

## THIS WEEK:

- **Sentencing; Merger**
- **Appellate Review; Incomplete Record**
- **Conceding Guilt; Motion to Compel Transcription**
- **Rule 414; Rule 403**
- **Other Acts Evidence; Rule 403**
- **Motions to Withdraw Guilty Pleas; Jurisdiction**

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### Sentencing; Merger

*Stone v. State, A20A2111 (1/11/21)*

Appellant was convicted of rape, aggravated child molestation, statutory rape, enticing a child for indecent purposes, and contributing to delinquency of a minor. Relying on *Lay v. State*, 264 Ga. App. 483 (2003), he contended that the trial court should have merged his convictions for rape (Count 1) and aggravated child molestation (Count 3). The Court disagreed.

The Court stated that a crime is included in the other, under OCGA § 16-1-6 (1), where "[i]t is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged." OCGA § 16-1-6 (1). When making this determination, courts apply the "required evidence" test adopted in *Drinkard v. Walker*, 281 Ga. 211 (2006): Where the same act or transaction constitutes a violation of two distinct statutory provisions, the required evidence test considers whether each provision requires proof of a fact which the other does not. If so, then there are two offenses, and neither is included in the other.

In reviewing the elements of the two offenses, the Court found that there is no merger. The offense of aggravated child molestation requires proof of facts that the offense of rape did not: physical injury to the victim and that the victim was under the age of 16. And, the offense of rape required proof of a fact that the offense of aggravated child molestation did not: lack of consent.

Furthermore, the Court found, the case relied upon by appellant, *Lay v. State*, was decided prior to the Supreme Court's adoption of the required evidence test in *Drinkard*. The *Lay* Court held that a rape conviction merged with an aggravated child molestation conviction because they were based on one act of sexual intercourse and the physical injuries required to support the aggravated child molestation conviction occurred during the rape. Thus, to the extent that the holding in *Lay* diverges from *Drinkard* and application of the required evidence test, it was impliedly overruled by the Supreme Court's decision in *Drinkard*. However, the Court took the opportunity to overrule *Barber v. State*, 283 Ga. App. 129, 130, n.2 (in reliance on *Lay*, holding that convictions for aggravated child molestation merge with convictions for rape because all arising from a single incident of sexual intercourse), decided two months after *Drinkard*, because it applied the wrong standard for merger.

## Appellate Review; Incomplete Record

*Kittrell v. State, A20A1680 (1/11/21)*

Appellant was convicted of armed robbery and possession of a firearm during commission of a felony. The evidence showed that appellant robbed a Pizza Hut, fled from the store, got into a silver car driven by an unknown man, which then drove away. During the trial, the State submitted numerous recordings of appellant's jail house phone calls. In one of these calls between appellant and his mother, appellant discussed his willingness to take a plea offer and said that he would testify against the driver in exchange for a reduction in charges. Appellant did not testify.

Appellant contended that his trial counsel rendered ineffective assistance of counsel by failing to object when the prosecutor allegedly stated that appellant had discussed taking a plea deal in those jail house phone calls, and that an innocent man would not consider taking a plea. However, the Court stated, it could not reach this issue.

The Court noted that closing arguments were not transcribed. At the hearing on the motion for new trial, both trial counsel and appellant testified that the prosecutor made a statement in closing argument to the effect of "why would an innocent man consider taking a plea deal?" But, in its order denying the motion for new trial, the trial court made no finding as to the content of the closing argument, and the parties did not otherwise perfect the record to show that any such "innocent man" statement was made.

To counter the absence of a complete record, appellant proffered his attorney's argument that such a statement was made. But, the Court held, such circumstances are insufficient to establish the correctness of the record. The only means for reconstructing a transcript from recollection is via agreement of the parties or their counsel or independent recollection of the trial judge and argument from counsel at the motion for new trial hearing is not sufficient.

The burden was on appellant to complete the record, and he did not do so in a way that would enable the Court's review. Notably, the record did not contain any stipulation from the State as to the content of its closing remarks or agreement as to the alleged language, nor did the record include any ruling from the trial court on this issue. Accordingly, because appellant failed to complete the record consistent with the requirements of OCGA § 5-6-41, the Court found this issue had been abandoned.

## Conceding Guilt; Motion to Compel Transcription

*St. Germain v. Sate, A20A1854 (1/14/21)*

Appellant was convicted of rape, incest, two counts of child molestation, and three counts of aggravated child molestation. He argued that his trial counsel was ineffective because he conceded that appellant was guilty during closing argument. The Court disagreed.

The Court found that trial counsel made no such concession of guilt. Rather, as established by appellant's own witnesses at the motion for new trial hearing, trial counsel argued during his closing that the State had not proved guilt beyond a reasonable doubt, and further noted that even if the jurors found guilt on certain offenses, they did not have to find guilt on all charges. As counsel explained at the motion hearing, he simply wanted to give the jurors options and direct them

away from a verdict carrying multiple life sentences. Furthermore, the Court stated, even if counsel had not merely sought to clarify the verdict options and had actually conceded guilt on some charges in order to avoid more serious convictions, appellant still would not have raised a convincing claim of deficient performance since it is not objectively unreasonable to concede guilt on a lesser offense in an effort to avoid conviction on a more serious charge.

Next, appellant contended that the trial court erred in denying his motion to compel transcription. The record showed that the trial court granted appellant's pretrial motion to record all proceedings. The court reporter subsequently recorded, but did not transcribe, the opening statements and closing arguments of the attorneys. After the trial, appellant filed a motion to compel the court reporter to transcribe the opening statements and closing arguments, but the trial court denied the motion.

With regard to the opening statements, the Court found that appellant made no claim that any error occurred during those statements. In fact, the Court noted, he stated in his brief only that he claimed that an error occurred during closing arguments. Thus, appellant failed to show that he suffered any harm from the absence of a transcript of those statements. Failure to transcribe is not harmful per se; rather, the defendant as appellant must demonstrate harm resulting from the failure to transcribe.

As for the closing arguments, the Court noted that the only alleged error appellant identified was the argument that his trial counsel conceded guilt. But, as conceded by appellate counsel at the motion for new trial hearing, appellant was able to establish a record of counsel's allegedly improper closing argument through the testimony of witnesses at that hearing. So again, there was no showing of harm due to the lack of a transcript.

### **Rule 414; Rule 403**

*Hamby v. State, A20A1821 (1/14/21)*

Appellant was convicted of one count of aggravated child molestation, one count of aggravated sodomy, one count of cruelty to children, and two counts of child molestation. The evidence, briefly stated, showed that when the victim was approximately eight years old, appellant lived with the victim's mother and watched the victim and the other children in the household while the victim's mother worked an overnight shift. Appellant would wait until everyone else in the house was asleep and would then take the victim into the living room and perform oral sex on her, and once showed her naked body to another man over a web camera.

Appellant argued that the trial court erred in denying his motion in limine to exclude evidence that he made the victim participate in online sexual performances. The Court noted that even though the counts related to this conduct were nolle prossed by the State because the events occurred in a different jurisdiction, there was no error.

First, although the trial court apparently relied upon Rule 404 (b) in admitting the contested evidence, the proper statutory authority to admit such evidence under Georgia's new Evidence Code is OCGA § 24-4-414 (a) ("Rule 414 (a)"). Under Georgia's new Evidence Code, OCGA § 24-4-413 and 24-4-414 supersede the provisions of OCGA § 24-4-404 (b) in sexual assault and child molestation cases. Thus, the trial court's apparent reliance on Rule 404 (b) in its decision to admit the evidence was not reversible error.

And here, the Court concluded that the trial court did not abuse its discretion in admitting the testimony regarding appellant's prior acts under Rule 414. The evidence was clearly relevant to appellant's intent, identity, and propensity to commit the crimes against the victim. Further, the probative value of the evidence was great because it provided a narrative of how the victim's abuse began, how the grooming process began, and why the victim delayed her disclosure. Although appellant argued that the evidence it sought to exclude in its motion in limine was too temporally remote to be probative evidence, the State correctly argued that remoteness of time goes to the weight and credibility of the evidence, not to its admissibility.

Furthermore, with regard to the Rule 403 balancing test, appellant correctly noted that the trial court did not make an explicit finding regarding the balancing test in its oral ruling or in its order on the motion for new trial. But, the Court found, the trial court engaged in discussion with both parties regarding Rule 403 during the motion in limine hearing prior to issuing its ruling. Although the trial court did not explicitly mention Rule 403, absent some express showing that the trial court did not understand its obligation to conduct the balancing test, the Court stated it would not read such error into the trial court's ruling.

### **Other Acts Evidence; Rule 403**

*Mike v. State, A20A1600 (1/15/21)*

Appellant was convicted of child molestation, cruelty to children in the first degree, obstruction of a police officer, and possession of less than one ounce of marijuana in connection with an incident in which appellant exposed himself to a 15-year-old girl in a supermarket. During the trial, the State was permitted to present other acts evidence. Specifically, six women testified about prior incidents in which appellant had exposed himself to them while masturbating. Five of the incidents occurred while appellant was incarcerated. Before this testimony and following the close of the evidence, the trial court gave the jury a limiting instruction.

Appellant contended that absence of mistake or accident was not a proper purpose for admitting the evidence because he never actually claimed that the incident at issue was an accident or mistake. The Court stated that generally other acts evidence should not be admitted on a lack-of-accident-or-mistake theory when the defendant never claimed, nor was there any evidence to suggest, that the offense at issue was the result of an accident or mistake. But here, some evidence suggested that the incident was the result of an accident, namely evidence that appellant told police that he had just exited the restroom and impliedly did not realize his penis was exposed when the victim saw him. Moreover, appellant affirmatively put forth accident or mistake as a defense. He elicited testimony from the supermarket's manager that surveillance cameras in the store monitored the restroom area and that the manager did not review the surveillance footage to determine whether anyone was leaving the restroom at the time, seemingly implying that appellant could have been exiting the restroom as he had claimed in his statements to police. Appellant then highlighted this fact in closing to the jury and argued that the State "[had] not proven that he was not in fact in the bathroom." Finally, appellant requested and received a jury charge on the defense of accident or mistake. Thus, the Court concluded, the other acts evidence was relevant to rebut the contention that appellant accidentally exposed his penis after using the bathroom and was admitted for a proper purpose.

Appellant also argued that even if the other acts evidence was admitted for a proper purpose, the prejudicial nature of the evidence far outweighed its probative value because five of the six incidents occurred while appellant was incarcerated, and thus evidence of his prior incarceration was presented to the jury. The Court disagreed.

Here, the Court found, the State needed to overcome appellant's defense that he accidentally exposed his penis to the victim after using the bathroom. Additionally, as the trial court found, all of the incidents were significantly similar: Appellant exposed his penis to a female in a public place and masturbated before ultimately fleeing. Evidence that appellant on six prior occasions had exposed himself in the same manner lessened the possibility that the incident at issue was an accident. Thus, while evidence of appellant's prior incarcerations was prejudicial, the incidents were not a matter of scant or cumulative probative force, dragged in by the heels for the sake of their prejudicial effect. Moreover, the trial court lessened the prejudicial impact of this evidence when it repeatedly instructed the jury to consider the evidence for only the limited purpose of proving intent or the absence of mistake or accident.

## **Motions to Withdraw Guilty Pleas; Jurisdiction**

*Jacobo v. State, A20A2083 (1/19/21)*

In January 2010, appellant waived his right to counsel and pled guilty to possessing less than one ounce of marijuana. On May 5, 2020, appellant filed an extraordinary motion to withdraw guilty plea and vacate conviction, alleging that he was presently jailed and in "removal proceedings." As grounds for his motion, appellant asserted that nothing in the record, including the waiver of counsel form, indicated that the trial court warned him that he could suffer negative immigration consequences as a result of his guilty plea, and that therefore, his Sixth Amendment right to counsel and his substantive and procedural due process rights were violated. The trial court dismissed the motion for lack of jurisdiction because the motion was filed outside the term of court and appellant made no contention that his sentence was void.

Appellant contended that the Court should establish a new standard in situations such as his where it appears the trial court failed to "follow the rules" when taking his plea. See OCGA § 17-7-93 (c), and USCR 33.8 (D) (2). He further argued that the "'void'/'voidable' distinction in this situation has led to a manifest injustice" and that "[a]rguing that the conviction in this case is 'void[,] or merely 'voidable' is an exercise in sophistry." The Court declined his invitation.

The Court stated that it is well settled that when the term of court has expired in which a defendant was sentenced pursuant to a guilty plea, the trial court lacks jurisdiction to allow the withdrawal of the plea. Despite appellant's claim of manifest injustice because of the trial court's alleged failure to inform him of the impact on his immigration status, and his urging that the Court establish a new standard, the Court found that he failed to show a basis to disturb the trial court's dismissal of his motion to withdraw his guilty plea. Accordingly, given the circumstances, the trial court correctly dismissed appellant's motion to withdraw his guilty plea.