Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING JANUARY 14, 2022
Issue 2-22

# THIS WEEK:

- Rule 404 (b); Rule 403
- Self-Incrimination; General Demurrers
- Discovery Violations; List of Witnesses
- Jury Charges; Alibi Defense
- Right to Counsel; Waiver

## Rule 404 (b); Rule 403

*Ramirez-Ortiz v. State, A21A0982 (10/25/21)*

Appellant was convicted of three counts of child molestation. The evidence showed that in 2017, appellant rented a room from Paz and Raul, the grandparents of the five-year-old victim. The victim testified that appellant touched her vagina, buttocks, and breasts. Pursuant to OCGA § 24-4-404 (b), I. G., Paz's daughter-in-law, testified that in November 2011, at a Thanksgiving gathering, appellant touched her inappropriately three times. The first time, I. G. felt him grab her butt, and she assumed it was an accident. Later that same day, he "let himself fall and grabbed [her] again." The third time, he came towards her "really fast" and touched her vagina as she bent down to retrieve a baby bag. M. M., the victim's mother, testified that in 2012, appellant slapped her buttocks with his hand at a party at Paz's house.

Appellant contended that the trial court erred in admitting this evidence. Specifically, appellant contended that the evidence was not relevant to an issue in the case other than his character and that the evidence was inadmissible under Rule 403. The Court disagreed.

The Court stated that the evidence tended to prove appellant's intent because he put his intent at issue by pleading not guilty, and he did not take any affirmative steps to relieve the State of its burden to prove intent. And if a defendant's intent to commit the charged offense is at issue, the relevancy of the extrinsic offense derives from the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic and charged offenses. The reasoning is that because the defendant had unlawful intent in the extrinsic offense, it is less likely that he had lawful intent in the present offense. Where the state of mind required for both offenses is the same, the extrinsic crime is relevant to the charged offense. The test is to ask: Under the facts of the case, is there any danger that a rational jury could find that although the defendant committed the objective, charged acts, he did not intend to do so?

Here, the State was required to prove that appellant committed the acts against the victim with the intent to arouse his own sexual desires. Similarly, the State had to overcome potential defenses of accident or mistake. The extrinsic acts against I. G. and M. M. were relevant to show intent and to similarly show an absence of mistake or accident and motive. And because the victim's young age at the time of the alleged offenses and at trial impacted both her memory and her interpretation of appellant's motive and intent, the relevancy of the extrinsic evidence was increased.


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Next, the Court found no basis to support the extraordinary remedy of excluding this evidence as unduly prejudicial under OCGA § 24-4-403, particularly given the strong statutory presumption of admissibility and given the close similarities between the crimes at issue. Although the extrinsic acts occurred against women, as opposed to the child victim in the instant case, all three cases involved what appeared to be surreptitious touching of the buttocks and/or vaginas of female victims, over their clothing, in appellant's home, in a manner that appellant could assert was accidental or incidental. And as the trial court found, "[t]here has been no showing that the evidence would confuse the issues, mislead the jury, waste time, or be cumulative of other evidence, or that the probative value of the evidence would otherwise be substantially outweighed by its prejudicial impact."

## Self-Incrimination; General Demurrers

*Woods v. State, A21A0723 (10/25/21)*

Appellant was convicted of DUI (less safe); driving too fast for conditions and failure to maintain lane. He argued that the arresting officer violated his right against self-incrimination by coercing him to participate in the HGN test and a Preliminary Breath Test ("PBT"). The Court disagreed.

The Court noted that the facts of this case differed from *Olevik* and its progeny because the sobriety tests here were taken before appellant's arrest and before the reading of the implied consent notice. The State contended that these facts per se distinguish the case from *Olevik* and the application of Paragraph XVI, but the Court declined to adopt this view. The totality of the circumstances test, as explained in *Olevik*, is applicable to a defendant's pre-arrest consent, especially in determining whether the consent was voluntary or mere acquiescence to authority.

And here, the Court noted, the trial court, in considering the totality of the circumstances, denied appellant's motion to suppress the field sobriety tests. The court found that there was no evidence of threat or coercion by the arresting office, began most of his sentences with requests, such as "I am going to ask you to perform HGN" and "Do me a favor and blow into this tube." Although these requests came while appellant and the officer were seated in the back seat of a patrol car, the Court found that appellant was only in the patrol car due to heavy rain, and the officer confirmed this fact with appellant. Based on these facts, the trial court found that appellant voluntarily consented to the field sobriety tests.

Thus, the Court stated, given the applicable standard of review and the facts in this case, it could not say that the evidence demanded a finding contrary to the trial court's ruling, and consequently, the Court found no abuse of discretion by the trial court in denying appellant's motion to suppress. Although appellant argued that he did not provide affirmative consent and "merely acquiesced" to the arresting officer's instructions, the facts here did not contain the same hallmarks as other cases in which appellate courts have found mere acquiescence.

The State accused appellant of driving too fast for conditions in the he "did drive a vehicle at a speed greater than reasonable and prudent under the conditions and without having regard for the actual and potential hazards then existing when approaching and going around a curve on Hiram Sudie Road when special hazards exist with respect to highway conditions, to wit: wet roadway, in violation of [OCGA §] 40-6-180[.]" Appellant contended that the trial court erred in denying his general demurrer to this count. The Court agreed.

In considering a vagueness attack on OCGA § 40-6-180, the Court stated that the statute is constitutional, but only when read in conjunction with OCGA § 40-6-181. OCGA § 40-6-181 provides the maximum lawful speeds for vehicles driving in specific locations. Thus, the accusation or citation for OCGA § 40-6-180 must allege the speed of the vehicle and the hazard or condition which made that speed greater than is reasonable and prudent under the conditions. And here, the accusation did not allege appellant's speed or estimate his speed. Therefore, because OCGA § 40-6-180 standing alone is insufficient to define a crime, the accusation was subject to a general demurrer. Accordingly, the Court reversed appellant's conviction for driving too fast for conditions.

Next, appellant contended that the trial court erred in denying his general demurrer to the State's accusation for failure to maintain lane. The Court again agreed. The Court noted that the accusation alleged that appellant ""while operating a motor vehicle upon Hiram Sudie Road, a roadway divided into clearly marked lanes for traffic, did unlawfully fail to drive his vehicle as nearly as practicable entirely within a single traffic lane, in violation of [OCGA §] 40-6-48[.]" The Court agreed with appellant that the accusation failed to contain an essential element of the offense — that appellant failed to maintain his lane until he "first ascertained that such movement can be made with safety[.]" See OCGA § 40-6-48 (1). Citing *Jackson v. State*, 301 Ga. 137, 143 (2) (2017), the Court stated that this deficiency can no longer be cured by a citation to the statute. Accordingly, the accusation was subject to a general demurrer, and thus, the Court reversed appellant's conviction for failure to maintain lane.

## Discovery Violations; List of Witnesses

*Hendrix v. State, A21A0920 (10/26/21)*

Appellant was convicted of the misdemeanor offense of violating a family violence order by having contact with his former girlfriend. The record showed that when the State called appellant's former girlfriend to testify, appellant objected on the ground that she was not on the State's witness list. The State acknowledged that it had inadvertently left her name off its witness list but noted that she was named in the accusation. To remedy the situation, the court allowed appellant's counsel to interview her prior to her testimony.

Citing OCGA § 17-16-21, appellant argued that the misdemeanor discovery statute prohibited her from testifying. But, the Court stated, the purpose of this type of statute is to avoid surprise. And here, the Court found, appellant could not validly claim that he was surprised when the State called his former girlfriend as a witness — she was named as a victim in the accusation. In addition, the testimony of a witness whose name was not supplied to the defendant does not have to be excluded if other means of protecting the defendant and effectuating the intent of the statute can be found. Here, the trial court allowed appellant's counsel to interview the witness prior to her testimony. Thus, the Court concluded, under the circumstances, the purpose of OCGA § 17-16-21 was satisfied, and the trial court properly allowed the witness to testify.

## Jury Charges; Alibi Defense

*Reid v. State, A21A0882 (10/26/21)*

Appellant was convicted of enticing a child for indecent purposes and aggravated child molestation. He argued that the trial court committed reversible error by denying his request to charge the jury on the defense of alibi. The Court disagreed.

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The record showed that the indictment alleged that the crimes of which appellant was convicted occurred "between the 1st day of June 2012, and the 30th day of June 2012, the exact date of the offense being unknown to the Grand Jury." At trial, appellant presented the testimony of his brother to establish an alibi defense. Appellant's brother testified that appellant traveled to New Jersey on June 14, 2012, and, the next day, was arrested there and jailed until being bonded out early the next week. Appellant's brother further testified that appellant returned to Georgia in late June or early July but indicated that he was "not too sure of the exact date" of appellant's return. After extensive consultation with both appellant and the State during the charge conference, the trial court denied appellant's request to charge on alibi, explaining that appellant had not presented evidence "from which it could reasonably be inferred that it was impossible for him to have committed the offense[s]."

The Court found that the trial court's reasoning was sound. A requested jury charge must be legal, apt, and precisely adjusted to some principle involved in the case and be authorized by the evidence. If any portion of the request to charge fails in these requirements, denial of the request is proper. "The defense of alibi involves the impossibility of the accused's presence at the scene of the offense at the time of its commission. The range of the evidence in respect to time and place must be such as reasonably to exclude the possibility of presence." OCGA § 16-3-40.

Here, the Court found, the testimony of appellant's brother established, at best, that appellant was out of the state from June 14 through the end of the month. There was no evidence showing, however, that appellant was not in Georgia from June 1 to June 13, 2012. Thus, the Court held, because the evidence supporting appellant's alibi defense did not show the impossibility of his presence at the crime scene during the crime's commission, the failure of the court to charge the law of alibi was not error.

## Right to Counsel; Waiver

*Stewart v. State, A21A0972 (10/26/21)*

Appellant was convicted in back-to-back trials of aggravated battery (first trial) and felony obstruction and simple battery (second trial). Both incidents occurred while appellant was in jail awaiting trial on other charges. He contended that the trial court erred in finding that he knowingly and voluntarily waived his right to counsel and "[b]ased on the peculiar circumstances of this case," the Court agreed.

The Court stated that the right to counsel may be waived only by voluntary and knowing action. Such a waiver is generally established with two steps: the defendant asserts that he has decided to represent himself, and the trial court holds what is known as a *Faretta* hearing to ensure that the defendant knowingly and intelligently waives the traditional benefits associated with the right to counsel and understands the disadvantages of self-representation so that the record will establish that he knows what he is doing and his choice is made with eyes open. The State bears the burden of demonstrating that the defendant received sufficient information and guidance from the trial court upon which to knowingly and intelligently relinquish this right, and there is a presumption against waiver.

Applying these standards and based on the full record, the Court found no evidence of a knowing and voluntary waiver sufficient to uphold the trial court's ruling. First, appellant's course of conduct leading up to the trial date raised serious


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doubts that he expressed an intentional and voluntary decision to waive his right to counsel. Over the course of the six months following his arrest, appellant retained three attorneys. Two of those attorneys withdrew from representation over appellant's objection, a fact that appellant brought up unhappily at a later appearance. Throughout his pretrial proceedings, he maintained that he intended to retain counsel to represent him at trial, telling the court, "I will have an attorney by trial," "I will have an attorney," "I am [going to have an attorney]," and "I will have a lawyer at trial." He told the court shortly before trial that he had not been able to hire an attorney for trial because he had not been provided a written order confirming the withdrawal of his prior counsel. And even on the morning of trial, appellant did not say in so many words that he wanted to waive his right to counsel, or that he had decided to proceed pro se. Instead, he merely agreed that he did not have an attorney when the trial court noted that he was "sitting by [him]self." The Court found that this year-long course of conduct up through the morning of his first trial painted a picture of a defendant who wanted an attorney but, for reasons not entirely clear from the record, failed to retain one—not a defendant who definitely wanted to go to trial without counsel.

Second, the Court found that the complete lack of any contemporaneous discussion bearing on the waiver decision cut strongly against a finding of knowing and intelligent waiver here. The Court noted that there is some precedent to suggest that a trial court *must* hold a *Faretta* hearing or at least a colloquy, at or following the time that the defendant expresses a clear intent to represent himself. But even if a contemporaneous discussion is not an ironclad requirement, the complete absence of any such discussion under the circumstances here made it much harder to establish a knowing and intelligent waiver. To be sure, the Court noted, the trial court and the State made some effort to inform appellant about some of what he needed to know to waive his right to counsel "with eyes open," including his charges and their factual bases, his status as a recidivist, and the maximum sentences he faced. But every such discussion took place months before trial while appellant was still maintaining, without equivocation, that he would have an attorney for his trial, and so none of these statements were couched as warnings about the dangers of self-representation. And when it finally became clear on the morning of his first trial that appellant did not have counsel, the trial court failed to hold a *Faretta* hearing or even have a discussion with appellant at that time to make sure he was aware of the traditional benefits associated with the right to counsel or the disadvantages of self-representation. The Court found that this utter lack of discussion about the waiver decision at a time when appellant was actually weighing that decision also cut against a finding that he waived his right knowingly and intelligently.

Third, the Court found that the record was "pretty thin" on what appellant knew about the dangers of self-representation. Although there are no specific questions or information a trial court must ask or provide to make sure a defendant's waiver of the right to counsel is knowing and voluntary, at the least, the record must show that the defendant is aware of two sets of information: (1) the "dangers" and "disadvantages" of self-representation, and (2) the basics of his case, including the general nature of the charges and case against him, possible defenses and mitigating circumstances, and the range of consequences if convicted of those charges. And here, the Court found, the record showed that appellant heard from the State and the trial court about a subset of the second set of information (the charges against him, the fact that he would be sentenced as a recidivist, and the maximum sentences he faced, but not possible defenses to the charges or any mitigating circumstances). But the first set of information—why self-representation is a bad idea—was noticeably absent. Instead, the record only reflected the trial court's conclusory pretrial statement—"[w]e talked about the pitfalls about representing yourself before"—and appellant's agreement that they did. But a trial court's conclusory statement that it had previously warned the defendant about the risks of self-representation that fails to provide details about the information actually

provided, cannot be used to satisfy the State's burden. And, the Court further found, not a single conversation providing any detail at all about the "pitfalls" of self-representation appeared in the record. Thus, the Court stated, when it came to appellant's awareness of the dangers of self-representation and other information relevant to the waiver decision, the record was a mixed bag at best.

The Court concluded that any one of these shortcomings on their own might not have been enough to reverse the trial court's ruling here, which was, after all, reviewed for abuse of discretion. But taken as a whole, the record showed a course of conduct in serious tension with the notion that appellant intentionally waived his right to counsel; the complete absence of any contemporaneous discussion of the dangers of self-representation (much less a full *Faretta* hearing) after it became clear that the defendant did not have an attorney; and an incomplete set of information relevant to the waiver decision, conveyed piecemeal in the months leading up to trial while the defendant was, by all accounts, still planning to hire counsel. Under these circumstances, and given the strong presumption against waiver of the constitutional right to counsel, the Court held that appellant did not knowingly and voluntarily waived his right to counsel.

In so holding, the Court stated that it could sympathize with the trial court here. The court was faced with a defendant who refused the assistance of the public defender, cycled through multiple attorneys, insisted he would retain counsel for trial, and then, without warning, showed up the morning of trial without an attorney. Whatever the reasons for these actions and appellant's ultimate failure to retain counsel, some frustration and a desire to move on with the trial would be understandable. But waiver of the fundamental right to counsel in a criminal case must not be lightly presumed, and to find such a waiver, the record must reflect that the accused was made aware of the dangers of self-representation and nevertheless made a knowing and intelligent waiver.


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