

## THIS WEEK:

- **Recidivist Sentencing; Prior Offenses**
- **Search & Seizure; Fighting Words**
- **Search & Seizure; Inventories**
- **Other Acts Evidence; Mistrials**
- **Sufficiency of the Evidence; Relevant Evidence**

## Recidivist Sentencing; Prior Offenses

*Wooten v. State, A20A1586 (11/12/20)*

Appellant was convicted of armed robbery and sentenced to life imprisonment without parole. The record showed that midway through his trial, appellant decided to represent himself.

Appellant contended that the trial court erred by sentencing him as a recidivist because the record showed that one of his three predicate felony convictions was uncounseled. Specifically, appellant challenged his 1997 Toombs County judgment of conviction entered on a negotiated guilty plea to two counts of aggravated assault upon a peace officer. The Court noted that to prove this conviction, the State introduced a certified copy of the judgment of conviction. The form sentencing sheet for this conviction has the notation "Attorney Waived" handwritten in the section stating that "The defendant was represented by the Honorable \_\_\_\_\_ Attorney at Law \_\_\_\_\_ county by (Employment) (Appointment)." At the motion for new trial hearing, when asked if he had ever represented himself before the instant trial, appellant responded, "No." When he was specifically asked about his Toombs County convictions, appellant testified that he had engaged paid counsel but that counsel failed to appear when the case was called for trial, so he "went on ahead and took a plea [him]self. [He] didn't represent [him]self." In the order denying appellant's motion for new trial, the trial court held "that any inconsistencies that existed with certified copies of Defendant's convictions have now been resolved, and the Court hereby resentsences Defendant to life in prison without parole."

The Court stated that when the State seeks recidivist punishment because of prior felony convictions entered on guilty pleas, the burden is on the State to prove both the existence of the prior guilty pleas and that the defendant was represented by counsel in all felony cases and those misdemeanor proceedings where imprisonment resulted, or that the defendant had waived his right to counsel. The State can do this by introducing a transcript of the plea hearing, a docket entry or another document affirmatively showing that the right to counsel was waived. When the State is able to show that the defendant waived his right to counsel, a presumption of regularity attaches to the plea proceedings and the burden then shifts to the defendant to show any irregularities in the proceedings.

The Court further stated that the trial court had the responsibility to weigh the evidence submitted by appellant and by the State to determine whether the State met its burden of proving that appellant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three *Boykin* rights. And here the Court noted, appellant's credibility

and the weight to be given his testimony were matters within the purview of the trial court. Thus, the Court found, appellant failed to show that the trial court erred in finding that appellant's Toombs County judgment of conviction could be used for the purposes of recidivist punishment.

## Search & Seizure; Fighting Words

*Trammell v. State, A20A1942 (11/20/20)*

Appellant was charged with possessing a false identification document in violation of OCGA § 16-9-4 (b) (6). He moved to suppress and after an evidentiary hearing, the trial court denied the motion, finding that the officers had probable cause to arrest appellant for disorderly conduct and that the search incident to the arrest was therefore valid. The trial court also granted appellant a certificate of immediate review and the Court granted appellant's petition for interlocutory appeal.

The Court noted that the trial court found in its order that at 1:30 a. m., two officers were outside a downtown bar when they witnessed bar staff pulling appellant down stairs and escorting him out of the bar. Appellant was pulling away from the staff and yelling profanities. The officers approached appellant and "[w]hen they put their hands on him, he told them not to touch him and to 'walk away down the street.'" The trial court further found that appellant appeared agitated and aggressive, that the officers arrested him for disorderly conduct, and that subsequent to the arrest, the officers searched appellant and located an identification that formed the basis for the violation of OCGA § 16-9-4 (b) (6).

The State argued that the officers had probable cause to arrest appellant for disorderly conduct pursuant to OCGA § 16-11-39 (a) (3), the "fighting words" provision of the statute. The Court stated that to ensure no abridgment of constitutional rights, the application of OCGA § 16-11-39 (a) (3)'s proscription on fighting words must necessarily be narrow and limited. Moreover, the fighting-words exception to constitutionally protected speech requires a narrower application in cases involving words addressed to a police officer. This is because a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fighting words. Thus, the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.

And here, the Court concluded, given the narrow application of the fighting words exception, especially in cases involving words addressed to a police officer, the trial court erred in finding that there was probable cause to arrest appellant for disorderly conduct under OCGA § 16-11-39 (a) (3). The statements found by the trial court - appellant saying not to touch him and to walk away - were not so opprobrious or abusive that their very utterance would tend to incite an immediate breach of the peace. And while the Court recognized that the officer who made the decision to arrest appellant for disorderly conduct testified that he did so after hearing appellant say something to the effect of "fuck you" to the other officer, the Court noted that the trial court did not find that such words were uttered. Rather, the court found that appellant used profanity when he was being escorted out of the bar, but made no finding as to any specific profanity directed toward the officers. Moreover, while the trial court also noted that appellant appeared agitated and aggressive, it did not cite any evidence regarding how he did so.

Consequently, the Court stated, while it could not condone appellant's rude and disrespectful comments toward the police officers, the conduct at issue here simply did not rise to the level of criminal conduct that would constitute "fighting words"

under OCGA § 16-11-39 (a) (3). And, because the officers did not have probable cause to arrest appellant for the use of fighting words, the search incident to that unlawful warrantless arrest was not valid. The trial court therefore erred in denying the motion to suppress.

## Search & Seizure; Inventories

*State v. Loechinger, A20A1638 (11/24/20)*

Loechinger was charged with trafficking in methamphetamine and driving with a suspended license. The evidence showed that after Loechinger was pulled over on I-285 and arrested for driving with a suspended license, the arresting officer conducted an inventory search of the vehicle prior to impounding it, and the methamphetamine was found in the center console. Loechinger filed a motion to suppress which the trial court granted after an evidentiary hearing. The State appealed.

The State first argued that the trial court erred in finding that the impoundment of the vehicle was not reasonably necessary. The Court noted that the trial court discredited the officer's testimony that an impoundment was reasonably necessary because there was no testimony at the motion to suppress hearing that the car "was not inoperable or in any way obstructing, or making the roadway less safe for someone to pick it up." However, the Court found, its de novo review of the portion of the officer's body-cam video shown to the trial court belied this finding. The video footage showed that Loechinger's car was parked on a narrow shoulder of I-285, very close to an exit, during what appeared to be dense rush-hour traffic. In the motion to suppress hearing, the trial court admitted that "it seems to be dangerous, of course, looking at the video[.]" but hinged its decision on the fact that there was "no testimony that [the] car was obstructing or causing any issues."

But, the Court stated, it is well established that a police seizure and inventory is not dependent for its validity upon the absolute necessity for the police to take charge of property to preserve it. They are permitted to take charge of property under broader circumstances than that. Furthermore, it has previously rejected the argument that an automobile must be an impediment to traffic before it can be lawfully impounded. Therefore, the Court concluded, based upon its de novo review of the video footage, the officer's decision to impound the vehicle was reasonably necessary under the circumstances.

The State also contended that the trial court erred in finding that the officer's inventory search of Loechinger's car was not in accordance to police procedures. The Court noted that in arriving at its decision, the trial court took into account that the officer did not inventory any valuables in the vehicle and only inventoried contraband. However, the Court found, the officer testified it was the policy of his department to inventory only those items that he actually removed from a car prior to it being impounded, limited to items that he deemed to be valuable, such as electronics, money and jewelry. In the instant case, the officer testified that he did not observe any such valuable items in the car during his inventory search. Thus the Court held, because evidence showed that the impoundment of the car was lawful and that the search was conducted in good faith pursuant to standard police department procedure for a valid inventory purpose, the trial court erred in granting Loechinger's motion to suppress.

## Other Acts Evidence; Mistrials

*Becton v. State, A20A1837 (12/4/20)*

Appellant was convicted of eight counts of child molestation, four counts of aggravated child molestation, two counts of aggravated sexual battery, and one count each of cruelty to children in the first degree, aggravated sodomy, and statutory rape for acts involving his girlfriend's two daughters (one of whom was T. R.) and two other victims. He contended that the trial court erred in failing to grant a mistrial after the State, in violation of OCGA §§ 24-4-404 (b), 24-4-413, and 24-4-414, introduced improper character evidence during the video replay of T. R.'s forensic interview. The Court disagreed.

The record showed that appellant's motion in limine to exclude statements made by one victim during her forensic interview that she had seen paperwork indicating that appellant had molested his daughters in Atlanta. The State assured the court that it had redacted "all of that" from the video. However, during the three-hour video played for the jury, the victim told the forensic interviewer that appellant twice tried to make her kiss him on the lips, and that she asked him "why do you do this, what does it get you?" The victim then recounted to the interviewer that she asked appellant, "[d]o you do this to your daughters," and appellant responded, "[h]ow do you know about that?" The forensic interviewer then stated, "and you asked about his daughters and he didn't know how you knew about his daughters." The court denied appellant's motion for mistrial, but gave curative instructions and took other measures to protect appellant's right to a fair trial.

The Court stated that as a general rule, a trial court's denial of a motion for mistrial based on the improper admission of bad character evidence is reviewed for abuse of discretion by examining factors and circumstances, including the nature of the statement, the other evidence in the case, and the action taken by the court and counsel concerning the impropriety. The Court also considers whether the reference to the improper character evidence is isolated and brief, whether the jury's exposure was repeated or extensive, and whether the introduction of the objectionable evidence was inadvertent or whether it was deliberately elicited by the State. Moreover, a trial court generally has the discretion to decide whether a mistrial is the only corrective measure to take or whether proper instructions withdrawing the testimony from the jury's consideration can correct the prejudicial effect.

And here, the Court found, taking into consideration these factors, the trial court did not abuse its discretion in denying appellant's motion for mistrial. The victim's description to the interviewer of her conversation with appellant and the interviewer's response were brief and occurred in the midst of a three-hour-long videotape. Moreover, the exchange was not repeated, and the State's failure to redact it was inadvertent. Additionally, the trial court gave the jury a thorough curative instruction to disregard the statement and it ordinarily presumes that a jury follows such instructions. But, the Court stated, it did not need to rely on that presumption because here, the trial court confirmed the jurors' compliance by obtaining verbal verification. Finally, the Court found that in light of the overwhelming evidence, it could not say that the statement was so highly prejudicial as to be incurable by the trial court's admonition. Consequently, the Court concluded, appellant failed to show that a mistrial was essential to preserve his right to a fair trial, and the trial court did not abuse its discretion in denying his motion.

## Sufficiency of the Evidence; Relevant Evidence

*Rice v. State, A20A1802 (12/7/20)*

Appellant was indicted on 48 counts. Following a bench trial, he was convicted of seven counts of child molestation, two counts of sexual exploitation of children, and three counts of invasion of privacy. The evidence, very briefly stated, showed that a federal agent located online photographs found in a folder titled "9-Y-O sleeping." The agent testified that 3 of the 12 photographs, "were of a fully-clothed child that wouldn't arise any kind of normal issues." The agent explained, however, "that there were nine images that were suggestive ... as potential child sexual exploitation, which were images of a child sleeping in a dark room, clothed, but the clothes were arranged in such a way that led [agents] to believe that they had been partially removed or that she had been posed[.]" The special agent further explained that those 12 images were indicative of, but not child sexual exploitation material or contraband and that one would not be arrested for simply possessing the images. An investigation led to appellant and the pictures were identified as being of S. E., appellant's wife's daughter, and M. R. and E. R., appellant's young daughters that stayed with appellant and his wife every other weekend.

Appellant contended that the evidence in six of the seven convictions for child molestation were insufficient to support his conviction. The Court noted that the indictment charged that appellant "did ... unlawfully perform an immoral and indecent act upon the person of [S. E., M. R., and E. R.], . . . child[ren] under the age of sixteen (16) years by taking ... sexually suggestive photograph[s] ... with intent to arouse and satisfy the sexual desires of said child[ren] or said accused." The Court found that the photographs at issue were of S. E. and E. R. asleep and clothed in underwear and a shirt and M. R. with her bottom exposed. There was no evidence that S. E., M.R., or E. R. were aware that the photographs were taken. And the Court found no authority to support the State's argument that taking photographs of one's sleeping, unaware daughter and step-daughter is an act of child molestation. Additionally, even if the State's broad construction were reasonable despite the lack of any supporting authority, the contrary strict construction of OCGA § 16-6-4 nevertheless must be accepted because it is at least equally reasonable.

Furthermore, OCGA § 16-6-4(a) must be construed in connection with all of the other provisions of the criminal code. OCGA § 16-12-100 (b) (1) criminalizes taking photographs of minors engaging in sexually explicit conduct. Thus, if the photographs depicted sexually explicit conduct, then appellant's alleged act would constitute the offense of sexual exploitation of children. Accordingly, the Court concluded that appellant's actions in photographing S. E., M. R., and E. R., while concerning, did not constitute child molestation under OCGA § 16-6-4 (a).

Appellant also contended that the evidence was insufficient to support his three convictions for invasion of privacy under OCGA § 16-11-62 (2). The Court agreed. The Court noted that the indictment charged that appellant "did, through the use of a device, to wit: cellular telephone, without the consent of all persons observed, photograph the activities of another person[s], to wit: [E. R. and S. E.], in a private place, a bedroom, and out of public view[.]" Here, the Court found, the subjects of the alleged invasion of privacy were two eight year old girls who were asleep in a bedroom that they shared with appellant and appellant's wife. Neither of the girls testified at trial that they did not consent to the photographs being taken. The State failed to show both that the photographs were taken without the girls consent and that the young girls had a reasonable expectation of privacy while they were sleeping in a bedroom that they shared with their parents. Accordingly, because the State failed to meet its burden, the Court reversed appellant's convictions for invasion of privacy.

*Prosecuting Attorneys' Council of Georgia*  
**CaseLaw** UPDATE

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Finally, appellant contended that the trial court erred by granting the State's motions in limine excluding information about his wife's occupation and excluding him from "pointing the finger" at his wife. The Court again agreed.

The record showed that appellant's wife had an online sex business whereby she would perform sexual acts in exchange for money using a web camera. Appellant's wife advertised herself online in order to attract more customers. In addition to appellant's wife's involvement and knowledge of the online sex business, she resided in the same bedroom as the children, she had the same make and model of phone, that took some of the photographs, and when she was initially confronted by the federal agent she immediately admitted to taking one of the photographs.

The Court also found that appellant's sole defense was that his wife committed the crimes for which he was charged. The fact that appellant was acquitted of the some of his charges was not relevant to the determination of whether he was able to adequately present his defense. The trial court's rulings prevented appellant from not only presenting evidence that the only other adult sharing a room with S. E. and E. R. had experience in the online sex trade, but also from cross-examining her about it.

Thus, the Court concluded, the evidence about appellant's wife's occupation in combination with the other testimony about her opportunity to commit the crimes in question, raised a reasonable inference of appellant's innocence and connected his wife with the corpus delicti. Accordingly, the trial court abused its discretion and appellant's convictions must be reversed.