

THIS WEEK:

- **Self-Representation; Timeliness of Motions**
- **Theft by Receiving Stolen Property; Sufficiency of the Evidence**
- **Other Acts Evidence; Rule 414 (a)**
- **Self-Serving Statements; Admissibility**

Self-Representation; Timeliness of Motions

Simpson v. State, A20A1686 (12/9/20)

Appellant was convicted of multiple sexual and other offenses against two women. The record showed that after voir dire was completed, the trial court asked if the jury was the one selected by the State. When the State responded in the affirmative, the court then addressed the same question to appellant's counsel. He responded affirmatively, but appellant then stated "No, it's not." After the jury was excused, appellant complained to the judge that he could have done a better job at selecting a jury than his counsel had done and stated, in response to the judge's question about representing himself, that he "would love that." The court, however, told him to "[b]e quiet" and brought the jury back in.

Appellant contended that the trial court erred in denying him the right to self-representation at trial. But, the Court stated, a defendant's invocation of his right of self-representation must be both unequivocal and timely. Pretermitted whether the above exchange was an unequivocal attempt to assert the right to self-representation, the Court, citing *Thaxton v. State*, 260 Ga. 141, 142 (2) (1990) stated that the assertion of the right to self-representation must be made prior to trial.

Nevertheless, appellant argued, here the jury was impaneled, but not sworn and therefore, his trial had not begun. The Court disagreed. While Georgia law acknowledges that the impaneling of a jury is separate from the jury being sworn, *Mallory v. State*, 225 Ga. App. 418, 422 (4) (1997) found that a request for self-representation made after the jury was impaneled was untimely. Accordingly, the trial court did not err in denying appellant's request to represent himself.

Theft by Receiving Stolen Property; Sufficiency of the Evidence

In re J. B., A20A1642 (12/21/20)

The juvenile court adjudicated appellant delinquent for committing an act that, if committed by an adult, would constitute theft by receiving stolen property. Appellant argued that the evidence was insufficient to support his delinquency adjudication. The Court agreed and reversed.

The evidence showed that the victim discovered one morning that his car was missing from the driveway of his Glynn County home. Later that evening, police found the car abandoned in Camden County. The car was undamaged, but the key, which the victim had accidentally left in the vehicle, was missing. Police recovered several latent fingerprints from the exterior of the driver's door, behind the window. An analysis of these prints produced "hits" for three individuals —

appellant and two other males. The victim testified that appellant did not “have permission to take [his] car[.]” However, the victim did not see who did take his car.

The Court stated that a person commits the crime of theft by receiving “when he receives, disposes of, or retains stolen property which he knows or should know was stolen unless the property is received, disposed of, or retained with intent to restore it to the owner.” OCGA § 16-8-7 (a). The term “receiving” in this context means “acquiring possession or control or lending on the security of the property.” OCGA § 16-8-7 (a). With respect to stolen vehicles, mere proximity does not establish possession or control. Rather, the State must offer evidence that the accused exercised power or control over the stolen vehicle, such as by driving it or otherwise controlling where it would go or whom it would transport.

But, the Court found, no such evidence existed here. At best, the record showed that appellant touched the outside of the driver's door at some unknown point in time. Nothing in the record indicated that his fingerprints were on “the driver's side door handle,” as the State argued, and his fingerprints were not found inside the vehicle. Nevertheless, the State argued, appellant resides in Camden County, the “fact that the vehicle [was abandoned] in the defendant's home county also supports that [appellant] was within the vehicle with some control.” But, the Court found, the testimony presented at the adjudication hearing did not establish the county of appellant's residence. Moreover, even if appellant is a Camden County resident, the State made no effort to demonstrate where the vehicle was located in relation to his home.

The Court noted that the State may rely upon circumstantial evidence to sustain a conviction or juvenile adjudication. But, when doing so, the State must present evidence excluding every reasonable hypothesis of innocence. And here, other than the fingerprints found on the exterior of the vehicle, the State offered no evidence connecting appellant to the car or excluding the possibility that his contact with the vehicle involved something other than possession or control. The evidence did not, for example, discount the possibility that appellant was merely a passenger in a vehicle stolen by the other two individuals who left prints on the driver's door.

Thus, the Court concluded, while the record demonstrates that appellant had some contact with the exterior of the stolen vehicle, there was no proof that he possessed or controlled the car or affirmatively acted as a party to the crime of theft by receiving stolen property. Accordingly, the evidence was insufficient, and appellant's adjudication of delinquency must be reversed

Other Acts Evidence; Rule 414 (a)

Maner v. State, A20A1759 (12/21/20)

Appellant was convicted of four counts of child molestation against two children. He argued that the trial court erred by admitting evidence, pursuant to OCGA § 24-4-414 (a), that he committed prior acts of child molestation. Specifically, he contended, the other instances of child molestation should have been excluded because they were too remote in time from the offenses alleged in the indictment and were highly prejudicial.

The record showed that at trial, the State presented evidence of two other acts of child molestation by appellant. A limiting instruction was read to the jury prior to the testimony of each witness. Appellant's younger sister, Janis, testified about an experience with her brother in their childhood home. Janis testified that in 1958, when she was eight years old, appellant

called for her to come up to a storage loft in their house. Appellant, then 14 years old, was on a cot in the loft with an erect penis. He unsuccessfully attempted to penetrate her before she escaped. Janis explained that she never told anyone about the occurrence because “[i]t's just something we didn't talk about[,]” and because she managed to block it from her memory for a long time.

The State also presented evidence of an earlier act of child molestation by appellant against Gabrielle. She testified that appellant is her mother's friend. In 2002, when she was nine years old, appellant spent the night at their house in Pensacola, Florida and slept on their couch. When Gabrielle left her room in the middle of the night to get a glass of water, appellant asked her to come over and sit next to him on the couch. She complied, and appellant began running his hands on her legs around her thighs and underwear. The next morning, she told her parents about the incident, and they called the police.

Appellant argued that the trial court erred in concluding that the probative value of this evidence was not substantially outweighed by its unduly prejudicial effect. The Court noted that OCGA § 24-4-414 (a) (“Rule 414”) creates a rule of inclusion, with a strong presumption in favor of admissibility, and the State can seek to admit evidence under these provisions for any relevant purpose, including propensity. Nevertheless, evidence that is admissible under these rules may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. OCGA § 24-4-403. The trial court is required to conduct a balancing test under Rule 403 when considering whether evidence is admissible under Rule 414. This determination lies within the discretion of the trial court.

The Court stated that it must determine whether the trial court properly considered all the circumstances surrounding the extrinsic act evidence, the remoteness in time between the charged act and the extrinsic act, including the similarities between the charged act and the extrinsic act, and the prosecution's need for the extrinsic act evidence. And in doing so, the Court noted that it must be mindful that the exclusion of relevant evidence under OCGA § 24-4-403 is an extraordinary remedy which should be used only sparingly, since it permits the trial court to exclude concededly probative evidence. Thus, the Court stated, it looks at the evidence in the light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact.

And here, the Court concluded that the trial court did not abuse its discretion in admitting evidence regarding appellant's prior acts because the evidence was relevant to show appellant's “intent, identity, and propensity to commit the crimes.” Both of the prior incidents that the State sought to admit were relevant to show appellant's lustful disposition with respect to preteen or teenaged girls and his pattern of molesting young girls with whom he was living.

Further, although more than fifty years elapsed between appellant's prior offense against Janis and the current offense, such an interval, standing alone, was not enough to require that evidence of the similar transaction be excluded. The lapse of time between the prior occurrences and the offenses charged goes to the weight and credibility of such testimony, not its admissibility. Accordingly, in light of the “strong presumption in favor of admissibility,” the Court could not say that the trial court abused its discretion in allowing the prior acts to be admitted.

Self-Serving Statements; Admissibility

Barraza v. State, A20A1657 (12/22/20)

Appellant was convicted of three counts of child molestation. Prior to the start of trial, the State moved in limine to exclude appellant's statements to the detective who came to his home to speak with him during the investigation. The exchange between appellant and the detective was audio recorded. The State argued that appellant's statements were self-serving and asked that there be no reference to them "unless [appellant] testifies, subject to cross-examination." The trial court granted the State's request "unless and until" the parties could convince him otherwise when the detective was called to testify at trial.

At trial, the detective stated during direct that she "went and spoke to [appellant]." Later, in her direct examination, the detective was asked if she conducted a search warrant at appellant's residence. The detective stated, "Well, I had gone to his house previously trying to get a search warrant, trying to talk to him. So as soon as all this came out, I went to his house just to speak with him, figure out –" The prosecutor interrupted, stating, "I'm not asking about that." The prosecutor then explained that he was asking specifically about the search of the appellant's home. On cross-examination, appellant's counsel attempted to ask the detective about appellant's self-serving statements, but the State objected and the court sustained the objection.

Appellant contended that that because the State "opened the door about there being a statement by [appellant]," defense counsel should have been allowed to question the detective about the statement on cross-examination. He argued further that self-serving declarations are not expressly excluded under Georgia's Evidence Code. However, the Court stated, the detective's testimony that she went to appellant's home to speak with him did not open the door to cross-examination regarding the statements made by appellant during that encounter.

Furthermore, the Court noted, although appellant did not enumerate as error the trial court's ruling on the State's motion in limine to exclude the statements, he argued that they were admissible under OCGA §§ 24-8-801 (d) (2) (admissions by party-opponent) and 24-1-106 (when a written or recorded statement or part of a statement is introduced by a party, an adverse party may require the introduction of any other part of the statement). However, the Court found, neither of these Code sections applied here. Appellant's statements were not admissions offered by an opponent (the State), and the recorded statements were not introduced by the State. And, in any event, appellant admitted that his statements were self-serving, but he did not testify at trial. A self-serving declaration, such as a statement of one's innocence, remains inadmissible hearsay unless the declarant testifies and is subject to cross-examination. Therefore, the Court concluded, appellant failed to show an abuse of the trial court's discretion in limiting his cross-examination of the detective.