

THIS WEEK:

- **Ineffective Assistance of Counsel; Speedy Trial Demands**
- **Sentence Modifications; Void Sentences**
- **Flight; Jury Instructions**
- **Hearsay; Verdict Forms**
- **Indictments; Jury Charges**
- **Preservation of Evidence; Victim's Character**
- **Jury Charges; Burden of Proof**
- **Special and General Demurrers**
- **Rule 404 (b); Intrinsic Evidence**

Ineffective Assistance of Counsel; Speedy Trial Demands

Henderson v. State, S20A0986 (10/19/20)

Appellant was convicted of malice murder and other offense. He contended that his trial counsel rendered ineffective assistance by failing to calculate court terms correctly for filing a timely statutory demand for a speedy trial under OCGA § 17-7-171. The Court disagreed.

The Court noted that in an analogous case, *Crawford v. Thompson*, 278 Ga. 517 (2004), it held that trial counsel performed deficiently by failing to comply with the strict requirements of OCGA § 17-7-171 by citing the wrong statute. It also held that trial counsel's error prejudiced the defendant in that the defendant could not exercise his right to a speedy trial. But, in reviewing *Crawford*, the Court found that it erred in its analysis. First, *Crawford* relied on a speculative analysis to determine that the defendant suffered prejudice.

Second, *Crawford* held that the defendant suffered prejudice, not because he was not discharged, but because he could not exercise his statutory right to a speedy trial. But, the Court determined, this conclusion is also erroneous. If *Crawford* was correct, it would follow that any time a trial lawyer improperly filed a statutory speedy trial demand, the defendant would automatically suffer *Strickland* prejudice and have a winning claim of ineffective assistance of counsel after being found guilty at trial. This is inconsistent with the *Strickland* prejudice analysis, which gauges the effect of a lawyer's error on the outcome of the proceedings. The Court stated that it could not categorize a delay in a proceeding as per se determinative of that proceeding's outcome.

Therefore, because *Crawford*'s prejudice analysis was speculative, incorrect, and resulted in an incorrect holding, the Court overruled *Crawford* to the extent it held that the untimely filing of a statutory speedy trial demand under OCGA § 17-7-171 always results in *Strickland* prejudice. Instead, failing to file a timely statutory speedy trial demand must be judged on a case-by-case determination.

Having overruled *Crawford*, the Court next looked to whether the trial court erred by determining that appellant did not suffer prejudice as the result of counsel's failure to file a timely statutory demand for speedy trial. Appellant argued that this failure to timely file a speedy trial demand and subsequent delay in his trial prejudiced him by contributing to his distrust in the judicial system and by losing contact with his ex-girlfriend, who was his alleged alibi witness. But, the Court found, appellant did not establish prejudice under *Strickland* because he did not demonstrate a reasonable probability that had his counsel filed a proper speedy trial demand, his trial's outcome would have been different.

Specifically, as the trial court properly noted, filing a statutory speedy trial demand would not have automatically resulted in appellant's acquittal as appellant suggested, but would likely have sent appellant to trial earlier and given his counsel less time to prepare a defense. In light of the overwhelming evidence against him, appellant failed to show that holding his trial earlier would have resulted in a different outcome. He therefore did not satisfy his burden of demonstrating that counsel's conduct caused him prejudice. Accordingly, the Court concluded, his claim of ineffective assistance failed.

Sentence Modifications; Void Sentences

Gray v. State, S20G0192 (10/19/20)

In January 2017, appellant entered a non-negotiated plea of guilty to five counts of sexual exploitation of children. He was sentenced to ten years to serve in prison followed by ten years on probation, with sexual offender requirements. Ten months later, he filed a motion to modify his sentence. Eleven months later, a substitute judge, sitting by designation, granted a consent order agreed to by the State and appellant. The modification order sentenced appellant to five years to serve followed by 15 years of probation. However, three weeks thereafter, the original sentencing judge, acting sua sponte and without holding a hearing, vacated the modification order and reinstated the original sentence in a reinstatement order.

The Court of Appeals affirmed the reinstatement order, holding that trial courts lack jurisdiction after one year, irrespective of when the motion to modify sentence is filed. *Gray v. State*, 351 Ga. App. 703 (2019). The Court granted appellant's petition for writ of certiorari to determine whether a trial court has jurisdiction to modify a sentence outside the one-year period after a sentence is imposed, as authorized under OCGA § 17-10-1 (f), when the motion to modify is filed within the one-year period.

The Court noted that the current version of OCGA § 17-10-1 (f) was enacted in 2001, and the relevant portion provides: "Within one year of the date upon which the sentence is imposed, or within 120 days after receipt by the sentencing court of the remittitur upon affirmance of the judgment after direct appeal, whichever is later, the court imposing the sentence has the *jurisdiction*, power, and authority to correct or reduce the sentence and to suspend or probate all or any part of the sentence imposed." (Emphasis supplied). The term "jurisdiction" was added for the first time in 2001. The Court found that our courts have long applied the common-law rule that the trial court has the inherent authority to modify a judgment within the term of court and that a motion made during the term serves to extend the power to modify the judgment. And after the enactment of OCGA § 17-10-1 (f) in 2001, despite the change in language from previous statutes, the Court of Appeals has continued to follow the common-law rule as to motions filed within the term of court or before the statutory deadline.

Therefore, the Court stated, the key question is whether the addition of the word “jurisdiction” to the statute's grant of “power and authority” to the trial court clearly overrides the common-law rule. The Court concluded that it does not. Moreover, the Court disagreed with the Court of Appeals that the legislature rejected the common-law rule because the legislature did not expressly write the common-law rule into the current version of the statute. Although the legislature was aware of and could have codified the common-law rule, the Court stated that it could not assume that omitting the common-law rule from the statute was proof of the legislature's intended rejection of it. Instead, the Court presumed the opposite—that the legislature knew about the common-law rule, wanted to keep the rule, and understood that it would be unnecessary to write the rule into the statute when courts have incorporated the common-law rule into the statute for decades.

Thus, the Court held, the text of OCGA § 17-10-1 (f) does not expressly or by necessary implication contravene the common-law rule, and the Court of Appeals erred in determining otherwise.

Flight; Jury Instructions

Rawls v. State, S20A0872 (10/19/20)

Appellant was convicted of malice murder and feticide in connection with the killing of his pregnant girlfriend. Citing *Renner v. State*, 260 Ga. 515, 518 (1990), appellant contended that the trial court committed plain error in giving the State's requested charge that the jury could consider evidence of appellant's “alleged flight” as circumstantial evidence of his guilt. The State argued that *Renner* is no longer good law under the current Evidence Code, because an instruction on flight has been allowed in federal courts.

The Court noted that *Renner's* holding was about *jury instructions*, not about the admission or exclusion of evidence. *Renner* did not reject instructions on flight because evidence of a defendant's flight was inadmissible under the old Evidence Code; rather, *Renner* explained that evidence of flight may be admissible as circumstantial evidence of guilt, which remains true under the current Evidence Code. Thus, the Court stated, there is no reason to conclude that the current Evidence Code abrogated *Renner's* holding on a jury instruction issue.

And, the Court found, as for the persuasiveness of the federal case law approving jury instructions on flight, such authority existed before *Renner* was decided, see, e.g., *United States v. Borders*, 693 F2d 1318, 1327-1328 (11th Cir. 1982), and the State identified nothing about that case law that would make it more persuasive than it was when the Court decided *Renner*. Accordingly, the Court held that the trial court committed a clear and obvious error by instructing the jury on flight in disregard of *Renner*.

Nevertheless, the Court found, appellant did not show that the flight instruction that the trial court gave likely affected the outcome of his trial. Under *Renner* and the current Evidence Code, the jury was entitled to find that there was evidence that appellant fled to avoid arrest after he killed his girlfriend. *Renner* also makes clear that the State was free to argue this flight evidence as circumstantial evidence of appellant's guilt.

And although *Renner* expressed concern that a flight instruction might be construed by the jury as an improper comment on the evidence under OCGA § 17-8-57, the Court further found that the instruction given in this case stated that evidence

of “alleged flight” had been “introduced” and could be considered as circumstantial evidence of appellant's guilt, under the instructions concerning circumstantial evidence in general, if the jury found that he committed acts of flight and that his purpose was to avoid arrest. There was no reason to believe that this particular instruction caused the jury to give undue weight to the flight evidence, particularly given the other strong evidence against appellant.

Appellant also argued that the flight instruction referenced conflicting standards of proof. The Court noted that the instruction indicated that the jury should apply both a “beyond any reasonable doubt” and a “more likely than not” standard in deciding whether appellant fled to avoid arrest. However, the Court found, in the final jury charge, the jury was instructed several times about the State's burden to prove appellant's guilt of the charged offenses “beyond a reasonable doubt.” Considering the jury instructions as a whole, the court's isolated reference to the preponderance standard in an instruction about one minor type of evidence did not clearly mislead or confuse the jury as to the State's burden of proof as to appellant's guilt. Thus, the Court concluded, appellant failed to show a likely effect on the outcome of his trial.

Hearsay; Verdict Forms

Atkins v. State, S20A1019 (10/19/20)

Appellant was convicted of felony murder predicated on aggravated assault and possession of a firearm in connection with the shooting death of Parks. The evidence, very briefly stated, showed that one evening, appellant, Parks, Thomas, Williams, and Jada Lawson watched a movie together. Lawson then went to take a shower. At that point, Parks was in his bedroom, and Atkins was sitting at the table in the kitchen area. About five minutes into her shower, Lawson heard a gunshot. She turned off the shower, wrapped herself in a towel, and went to check. She found Atkins facing the front door, which was open, and Parks lying on the floor in the living room, near the television. Parks said, “Jada, call 911. [Appellant] just shot me.” Appellant turned toward her and said, “I didn't mean to; it was an accident; I didn't know it was loaded.” Appellant later told the investigators that, after the shooting occurred, Thomas took the gun from him, and Thomas and Williams collected all the bullets and left the apartment before the police arrived.

Appellant contended that the trial court erred in refusing to admit Williams's out-of-court statements that the shooting was an accident as an excited utterance under Rule 803 (2). The Court stated that whether a hearsay statement was an excited utterance is determined by the totality of the circumstances. The critical inquiry is whether the declarant is still in a state of excitement resulting from that event when the declaration is made. And in that regard, even a brief period of time can provide a declarant an opportunity to couch a statement in such a way as to best serve his interests. And here, the Court found, Williams, who admittedly was involved in tampering with the crime scene immediately after the shooting, allegedly made the statements while actively avoiding being found by the police. Thus, the Court concluded, the trial court did not abuse its discretion in rejecting appellant's excited-utterance argument because the circumstances did not eliminate the possibility of fabrication.

Nevertheless, appellant argued, Williams's statement was admissible under the residual hearsay exception, set out in OCGA § 24-8-807, and the trial court erred by not admitting it under that Rule. The Court disagreed. The Court stated that Rule 807 is to be used very rarely and only in exceptional circumstances, and only when there exists certain *exceptional guarantees of trustworthiness* and high degrees of probativeness and necessity. Courts should be particularly hesitant to

overturn a trial court's admissibility ruling under the residual hearsay exception absent a definite and firm conviction that the court made a clear error of judgment in the conclusion it reached based upon a weighing of the relevant factors.

The Court noted that such guarantees of trustworthiness must be equivalent to cross-examined former testimony, statements under a belief of impending death, statements against interest, and statements of personal or family history. These categories of hearsay have attributes of trustworthiness not possessed by the general run of hearsay statements that tip the balance in favor of introducing the information if the declarant is unavailable to testify. And they are all considered sufficiently trustworthy not because of the credibility of the witness reporting them in court, but because of the circumstances under which they were originally made. And here, the Court found, even if Williams told multiple, allegedly independent witnesses that the shooting was an accident, appellant failed to show that such repetition is a guarantee of trustworthiness equivalent to cross-examined former testimony, statements under a belief of impending death, statements against interest, or statements of personal or family history. Consequently, the trial court did not abuse its discretion in excluding Williams's statements.

Appellant also argued the trial court used a verdict form, over his objection, which was misleading. As to each of the four counts of the indictment, the verdict form read: "We the Jury find the Defendant _____ of _____." The court agreed to appellant's request that the jury be instructed on the definition of involuntary manslaughter, but the court declined appellant's request to include a separate line on the verdict form, after the lines for the numbered counts, "We the Jury, as to the lesser included offense of involuntary manslaughter, find the Defendant _____." Appellant argued that this omission required a new trial because the form may have misled the jury into thinking that, after entering its "not guilty" verdict as to malice murder, it could not find him guilty of involuntary manslaughter for the homicide. The Court again disagreed.

The Court stated that in deciding whether a verdict form accurately presented the law and properly guided the jury, the Court reviews the language of the form along with the trial court's instructions to the jury. In a criminal case, a verdict form is erroneous when the form would mislead jurors of reasonable understanding, or the trial court erroneously instructed the jury on the presumption of innocence, the State's burden of proof, the possible verdicts that could be returned, or how the verdict should be entered on the printed form. A preprinted verdict form is treated as part of the jury instructions which are read and considered as a whole in determining whether there is error.

And here, the Court found, the language of the verdict form, the explanations during closing argument about the jury's consideration of an involuntary manslaughter verdict and filling in the verdict form, and the trial court's jury charge, viewed together, showed no error. In addition, the Court found, the jury's request for definitional instructions, including for involuntary manslaughter, showed the jury's focused attention on involuntary manslaughter along with the charged offenses.

Indictments; Jury Charges

Middleton v. State, S20A0718 (10/19/20)

Appellant was convicted of felony murder. The evidence showed that through an intermediary known to appellant and the victim, appellant arranged to purchase marijuana from the victim in a pharmacy parking lot. Shortly after appellant got in the car, the victim was shot. A surveillance camera recorded appellant getting out of the victim's car holding a gun

in his right hand, closing the door, and running away with what appeared to be items stuffed into the left pocket of his jacket. A few moments later, the surveillance camera recorded the victim on the driver side of his car walking a few steps and dropping his cell phone before collapsing onto the pavement.

Appellant argued that his felony murder conviction on Count 2 of the indictment must be vacated because that count did not allege the essential elements of the underlying offense of armed robbery. Citing *Reed v. State*, 291 Ga. 10, 11 (2012), the Court stated that a claim that a felony murder count fails to allege the essential elements of the predicate offense is, in essence, a special demurrer seeking greater specificity with regard to the predicate felony. Therefore, appellant waived this claim by failing to raise it before trial in a timely filed special demurrer.

Appellant also argued that the trial court erred in denying his written request to instruct the jury on the affirmative defense of justification based on self-defense. The Court stated that although generally “a person is justified in using force which is intended or likely to cause death or great bodily harm ... if he ... reasonably believes that such force is necessary to prevent death or great bodily injury to himself,” OCGA § 16-3-21 (a), “a person is not justified in using” such force “if he ... [i]s attempting to commit, committing, or fleeing after the commission or attempted commission of a felony,” OCGA § 16-3-21 (b) (2). Thus, a jury instruction on justification based on self-defense would have included an admonition that appellant was not justified if he was committing or attempting to commit a felony.

Purchasing marijuana is a felony, regardless of the amount of marijuana involved. Thus, even under appellant's own account of the events, he was attempting to commit or committing a felony at the time of the shooting. Accordingly, it was highly probable that any error in denying appellant's request to instruct the jury on justification based on self-defense did not affect the verdicts and was therefore harmless.

Preservation of Evidence; Victim's Character

Goins v. State, S20A0847 (10/19/29)

Appellant was convicted of malice murder. The evidence, briefly stated, showed that appellant was having an affair with the victim. Appellant wanted to end the affair, but the victim threatened to tell appellant's wife and children if he did. The victim was last seen leaving her friend, Dallas Regal's house with appellant around 1:30 p.m. on October 7, 2014. The next morning, her partially burnt body was found in a park. The cause of death was manual strangulation, after which her body had been doused in gasoline and set on fire.

During the trial, the lead detective on appellant's case testified that near the beginning of his investigation, he focused on Taylor's friend Regal as a suspect, because the detective “noticed quite a few indicators of deception” when he first questioned Regal about the days before Taylor's death. The detective explained that after he told Regal about Taylor's murder, however, Regal appeared less nervous and more honest, and the detective believed that Regal had initially been deceptive because he had assumed he was being interviewed about some stolen property that Taylor had given him. Regal showed the detective some gasoline-soaked clothing in Regal's house, and the detective observed some scratches on Regal's hands and arms. The detective testified that Regal explained that the clothing and injuries were related to his work as a stone mason. The detective did not collect the clothing or further investigate the injuries.

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 13, 2020

Issue 46-20

Relying on *California v. Trombetta*, 467 U.S. 479 (104 SCt 2528, 81 LE2d 413) (1984), and *Arizona v. Youngblood*, 488 U.S. 51 (109 SCt 333, 102 LE2d 281) (1988), appellant contended that the State deprived him of due process by failing to preserve Regal's clothing or better document his injuries. He argued that because Taylor was manually strangled and her body was burned with gasoline, the detective ignored the obvious exculpatory value of the gas-soaked clothing and scratches, and that if the clothing had been collected, appellant could have conducted DNA or other testing on it, the results of which might have exonerated him.

The Court stated that in evaluating whether a defendant's constitutional right to due process was violated when the State failed to preserve evidence that could be exculpatory, a court must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence. To meet the standard of constitutional materiality, the evidence must possess an exculpatory value that was apparent before it was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. This test is ordinarily applied when State officials dispose of potential evidence that was previously in the State's actual or constructive possession. But, the Court noted, here, a detective did not try to collect or further document certain potential evidence in the first place — evidence that might have required Regal's consent or a search warrant to obtain — and no State actor then had anything to do with the disposition of that potential evidence.

However, the Court stated, it need not decide whether appellant's claim invokes the test to determine a due process violation based on the State's failure to preserve evidence. Even if the Court assumed it does, and even if it also assumed that appellant could establish under the first part of the test that the evidence was constitutionally material, the claim failed because appellant failed to show that the detective acted in bad faith. Specifically, the record provided no support for such a finding, and appellant made no allegation in the trial court that the detective acted in bad faith. Although the detective initially considered Regal a suspect, he believed that Regal was truthful after learning the actual reason for the investigation, and he credited Regal's explanation for the clothing and injuries. Moreover, the detective testified that at that point in the investigation, he had not yet contacted appellant for an interview and did not “really think [appellant] was a suspect.” Thus, appellant could not establish that the State violated his right to due process.

Appellant also contended that the trial court abused its discretion by excluding evidence about the victim that he asserted would have supported his defense theory that other people had a motive to kill her. The record showed that appellant's pretrial counsel filed a motion to introduce “character evidence” about the victim, including her prostitution- and drug-related convictions and posts from her Facebook page. At the hearing on the motion, counsel argued that the victim's convictions and Facebook posts showed that she solicited customers for sex and drugs and that the posts also showed that she had conflicts with people other than appellant. Counsel asserted that this evidence showed “the various suspects in this case, all the people [the victim] came in contact with,” and was relevant to prove that other people could have had a motive to kill her. The trial court denied the motion.

The Court noted that generally, before evidence can be introduced that another person committed the charged crime, the proffered evidence must raise a reasonable inference of the defendant's innocence and, in the absence of a showing that the other person recently committed a crime of the same or similar nature, must directly connect the other person with the corpus delicti. And here, the proffered evidence showing that the victim had been convicted of prostitution and drug crimes and that unknown individuals contacted her to obtain sex or drugs or had some sort of conflict with her during the weeks and months before her death would have done nothing to establish that someone other than appellant killed her,

because none of the proffered evidence linked any other individual to the murder. Thus, the convictions and Facebook posts would not have raised a reasonable inference that appellant was innocent or directly connected anyone else to the victim's murder, and the trial court was not required to allow appellant to introduce evidence based purely on rumor, speculation, and conjecture.

Moreover, the Court found, appellant failed to show that the form of the proffered evidence was proper under OCGA § 24-4-405 (a) because that rule generally limits “[c]haracter evidence about a victim ... to reputation or opinion, not specific bad acts.” Thus, the convictions and Facebook posts showing the victim's acts of prostitution, drug-dealing, and quarreling with individuals on social media were not admissible. Therefore, the trial court did not abuse its discretion by excluding the proffered evidence.

Jury Charges; Burden of Proof

Hill v. State, S20A0781 (10/19/20)

Appellant was convicted of murder, kidnapping and other offenses. He contended that the trial court committed plain error in instructing the jury regarding the level of proof required for conviction. Specifically, he argued that a statement in the court's preliminary instruction that “the object of this trial is to discover the truth,” and a statement in the court's final instruction that “[a] reasonable doubt is the doubt of a fair-minded, impartial juror, honestly seeking the truth[,]” allowed the jury to convict him based on a preponderance of the evidence standard, rather than on the correct reasonable doubt standard.

The Court noted that the two instructional fragments at issue are embedded in the pattern preliminary instructions and in the pattern instruction on the presumption of innocence, burden of proof, and reasonable doubt, respectively, which correctly emphasize the State's heavy burden of proof. Also the Court stated, it has upheld these reasonable doubt instructions. Furthermore, appellant cited no controlling authority for the proposition that the instructions are erroneous because they briefly refer to discovering or seeking the truth. Consequently, the Court held, he failed to show that giving the instructions constituted clear or obvious error.

Appellant next contended that his trial counsel was ineffective in failing to object to the instructions that referred to discovering or seeking the truth, again arguing that the instructions allowed the jury to convict him based on a preponderance of the evidence standard, rather than on the correct reasonable doubt standard. But, the Court stated, the objection appellant proposed would have advanced a novel theory under Georgia law and a criminal defense attorney does not perform deficiently in failing to advance a novel legal theory. Therefore, appellant also failed to show he received ineffective assistance of counsel in this regard.

Special and General Demurrers

Hinkson v. State, S20A0887 (10/19/20)

Appellant was convicted for felony murder predicated on aggravated assault stemming from the death of his eight-month-old son, Alexander Cabanayan. He contended that the trial court erred in denying his special demurrer as to Count 3, the felony charge upon which he was convicted. The Court disagreed.

Count 3 of the indictment charged appellant with aggravated assault, specifying that he “did unlawfully make an assault upon the person of Alexander Cabanayan with an object, to wit: his hands, which when used offensively against a person did result in serious bodily injury by causing an abusive head injury to Alexander Cabanayan.” OCGA § 16-5-21 (a) (2) provides that an aggravated assault occurs when a person commits a simple assault, as defined by OCGA § 16-5-20 (a), “[w]ith a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury.”

Appellant contended that Count 3 did not provide him sufficient notice to prepare for trial on that aggravated assault charge and its related felony murder charge. More specifically, he argued that the lack of detail in the indictment about what type of simple assault formed the basis of the aggravated assault charge and about the manner in which he used his hands to cause the “abusive head injury” alleged in the aggravated assault count did not provide him adequate notice of what he had to defend against at trial.

However, the Court stated, an indictment under OCGA § 16-5-21 (a) (2) need not specify the manner in which the defendant committed the simple assault, when that is a lesser included offense within the greater offense of aggravated assault. Instead, an indictment charging aggravated assault must allege the element that aggravates the crime above a simple assault, which, in this case, was the use of objects (hands), “which, when used offensively against a person ... actually does result in serious bodily injury.” OCGA § 16-5-21 (a) (2). Accordingly, the trial court did not err in denying the special demurrer on this ground.

Appellant also contended that the aggravated assault count failed to provide him notice of what he had to defend against at trial because it did not adequately allege the manner in which he used his hands to cause the “abusive head injury” alleged in the aggravated assault count. But, the Court stated, an indictment need not say how the defendant used the weapon or object that aggravated the assault. Here, the Court concluded, the indictment provided appellant with adequate notice of what he had to defend against at trial by telling him that he used his hands in an offensive manner against his eight-month-old son and that he caused his son “an abusive head injury” in doing so.

Appellant also contended the trial court erred in denying his general demurrer. Specifically, that the aggravated assault count of the indictment (and therefore its corresponding felony murder count) was insufficient to withstand his general demurrer because it failed to specify that his hands, “when used offensively against a person,” were “likely to ... result in serious bodily injury.” OCGA § 16-5-21 (a) (2) (emphasis supplied). However, the Court stated, although an allegation that appellant's hands were “likely to ... result in serious bodily injury,” would satisfy an essential element of aggravated assault, appellant erred by contending that his indictment had to contain that language. An indictment under OCGA § 16-5-21 (a) (2) must allege the element that aggravates the crime above a simple assault. But that aggravating element may be that the assault was committed either with a deadly weapon or an object that was likely to or actually did result in serious bodily injury. Appellant's indictment alleged that he committed an aggravated assault by assaulting his son with objects (his hands) that actually did “result in serious bodily injury.” The fact that it did not also allege that the use of his hands was likely to result in serious bodily injury was not a successful ground for a general demurrer.

Appellant next argued that the indictment had to, but did not, allege facts that showed that the assault he committed was dangerous per se or created a foreseeable risk of death. However, the Court held, this issue was not preserved for review.

Unlike a special demurrer, which is waived if not brought before trial, a count of an indictment which is subject to a valid general demurrer is void, and thus, a general demurrer may be raised after jeopardy has attached and at any time during trial, as well as in the form of a motion in arrest of judgment after a verdict in the same term of court. And here, the Court found, appellant first raised this general demurrer issue in his purported second amended motion for new trial. That motion, however, was not timely as an amendment to appellant's motion for new trial because it was filed after the trial court denied appellant's motion for new trial. Moreover, even treating appellant's motion as a motion in arrest of judgment, the Court stated that it could not address the merits of the motion because it was not timely filed as it was not filed within the term of court in which the judgment was rendered.

Rule 404 (b); Intrinsic Evidence

Harris v. State, S20A0786 (10/19/20)

Appellant was convicted of the malice murders of Tina and her six-year-old son, Jeremy. The evidence, very briefly stated, showed that In October 2011, Tina agreed that appellant could live with her and Jeremy in her house because appellant had been ousted from the house he previously shared with his ex-girlfriend, Patricia Sherrod, who had taken out a temporary protective order (“TPO”) against him. The original arrangement was for appellant to be out of Tina's house by December 2011, but appellant continued living there through January 2012 and into February. Only Tina and appellant had keys to Tina's house. Tina told her neighbors and her ex-husband, Jerry Hall, that she wanted appellant out and that she was going to ask appellant to leave. Hall testified that on Thursday, February 23, the day before the killings, he visited Tina and she told him she wanted to get a legal document forcing appellant to leave her house. Hall suggested that they do so together on the following Monday. At trial, Tina's neighbor, Emma Stokes, testified that appellant told her that “[...]another woman will not put me out of — would never put me out, I will kill her first.[...] Those [we]re his exact words.” On Friday, February 24, Tina and Jeremy both died from gunshot wounds to the chest. The bodies were found lying together on a bed. Appellant cooperated with police and told them Tina was having financial problems and was depressed. The police first thought it was a murder-suicide. But upon further investigation, including new forensics that showed Tina was shot first, appellant was eventually arrested for the double murder.

Appellant contended that the trial court abused its discretion by allowing certain evidence to be presented to the jury. Specifically, he argued that evidence regarding an incident with his ex-girlfriend, Sherrod, that resulted in a TPO being entered against him should not have been admitted in his trial for the murders of Tina and Jeremy because it was extrinsic evidence that did not satisfy the requirements of OCGA § 24-4-404 (b) (“Rule 404 (b)”). The Court disagreed.

The Court stated that evidence is admissible as intrinsic evidence, rather than extrinsic evidence subject to Rule 404 (b), when it is (1) an uncharged offense arising from the same transaction or series of transactions as the charged offense; (2) necessary to complete the story of the crime; or (3) inextricably intertwined with the evidence regarding the charged offense. Evidence pertaining to the chain of events explaining the context, motive, and set-up of the crime is properly admitted as intrinsic evidence if it is linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury. Moreover, intrinsic evidence remains admissible even if it incidentally places the defendant's character at issue.

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 13, 2020

Issue 46-20

The Court found that the general fact that appellant was forced to leave the house that he previously shared with Sherrod — a fact that explained why appellant moved in with Tina in the first place — was admissible as part of the State's case. But, the Court stated, the real question was whether the trial court abused its discretion in also admitting, as intrinsic evidence, specific evidence about *why* he had to leave that house, like that appellant broke windows and “other stuff” and that Sherrod felt like appellant was a threat to her life, resulting in a judge entering a TPO against him.

The Court stated that although the evidentiary issue was close, under the circumstances of this case, the trial court's admission of the Sherrod evidence was not an abuse of its discretion. Here, Sherrod's evidence — even including details such as appellant breaking items and causing Sherrod to feel like her life was threatened — provided context to other witnesses' accounts of the circumstances surrounding Tina and Jeremy's murders — such as Stokes's testimony that appellant told Stokes “another woman will not put me out of — would never put me out, I will kill her first,” and the testimony of multiple witnesses that Tina intended to kick appellant out of her house very soon — and helped explain appellant's possible motivations in facing those circumstances. Therefore, when considered in light of the other evidence presented in this particular case, the Sherrod evidence was reasonably necessary to complete the story of the crime for the jury.

Nevertheless, appellant argued, the Sherrod evidence was not intrinsic because it was not “necessary” to complete the story of Tina and Jeremy's murders. However, the Court noted, the Eleventh Circuit has spoken of admissible intrinsic evidence as that which is “*reasonably necessary* to complete the story of the crime.” *United States v. Fortenberry*, 971 F2d 717, 721 (11th Cir. 1992) (emphasis supplied). Similarly, it has upheld a trial court's admission of intrinsic evidence as “necessary to complete the story of the crime for the jury” where the evidence “advanced” the State's “theory of the case” that the charged offenses “were the culmination of a series of” incidents, and “the State had *some need* for this evidence” to “g[i]ve further context as to why this series of incidents occurred.” *Smith v. State*, 307 Ga. 263, 272-273 (834 SE2d 1) (2019) (citation and punctuation omitted) (emphasis supplied). As such, when considering what evidence is necessary for the State to complete the story of the crime, “necessary” is not used in a strictly literal sense, but rather, refers to what evidence is reasonably necessary for the State to complete the story of the crime.

And here, Stokes's testimony that appellant told Stokes “another woman will not put me out of — would never put me out, I will kill her first,” added significant weight to the State's theory that appellant killed Tina and Jeremy because Tina was trying to kick him out of her home. Also, Stokes's testimony that appellant issued this threat is given more context and makes more sense in light of the evidence that appellant reacted violently to what he perceived as Sherrod's attempts to “steal” the house he and Sherrod shared. In other words, appellant's actions and Sherrod's reaction concerning the TPO incident provided context and lent support to a key piece of evidence at the center of the State's theory of the case.

Moreover, the additional details about the Sherrod evidence presented to the jury did not just explain why appellant moved in with Tina; it also explained why appellant would not expect Sherrod to let him return to the house he previously shared with her if Tina ever “put [him] out.” The Sherrod evidence and other evidence developed at trial, which included the testimony of multiple witnesses that Tina wanted to evict appellant from her house and planned on doing so within the week, showed that this was exactly the predicament appellant faced: being kicked out of his residence by Tina and unable to return to his residence with Sherrod. As such, the Sherrod evidence was “intertwined with” the other evidence and witness accounts regarding the murders of Tina and Jeremy, and was part of the narrative of the case. Thus, the Court found, under the particular circumstances of this case, the limited additional facts about the Sherrod TPO that were

presented to the jury pertained to the chain of events explaining the context, motive, and set-up of the murders, formed an integral and natural part of the witness's accounts of the circumstances surrounding the offenses, and were reasonably necessary to complete the story of the crime for the jury.

Appellant also argues that the Sherrod evidence was not intrinsic to the charged offenses because it “involved different parties, different locations, and different conduct, at different times.” The Court agreed that whether evidence is linked in time and circumstances with the charged crime is pertinent to the intrinsic-evidence analysis, but there is no bright-line rule regarding how close in time evidence must be to the charged offenses, or requiring evidence to pertain directly to the victims of the charged offenses, for that evidence to be admitted properly as intrinsic evidence. And because it had concluded that the trial court did not abuse its discretion in finding that the Sherrod evidence was intrinsic to the charged offenses, the Court stated it need not determine the admissibility of that evidence under Rule 404 (b).

Finally, although the evidence that appellant broke items at the house he shared with Sherrod and that Sherrod felt like appellant had threatened her life was prejudicial, there was no abuse of discretion in the trial court's finding that the challenged evidence satisfied the requirements OCGA § 24-4-403, which permits the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Accordingly, the Court concluded, the trial court did not abuse its discretion in admitting the Sherrod evidence.