense; there was no contention that he stabbed Maurice and Deandre by mistake or accident, and the jury was given no instructions on those issues. Thus, the State had no need for evidence to disprove mistake or accident, and the trial court abused its discretion by admitting the other-act evidence for these purposes as well. Accordingly, because the evidence of appellant's other violent acts was not properly admitted for any purpose for which the jury was instructed to consider it, its admission under Rule 404 (b) was error.

Nevertheless, the Attorney General (but not the District Attorney) argued that even if the evidence of appellant's other acts was not admissible under Rule 404 (b), it was admissible as evidence of appellant's violent character under Rule 404 (a) after appellant introduced evidence of Maurice's violent character. The Court noted that Rule 404 (a) (2) allowed appellant to offer evidence of Maurice's violent character, as that trait was pertinent to appellant's claim of self-defense. Under Rule 405, however, Maurice's character trait could be proved only with reputation and opinion testimony, because a victim's violent character is not an *essential element* of a self-defense claim. Thus, although the trial court issued a pretrial order purporting to admit evidence regarding two specific instances of Maurice's conduct, under Rules 404 (a) and 405, those specific acts were not properly admissible as character evidence. And to the extent that the trial court erroneously allowed appellant to present evidence of Maurice's prior threatening acts as character evidence, the State's recourse was to object to the admission of that evidence, not to introduce *more* inadmissible evidence in the form of specific prior violent acts by appellant. Instead, any such rebuttal evidence, just like any initial evidence of Maurice's character trait, would be limited by Rule 405 (a) to reputation and opinion testimony.

Finally, the Court found that the erroneous admission of this evidence was not harmless. Although the jury could have found appellant guilty if it believed the State's witnesses and disbelieved appellant, it was highly probable that the trial court's erroneous admission of the voluminous evidence that appellant had previously committed multiple serious violent acts contributed to the guilty verdicts that the jury returned. Accordingly, the Court reversed appellant's convictions.

## Judicial Commentary; Ineffective Assistance of Counsel

*Barboza v. State, S20A0404 (6/29/20)*

Appellant was convicted of malice murder and other crimes after he, Harris, and Bentley committed an armed robbery that resulted in the death of one victim and Bentley. The record showed that Harris was indicted with appellant, but on the first day of their joint trial, before the jury was selected, she pled guilty to armed robbery. The State agreed to dismiss the other charges against her, and Harris agreed to testify truthfully against appellant. Because Harris' name was on the indictment, the trial court told the prospective jurors that Harris had pled guilty to armed robbery “[a]nd part of the plea negotiations was that the defendant, Ms. Harris, would give truthful testimony concerning her co-defendant ... during his actual jury trial. And so if she did not give truthful testimony, in the opinion of the State, then the State could ask for a life imprisonment sentence.” On the second day of the trial, the court brought in a new group of prospective jurors and told them essentially the same thing.

Appellant argued that the trial court's explanations of Harris's plea deal to the prospective jurors was automatically reversible error under OCGA § 17-8-57 (c) or, alternatively, plain error under OCGA § 17-8-57 (a) and (b). The Court disagreed.

Although it was unusual, and unnecessary, for the trial court to explain Harris's plea deal to the potential jurors, the explanations were in no way a comment on appellant's guilt in violation of OCGA § 17-8-57 (c). Nor were they comments on whether a fact at issue had or had not been proved in violation of § 17-8-57 (a). The court summarized the undisputed terms of Harris's plea deal; the court did not tell the jury that her testimony would be truthful, but rather stated accurately that the State's sentencing recommendation would depend on whether Harris's testimony was truthful “in the opinion of the State.” Thus, the court's comments were not error under § 17-8-57 (a), let alone clear and obvious error.

Appellant also argued that his trial counsel provided ineffective assistance by failing to object to the trial court's comments. The Court again disagreed.

The Court found that trial counsel's decision not to object to the trial court's accurate explanation of Harris's plea deal to the jurors was not deficient performance; it was instead a reasonable strategy. As counsel testified, the court's explanations highlighted that Harris was motivated to testify in a way that the State believed was truthful in order to get a favorable sentencing recommendation. Counsel took advantage of the foundation laid by the court's comments during his cross-examination of Harris by discussing her plea deal in depth, including getting her to acknowledge that she needed to "satisf[y]" the prosecutor with her testimony to avoid a life sentence recommendation from the State and that she thought she was "pleasing the district attorney" with her testimony. Therefore, the Court concluded, appellant's ineffective assistance of counsel claim failed.

### **Miranda; Proximate Cause**

*Smith v. State, A20A0512 (6/15/20)*

Appellant was convicted of first degree vehicular homicide predicated on DUI (per se). The evidence showed that appellant turned left, failing to yield to an oncoming motorcyclist, which caused the motorcyclist to slam into the passenger side of appellant's vehicle, killing him.

Appellant argued that the trial court erred by allowing the State to impeach him with statements he made to a magistrate during his bond hearing on this case because he was not Mirandized when speaking to the magistrate. The record showed that prior to trial, the State and appellant agreed that the State would not introduce those statements during the State's case-in-chief, but when appellant testified and minimized his alcohol use at the relevant time, the State sought to impeach him with contrary statements he made to the magistrate. Following a *Jackson-Denno* hearing, the trial court allowed the State to use the statements to impeach appellant, giving the jury an instruction about the permissible consideration of the impeachment evidence.

The Court noted that the evidence at issue came during appellant's bond hearing after he was arrested. At the outset of the hearing, the magistrate told appellant, "keep in mind anything you say can be used as evidence against you," but no formal *Miranda* warning was given. When the magistrate asked how much alcohol he had consumed, appellant equivocated, first saying one or two beers and then saying four at the most. Appellant also told the magistrate that he must have misjudged the distance when he turned left into the path of the oncoming motorcyclist. At trial, appellant testified in his defense, and after the trial court determined that the statements at issue were made voluntarily, the State used the statements he made to the magistrate to impeach his trial testimony that (a) he never saw the motorcyclist, and (b) he had only consumed two beers.

The Court stated that premitting whether the statements at issue arose from a custodial interrogation for purposes of *Miranda*, even if a statement cannot be admitted in order to establish guilt because it violates the prophylactic rule enunciated in *Miranda*, it is possible to admit such a statement for purposes of impeachment if the statement was made

voluntarily. This requires a determination of whether appellant made the statements without the slightest hope of benefit or remotest fear of injury.

And here, the Court found, based on a review of an audio recording of the bond hearing, it was plain that the magistrate did not make any threat or promise to appellant when she engaged in the colloquy with appellant about the circumstances of his arrest. She informally advised appellant that his statements could be used as evidence against him, and she gave no indication that any admissions would bear on her decision to grant or deny bond. Thus, the Court concluded, under the totality of these circumstances, the trial court did not err by finding that appellant's statements at the bond hearing were made voluntarily. Accordingly, the trial court did not abuse its discretion by allowing the State to impeach appellant's trial testimony with his prior inconsistent statements from the bond hearing.

Appellant also contended that the trial court erred by failing to give his requested jury instruction on proximate cause, specifically, "In prosecutions for vehicular homicide, the State must prove that the defendant's conduct of driving under the influence of alcohol to was the 'legal' or 'proximate' cause as well as the cause in fact, of the death. And although contributory negligence, as such, is not a defense in a vehicular homicide case, the conduct of the decedent whether negligent or not, is material to the extent that it bears upon the question of whether under all the circumstances of the case the defendant was negligent, or, if negligent, whether the decedent's negligence was the sole proximate cause of the injury, or whether the injury or death resulted from an unavoidable accident."

However, the Court found, the trial court's instruction was a correct statement of the law and adequately recited the principle of proximate cause, even as it relates to the conduct of the decedent. Furthermore, it was a nearly identical to the charge deemed adequate in *Hartzler v. State*, 332 Ga. App. 674, 680 (3) (2015), and the trial court's charge in this case, as a whole, properly encompassed the concept of causation with respect to vehicular manslaughter. As long as the defendant's negligence proximately caused the injury of another, the crime has been committed. And, the Court stated, unlike the civil context, in the criminal context it simply is not relevant that the victim was negligent unless the defendant's conduct did not substantially contribute to the cause of the injury. Accordingly, the Court found no error in not giving appellant's requested charge on proximate cause.

## **Jury Charges; Judicial Commentary**

*Gathers v. State*, A20A0097 (6/16/20)

Appellant was convicted of one count of child molestation. During its charge to the jury, the trial court stated as follows: "Now, ladies and gentlemen, I charge you that the testimony of a single witness is generally sufficient to establish a fact. *The evidence of the victim, alone, is sufficient to authorize a guilty verdict.* To the extent that any witness's testimony was inconsistent or contradicted, it is a function of you, the jury, to resolve such conflicts in the evidence." (Emphasis supplied). Although appellant did not object at trial, he contended that the trial court committed plain error because the jury instruction constituted an improper comment in violation of OCGA § 17-8-57. With one Judge concurring specially (with separate opinion), and another Judge of the panel concurring in judgment only, the Court disagreed.

The Court stated that under OCGA § 17-8-57 (c), when a court expresses an opinion as to the defendant's guilt, even if the defendant failed to object to the offending statement at trial, it is statutorily required to reverse his convictions and

grant him a new trial. But here, the Court found, the applicable standard of review is immaterial, as the trial court's jury instruction did not constitute error, plain or otherwise. It is well established that the victim's testimony alone is sufficient to sustain a conviction for child molestation. Thus, because the principle contained in the subject charge is a correct statement of the relevant law, there was not requirement to reverse his conviction.

### **Crawford; Controlled Buys**

*State v. Gilmore, A20A0189 (6/16/20)*

Gilmore was charged with sale of methamphetamine, possession of methamphetamine, and possession with intent to distribute methamphetamine. Prior to trial, the State filed motions to admit a video recording obtained by a confidential informant (CI) during a controlled drug buy involving Gilmore. The State asserted that the video recording was admissible pursuant to OCGA § 24-9-923 (b) because the CI (i.e., the witness authenticating the evidence) was now deceased; and the recording was admissible pursuant to OCGA § 24-8-807 "under the residual hearsay exception" given the statement's "circumstantial guarantees of trustworthiness." The trial court denied the motions, holding that the statements on the recording (both verbal and nonverbal), were testimonial and that Gilmore never had an opportunity to cross-examine the CI regarding those statements, such that admitting the recording would violate the Confrontation Clause of the United States Constitution. The State appealed.

First, the Court addressed whether the CI's nonverbal conduct depicted in the video recording constituted a statement. The Court found that it did. The Court stated that while Georgia's courts have not specifically determined whether nonverbal conduct is a statement within the Confrontation Clause, Rule 801 (a) of the Federal Rules of Evidence defines a "statement" as including assertive, nonverbal conduct. Likewise, tracking the federal rule, a "statement" under Georgia's hearsay statutes encompasses a person's nonverbal conduct if it is intended by the person to be an assertion (e.g., a nod of the head in response to a question). And here, it was undisputed that the recording showed Gilmore taking or holding the \$20 bill. Also, it was clear that the CI intended to show that Gilmore was selling methamphetamine to him, and that the statement was offered for the truth of the matter asserted. Thus, the Court found, the CI's movements were a statement.

Second, the Court needed to decide whether the video recording was testimonial. The evidence showed that law enforcement officers equipped the CI with a video camera and instructions to purchase drugs from Gilmore. Gilmore was later arrested for selling drugs to the confidential informant. Thus, the CI's movements were testimonial because they were knowingly and purposefully made to authorities and accused Gilmore of selling methamphetamine. And the drug-sale video recording was created under circumstances which would lead an objective witness to reasonably believe that the CI's statements and acts were going to be used against Gilmore at trial. In so holding, the Court distinguished the admissibility of store surveillance video footage - in which a video camera is continuously recording and coincidentally captures a crime occurring. The recording in this case was specifically designed by law enforcement officers in connection with their investigation of Gilmore for drug offenses, made to accuse him of such crimes and to be used against him at trial. And, while there was obviously a verbal conversation between Gilmore and the CI during the encounter, as the trial court specifically found, what the men were saying could not be discerned from the recording. Consequently, the Court additionally found that Gilmore was denied the opportunity to question the CI regarding what was being said (or not being said) in the recording.

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Nevertheless, the State contended, the video recording was admissible under OCGA § 24-9-923 because a law enforcement officer is available to authenticate the recording and establish its trustworthiness. The Court disagreed.

OCGA § 24-9-923 (b) permits the admission of video evidence where the authenticating witness is unavailable and where the court determines, based on competent evidence, that the recording tends to show reliably the facts for which it is offered. However, on its face, OCGA § 24-9-923 acknowledges that it supplements rather than supersedes other laws governing the admission of evidence. As *Crawford* provides, when testimonial statements are at issue, the Sixth Amendment requires that the witness is unavailable and that the defendant had a prior opportunity for cross-examination. It is when a statement is nontestimonial that the State's normal rules regarding hearsay apply. Accordingly, the trial court affirmed the trial court's finding that the CI's conduct constituted testimonial statements that are subject to and barred by the Confrontation Clause.

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