Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING APRIL 23, 2021
Issue 17-21

THIS WEEK:

- **Authentication of Tweets; Statements**
- **Statements; Mental Competency**
- **Sufficiency of the Evidence; Indictments**
- **Indictments; Jury Charges**
- **Motions in Limine; Rule 403**
- **Sufficiency of the Evidence; Hearsay**

Authentication of Tweets; Statements

Intemann v. State, A20A1870 (2/22/21)

Appellant was convicted of three counts of armed robbery and three counts of aggravated assault. The evidence, very briefly stated, showed that appellant listed Apple electronics on Craigslist for sale. When a potential buyer responded, appellant lured them to a place where he robbed them of the buy money and their cell phones. After the police caught him, he tried to pin the crimes on others, including his friend Contee.

Appellant contended that the trial court erred in admitting printouts of Tweets that the State maintained that he posted from his Twitter account because the Tweets were not properly authenticated. The Court stated that under Georgia's Evidence Code, authentication of evidence may be achieved through any of a variety of means so long as there is evidence sufficient to support a finding that the matter in question is what its proponent claims. Documents from electronic sources are subject to the same rules of authentication as other more traditional documentary evidence and may be authenticated through circumstantial evidence, which may include the appearance, contents, substance, internal patterns, or other distinctive characteristics of the documents, taken in conjunction with circumstances.

Prior to the admission of the Tweets, Contee testified that he had been friends with appellant since middle school, had known him for about ten years, and would often spend the night at his house. Contee testified that during the time period of the robberies, appellant had a Twitter account, and he and appellant followed each other's accounts. According to Contee, appellant posted under "ohitsgist" and "liljesuspiece" on Twitter. Contee explained that appellant was an aspiring rap artist who performed under the moniker "Gist" and that his Twitter username was intended to be read as "oh its gist." Additionally, Contee testified that appellant's Twitter account had a profile photo of appellant on it that had been taken by Contee, and he identified the profile photo that appeared on the account.

The lead detective testified that Contee provided him with the name of appellant's Twitter account, after which he searched for and located the account, observed that it had appellant's profile photo on it, and printed out Tweets from that account. The detective identified these pages at trial as the Tweets that he printed out from the Twitter account that he believed belonged to Contee based on his research. The Tweets listed the Twitter username or handle as "@ohitsgist" and the Twitter display name as "liljesuspiece."

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The Court found that based on the testimony of Contee and the lead detective, the trial court was authorized to find that the State established a prima facie case that the printouts accurately reflected the contents of the Tweets and that appellant posted them. Accordingly, the trial court did not abuse its discretion by admitting the printouts of the Tweets into evidence at trial.

Appellant also argued that his trial counsel was ineffective by failing to object when the State elicited testimony from the lead detective that appellant invoked his right to counsel during his first police interview. The record showed that at one point in the interview, appellant told the detective that he did not want to speak with him anymore and that he wanted an attorney. The detective stopped the interview and informed appellant that he was under arrest for the robberies. However, a few minutes later, when the detective returned to tell appellant that his paperwork was being completed and that he would not have to wait much longer in the interview room, appellant said that he wanted to continue talking with the detective about the robberies and asked to be read his *Miranda* rights again. The detective advised appellant of his *Miranda* rights for a second time, after which appellant signed a waiver form and completed his interview with the detective.

Appellant contended that his invocation of his right to counsel constituted an impermissible comment on his right to remain silent, and his trial counsel was deficient in failing to object. But, the Court found, the testimony elicited from the detective merely showed that appellant invoked his right to counsel after answering some of the detective's questions about the robberies, leading the detective to terminate the interview. Quoting Milich's Rules of Evidence, the Court stated that where the accused waived his rights and made some statements to law enforcement, the fact that he stopped answering questions and asked for an attorney is admissible to explain why the interview terminated. And thus, an officer's explanation that the defendant stopped answering questions and wanted an attorney is not a comment on defendant's silence; rather, it is an explanation of the officer's course of conduct. Accordingly, the Court found that under the circumstances, the evidence of appellant's invocation of his right to counsel was not an improper comment on his right to remain silent.

Statements; Mental Competency

Scriven v. State, A20A1941 (2/22/21)

Appellant was convicted of aggravated assault, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon. He contended that the trial court erred by admitting his statement into evidence because the trial court failed to determine whether he was mentally competent at the time of his statement**.** The Court disagreed.

The record showed that at the *Jackson-Denno* hearing, an officer testified that he interviewed appellant after advising him of his *Miranda* rights and that appellant did not appear to be under the influence of alcohol or drugs. He also testified that he did not threaten or coerce appellant, or make any promises in order to obtain a statement. A video recording of the interview was played. Appellant testified at the hearing that at the time he gave his statement he was "tired" and that he had been woken up at five o'clock in the morning. Appellant stated: "I just was ready to get it over with, but I told him the truth about the incident." During the statement, appellant stated that he had been diagnosed as bipolar and a paranoid schizophrenic, but that he was on his medication.

The Court stated that a person who is mentally ill can be competent to make a voluntary confession. Also, a mere showing that a person who confessed to a crime may have suffered from some mental disability is not a sufficient basis on which to exclude the statement. And here, the Court found, the officer stated that he did not coerce appellant or offer any inducements, the video of the statement was played and appellant himself did not claim to be too mentally ill to give a voluntary confession. Instead he claimed that he did not understand his right to have a lawyer present because he "was so tired [he] was ready to get back to the bed." Considering the testimony of the officer and appellant, and its own review of the videotaped statement, the Court concluded that it could not find that the trial court clearly erred in determining that appellant was mentally competent when he incriminated himself. Therefore, admission of appellant's statement was a proper evidentiary ruling.

Sufficiency of the Evidence; Indictments

Thompson v. State, A20A1601 (2/24/21)

Appellant was convicted of theft by taking, obstruction of an officer, and four counts of felony fleeing or attempting to elude a police officer. The evidence showed that appellant stole a vehicle while posing as a prospective buyer and then over the course of the next couple of days, eluded police chases until he crashed the vehicle and was caught running from the scene.

Appellant contended that the evidence was insufficient to support his four fleeing and eluding convictions. Specifically, he argued that the indictment charged him with a felony based on his alleged actions of driving in excess of 20 miles per hour over the posted speed limit *and* doing so in conditions that placed the general public at risk. But, he argued, the State failed to prove that he placed the general public at risk. Therefore, he should have been sentenced only for misdemeanor, as opposed to felony fleeing and eluding.

Pretermitting whether the evidence at trial authorized the jury to find that appellant drove in conditions that placed the general public at risk, the Court found that his argument failed. Our courts have long concluded that when a statute authorizes conviction upon proof of one or more alternative methods and these methods are expressed in the disjunctive, an indictment should charge the methods using the word "and," but at trial it is sufficient for the State to show that the offense was committed in any one of the separate ways listed in the indictment. Accordingly, the Court held, even if the State had failed to prove that appellant drove in conditions that placed the general public at risk (OCGA § 40-6-395 (b) (5) (A) (iii)), he was still guilty of felony fleeing and eluding because, as he admitted, the State established that he fled from the pursuing officers by driving in excess of 20 miles per hour over the posted speed limits. OCGA § 40-6-395 (b) (5) (A) (i).

Nevertheless, appellant argued, this well settled authority should no longer be followed in Georgia. But, the Court stated, citing *Cash v. State*, 297 Ga. 859, 862 (2) (2015), it is bound by the opinions of the Supreme Court.

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Indictments; Jury Charges

Bell v. State, A20A1761 (2/25/21)

Appellant was convicted of two counts of voluntary manslaughter (but acquitted of malice and felony murder) and one count of aggravated assault, one count of aggravated assault on a public safety officer, and two counts of possession of a firearm during the commission of a crime. He contended that the indictment was insufficient because it did not allege the necessary elements for the aggravated assault on a public safety officer offense. The Court disagreed.

Count 4 of the indictment alleged that appellant "did unlawfully then and there knowingly assault the person of Robert Burt, a public safety officer, with a deadly weapon, a handgun, by committing an act which placed said Robert Burt in reasonable apprehension of immediately receiving a violent injury, to-wit: by discharging said firearm in the direction of and in the presence of said Robert Burt, while said officer was engaged in the performance of his official duties[.]" The Court noted that the State alleged that appellant violated OCGA § 16-5-21 (c) (1), which provides "that an aggravated assault on a public safety officer occurs when a person knowingly commits the offense of aggravated assault upon a public safety officer while he or she is engaged in, or on account of the performance, his or her official duties." Therefore, aggravated assault is a lesser included offense of aggravated assault on a public safety officer. Additionally, this statute has been construed to require that, at the time of the assault, the defendant must have knowledge that he was assaulting a police officer engaged in the performance of his official duties.

But, the Court stated, pretermitting whether the indictment sufficiently charged appellant with assaulting someone he knew was a public safety officer under OCGA § 16-5-21 (c) (1), appellant could not admit to the allegations contained in the indictment and be innocent of committing the lesser included offense of aggravated assault. Therefore, the Court concluded, Count 4 of the indictment was sufficient to withstand a general demurrer.

Appellant also argued that the trial court committed plain error in instructing the jury that it was authorized to convict him of malice murder or felony murder. Here, the trial court charged the jury with the following instructions: "After consideration of all the evidence before you, you may be authorized to return a verdict of guilty of malice murder or felony murder. But before you do that you must determine whether mitigating circumstances, if any, would cause the offense to be reduced to voluntary manslaughter." Appellant contended that the trial court erred in charging the jury in this manner because the instructions ignored or diminished the presumption of innocence, it relieved the State of its burden of proving his guilt beyond a reasonable doubt, and it amounted to a comment on his guilt. The Court disagreed.

The Court found that the instructions did not diminish the presumption of innocence or relieve the State of its burden of proof, and did not operate as a comment on appellant's innocence. Instead, the trial court merely instructed the jury that before it could return a guilty verdict for malice murder or felony murder, it first had to consider whether mitigating circumstances warranted a guilty verdict for the lesser offense of voluntary manslaughter. The trial court's instruction closely mirrored the pattern jury instruction, which states: "After consideration of all the evidence, before you would be authorized to return a verdict of guilty of (malice murder) (felony murder), you must first determine whether mitigating circumstances, if any, would cause the offense to be reduced to voluntary manslaughter." Suggested Pattern Jury Instructions § 2.10.40.

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The Court also noted that the jury was also instructed that appellant was to be presumed innocent until proven guilty and that the State bore the burden of proof for each offense. Additionally, the trial court instructed the jury that "no ruling or comment that the court . . . made during the progress of th[e] [trial] [was] intended to express any opinion upon the facts of this case, upon the credibility of the witnesses, upon the evidence or upon the guilt or innocence of the defendant." Viewed in this context, the Court concluded that the trial court's statement that the jury "may be authorized" to find appellant guilty of malice murder, felony murder, or voluntary manslaughter was not a command or a statement that there was sufficient evidence to return a guilty verdict but was merely a statement reflecting the jury's discretion in returning its verdicts. No reasonable jury would have understood the court's instructions, taken as a whole, as intimating that the jury should reach a particular verdict or that the prosecution was relieved of its burden of proof. Therefore, appellant failed to show error in the trial court's instructions to the jury.

Motions in Limine; Rule 403

Jones v. State, A20A1842 (2/25/21)

Appellant was convicted of one count of armed robbery and two counts of aggravated assault. The evidence, briefly stated, showed that appellant and his accomplice were at a party at the victim's house, along with about ten other people. Appellant and his accomplice went outside and discussed robbing the victim. Later that evening, they did just that.

Appellant argued that the trial court erred by excluding evidence that the victim was a drug dealer. The Court noted that prior to trial, the State moved in limine to exclude evidence that the victim sold marijuana to people at the party on the night of the robbery. At the hearing, the proffers from the parties showed that the victim sold marijuana to multiple people, including appellant and his accomplice, and many attendees were using marijuana at the party. Appellant argued at the hearing that evidence of his own drug use or purchase of marijuana should be excluded, but that evidence involving the victim's selling of drugs should be admitted. After considering argument, the trial court excluded *any* evidence of drug use or involvement at the party, but permitted evidence that the defendants knew that the victim had cash. In the order denying appellant's amended motion for new trial, the trial court stated that it weighed the evidence as required by Rule 403 and concluded that the "scant probative value" of evidence regarding drug use or sale at the party was "substantially outweigh[ed]" by the "high danger of unfair prejudice."

The Court agreed that the source of the victim's cash was of limited probative value, which was substantially outweighed by its danger of creating prejudice. Consequently, the Court concluded that the trial court did not abuse its discretion in the exclusion of evidence that the victim sold or used drugs.

Sufficiency of the Evidence; Hearsay

Childers v. State, A20A1626 (2/25/21)

Appellant was convicted of a single misdemeanor count of furnishing a vapor product to a minor. The evidence, briefly stated, showed that Sgt. Turner, as part of an operation seeking to conduct compliance checks on retail establishments selling vapor products, sent two underage operatives, J. D. and A. Z., into a store where they purchased a bottle containing a mango flavored nicotine salt from appellant. She was subsequently charged and convicted of one count of furnishing a vapor product to a minor, in violation of OCGA § 16-12-171 (a) (1) (A). At trial, the court denied appellant's hearsay

objection to admission of the label on the product identifying it as a "RAM Top-Off 45 MG nicotine salt bottle," as well as an "e-cig liquid or fluid."

Appellant contended that the trial court erred in ruling that the product's label fell within an exception to the rule against hearsay. And, she argued, absent the admission of the product's label, the evidence was insufficient to support her conviction. The Court found that the trial court admitted the label under the "market-reports-and-commercial-publications" exception contained in OCGA § 24-8- 803 (17). The Court also noted that whether the label on the container of a vapor product comes within an exception to the general rule against hearsay is a matter of first impression in Georgia. But, even assuming, without deciding that the trial court erred in admitting the label of the product that appellant furnished to the two minors under the "market- reports-and-commercial-publications" exception to the rule against hearsay contained in OCGA § 24-8-803 (17), the Court concluded that any such error was harmless given the sufficiency of the evidence.

Appellant, however, contended that the evidence was insufficient to support her conviction. The Court noted that applying OCGA § 16-12-171 (a) (1) (A) to the sale of a vapor product to a minor also appears to be one of first impression in Georgia. As relevant here, OCGA § 16-12-171 (a) (1) (A) (2014) provides that "[i]t shall be unlawful for any person knowingly to [s]ell or barter, directly or indirectly, any cigarettes, tobacco products, tobacco related objects, alternative nicotine products, or vapor products to a minor[.]" OCGA § 16-12-170 (10) (2017), in turn, contains a detailed definition of "vapor product."

Appellant argued that based on the text of OCGA § 16-12-171 (a) (1) (A) (2014), the State had the burden to prove that the product she sold to the minors: (1) was noncombustible, (2) contained nicotine, and (3) employed a means to produce vapor from nicotine in a solution. The crux of her argument was that the State failed to put forth any evidence other than the product label, such as chemical analysis or expert testimony, to establish that the product she furnished to the minors met the statutory definition of a "vapor product."

As this too is an issue of first impression in Georgia, the Court noted that appellant failed to cite any legal authority for her interpretation requiring expert testimony or chemical testing to prove that a product meets the statutory definition of any of the products listed in OCGA § 16-12-171 (a) (1) (A). But, the Court found guidance in the analogous contexts of alcohol and narcotics. First, the Court noted that its decisions regarding the sufficiency of the evidence in open container cases do not recognize a burden on the State to prove specific alcohol concentrate in liquid found in labeled alcohol bottles. Similarly, in the context of narcotics, expert testimony is not necessary to identify a substance, including drugs.

And here, the Court found, the State presented separate evidence aside from the product label to show that appellant furnished a vapor product to a minor. Specifically, Sergeant Turner testified about the objectives of the operation — to conduct compliance inspections at retail establishments located in the county, and arrest or obtain warrants for individuals selling a vapor product to minors. As part of the operation, the two underage operatives entered the Store where appellant was working that day. One of the minors, J. D., testified that she purchased "mango e-juice" from appellant. The second operative, A. Z., stated that appellant told the minors that the retail store, titled "OLE 5 Vapor store," sold "custom vape juices." A. Z. asked to have the nicotine salt product "mixed together," which appellant did. The minors then exited the store and provided the solution, packaged in a bottle, to the police. Sergeant Turner also testified that the two operatives purchased "a mango flavored nicotine salt" as part of the operation. Importantly, appellant herself admitted to selling "salt

nicotine" to the two underage operatives, as captured on Turner's body cam, thereby establishing that the product contained nicotine. Thus, the Court concluded, the State presented the same information contained in the product label from sources separate and distinct from the label itself. And accordingly, taken as a whole, there was sufficient evidence from which the trial judge was authorized to infer appellant's guilt of furnishing a vapor product — containing nicotine for use with a noncombustible electronic cigarette — to a minor in violation of OCGA § 16-12-171 (a) (1) (A) (2014).

Nevertheless, appellant contended, to meet the definition of the term "vapor product," as employed in OCGA § 16-12-171 (a) (1) (2014), the State had to prove that she sold a product to a minor that includes both the compound or solution containing nicotine to be used in an electronic cigarette device *and* the electronic smoking device itself. But, the Court noted, again appellant offered no legal authority in support of her position and a plain common sense reading of the former version of OCGA § 16-12-170 (10) demonstrates that the term "vapor product" references any of the listed examples including, as relevant here, the compound used in an electronic smoking device, such as a "container of nicotine in a solution or other form," as well as the electronic smoking device itself. OCGA § 16-12-170 (10) (2017). Finally, the Court found that appellant's interpretation clearly conflicts with the purpose of the statute: to prevent the sale of vapor products to minors. By reading both parts of OCGA § 16-12-171 (a) (1) in the conjunctive, as appellant suggested, it would be permissible for example, for a person to sell an "electronic cigarette" to a minor so long as the minor also was not purchasing a "vapor cartridge of nicotine."