

THIS WEEK:

- Search & Seizure; Patterns of Criminal Behavior
- Sentencing; Judicial Commentary
- *Garrity, Kastigar*
- Venue; Expert Testimony
- Rule 404 (b); Rule 403

Search & Seizure; Patterns of Criminal Behavior

Bien-Aime v. State, A21A1014 (10/26/21)

Appellant was convicted of multiple offenses involving guns and drugs found in his possession during a traffic stop of the vehicle he was driving. He contended that the trial court erred in denying his motion to suppress. The Court agreed and reversed his convictions.

The evidence showed that around 8:00 p.m. on May 15, 2014, appellant drove a Chrysler automobile into a parking lot shared by two restaurants; after making a loop, appellant made a right turn out of the parking lot, then continued driving along the roadway. A uniformed police officer, who was sitting in his marked patrol vehicle stationed in the parking lot, began following the Chrysler. Due to parking lot traffic, however, by the time the officer was able to make a right turn out of the parking lot, the Chrysler had rounded a bend along the roadway, and the officer lost sight of the vehicle. The officer then accelerated beyond the 45-mile-per-hour speed limit and caught up with the Chrysler; the officer observed that the Chrysler's turn signal began blinking, and the car next began turning into a bank parking lot. The officer then activated the patrol vehicle's emergency equipment (blue-lights and a siren) and initiated the stop in question. Concomitantly, the officer informed dispatch that he was "conducting a traffic stop on a suspicious vehicle," which automatically summoned a backup police unit to the scene. During the stop, police retrieved marijuana, cocaine, and a firearm either from appellant's person or from the inside of the Chrysler.

The State argued that the facts supported the trial court's findings that the officer had reasonable, articulable suspicion to stop appellant's vehicle. But after reviewing the record, the Court agreed with appellant that the trial court erred in concluding that the underlying stop was supported by reasonable, articulable suspicion.

Citing *Runnells v. State*, 357 Ga. App. 572, 576 (1) (2020), the Court stated that a police officer witnessing a suspect fitting a *pattern of criminal behavior* in a high-crime area is not sufficient to provide a reasonable, articulable suspicion to detain the suspect. In fact, the Court stated, our case law makes clear that, absent some particularized suspicion of wrongdoing, merely acting in a way that fits a known pattern of criminal activity does not justify an investigatory stop. Also, a person's mere presence in a high crime area does not give rise to reasonable suspicion of criminal activity, even if

police observe conduct which they believe is consistent with a general pattern of such activity. Accordingly, the Court found that the motion to suppress should have been granted and reversed appellant's convictions.

Sentencing; Judicial Commentary

Clemmons v. State, A21A0782 (10/28/21)

Appellant was convicted of aggravated child molestation, two counts of child molestation, and other offenses based on evidence that he arranged sexual encounters between an underage female victim and other men. Relying on *Harden v. State*, 184 Ga. App. 371 (1987), appellant argued that his convictions for aiding and abetting aggravated child molestation and child molestation should be reversed because there are more specific statutes that prohibit that conduct — Trafficking of Persons for Sexual Servitude and Pimping of a Person under the Age of 18. The Court disagreed.

The Court found that appellant's case is not analogous to *Harden*. In that case, the defendant was convicted of escape (OCGA § 16-10-52) under an aiding-and-abetting theory, the Court reversed his conviction, concluding that the general aiding-and-abetting statutory provision (OCGA § 16-2-20 (b) (3)) and the escape statute did not apply to a person who aided another person's escape from confinement, given that the legislature had enacted a more specific statute creating criminal liability for aiding escape that imposed a different punishment (OCGA § 16-10-53 (a)). See *Harden*, 184 Ga. App. at 372. The *Harden* Court reasoned that "[b]y defining the offense of escape from confinement in one statute and defining the offense of aiding another in escaping from confinement as an independent offense in a separate statute, the legislature clearly created two separate offenses" that were mutually exclusive and intended to "preempt [] OCGA § 16-2-20 (b) (3)." (Emphasis omitted.) *Id.* Accordingly, the *Harden* Court concluded that "it was improper to charge and convict [the defendant] as an aider and abettor to the offense of escape from confinement, and [that] his conviction for that offense [could not] stand." *Id.* at 373.

But, here, the Court found, the legislature has not enacted a separate, more specific statute making aiding and abetting aggravated child molestation or aiding and abetting child molestation an independent offense with a different punishment. The trafficking and pimping statutes contain different elements and require different proof than aiding and abetting aggravated child molestation or aiding and abetting child molestation. The pertinent provision of the trafficking statute requires proof that the defendant knowingly recruited, enticed, harbored, transported, provided, solicited, patronized, or obtained by any means "an individual for the purpose of sexual servitude," OCGA § 16-5-46 (c) (2), while aiding and abetting aggravated child molestation and child molestation have no such sexual servitude requirement. See OCGA § 16-6-4 (a) (1), (c). Moreover, the trafficking statute provides that "[e]ach violation of this Code section shall constitute a separate offense and shall not merge with any other offense," OCGA § 16-5-46 (i), and in light of this language, the legislature clearly intended that the trafficking statute not foreclose a defendant's conviction under other criminal statutes. As to the pimping statute, that statute requires proof of conduct relating to prostitution, see OCGA § 16-6-11, while aiding and abetting aggravated child molestation and child molestation do not. See OCGA § 16-6-4 (a) (1), (c). Conversely, aiding and abetting aggravated child molestation and child molestation require proof that the defendant acted "with the intent to arouse or satisfy the sexual desires of either the child or the person," OCGA § 16-6-4 (a) (1), and neither the trafficking statute nor the pimping statute require proof of such intent. See OCGA §§ 16-5-46 (c) (2); 16-6-11. Hence, the Court concluded, appellant's case clearly did not fit within the narrow circumstance that arose in *Harden*

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 21, 2022

Issue 3-22

where the General Assembly enacted a specific statute making the aiding and abetting of an underlying offense an entirely separate crime with a different punishment.

Appellant also contended that the trial court committed plain error by making an impermissible comment on the evidence in violation of OCGA § 17-8-57. The record showed that after closing arguments, the trial court chose to recess for the day and have the jurors return the next day to hear the charge of court and begin their deliberations. In the court's statement releasing the jurors for the evening, the court stated, "You may be tempted to do a study on some of the matters that you've heard today and received expert testimony on today. You may be craving some input from somebody that you love and trust about matters that you're about to have to decide. You can't do any of that. "You have to restrict your consideration of this case to the evidence and the law that you receive in this courtroom *because we've carefully — well, the law has carefully filtered what you've heard so that only that which is most reliable and trustworthy comes to you.*"

The Court found that while appellant argued that the above-quoted italicized language was an improper expression of opinion about the evidence, his argument ignored the context in which the comment was made. By its instruction, the trial court did not express an opinion about appellant's guilt or innocence or about what facts had or had not been proved. Rather, the instruction, when read as a whole and in context, was an admonition for jurors to refrain from conducting their own investigation of the case and instead only to consider evidence that had been subjected to and filtered by the rules of evidence. Thus, the Court determined, given the context in which the comment was made, appellant could not show that there was error by the trial court that was clear and obvious beyond reasonable dispute, and therefore could not establish the second prong of the plain error test.

Garrity; Kastigar

State v. Ward, A21A0952 (10/28/21)

Ward was convicted of child molestation and enticing a child for indecent purposes. At the time of the offenses, Ward was police officer. Very briefly stated, the relevant record showed that because of the allegations, the police department conducted an investigation, led by Saulters, the then-lieutenant in charge of internal affairs. Although the investigative file and Ward's interview were not admitted at trial, the prosecution team obtained them through an Open Records Act request. One prosecutor read through the investigative file and watched at least part of Ward's interview while working on the case. Other prosecutors and the office's investigator also had access to the investigative file prior to Ward's trial.

At trial, Saulters testified to the fact that an internal affairs investigation was conducted. After Ward testified in his own defense that he did not molest the victim, Saulters was re-called by the State as a rebuttal witness. Saulters was asked: "Without getting into any specifics as to the reason for your opinion, if Kris Ward were to testify under oath, would you believe what he had to say?" Saulters responded, "No."

On appeal, the Court affirmed in part, vacated in part, and remanded the case with direction to the trial court. *Ward v. State*, 353 Ga. App. 1 (2019). Specifically, the Court instructed the trial court on remand to conduct an evidentiary hearing and issue an order addressing whether the State made derivative use of compelled statements made by Ward during an internal affairs investigation through his employer, and whether Ward's trial counsel was deficient for failing to address this issue. On remand, the trial court conducted this evidentiary hearing and issued an order granting Ward a new trial. The State appealed.

The State contended that the trial court erred in finding it made derivative use of compelled statements made by Ward. The Court disagreed. The Court noted that the parties did not dispute that the statements made by Ward during the internal affairs investigation “constitute[d] compelled, immunized statements subject to the constitutional protections of the Fifth and Fourteenth Amendments.” *Ward*, 353 Ga. App. at 9 (3). See *Garrity v. New Jersey*, 385 U. S. 493, 500 (87 SCt 616, 17 LE2d 562) (1967). Additionally, *Kastigar v. United States*, 406 U. S. 441, 453 (III) (92 SCt 1653, 32 LE2d 212) (1972) held that “evidence derived directly and indirectly” from compelled statements is also prohibited. This includes a prohibition on knowledge and sources of information obtained from compelled statements. Thus, the prosecution should not be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused.

The Court found that the State's presentation at the post-remand *Kastigar* hearing made clear that the prosecutors in this case were unaware of their burden not to use any information they learned from the *Garrity*-protected statements to influence their investigation or trial preparation, and consequently, they did not try to quarantine the information to ensure their investigation was not tainted by the protected statements. Second, although the lead prosecutor stated throughout the *Kastigar* hearing that her preparation for trial and questioning of the trial witnesses was based on information other than what she learned from her review of Ward's *Garrity*-protected statements, the Court found those denials were legally insufficient because conclusory denials cannot substitute for the affirmative showing of an independent source required for each and every item of evidence presented to the jury. Third, the Court found that Ward's *Garrity*-protected statements were raised at trial with no independent basis being presented to the jury.

Additionally, the State called only three trial witnesses at the *Kastigar* hearing, and as a consequence, the Court stated, it did not know whether other trial witnesses obtained Ward's *Garrity*-protected statements. And there were other trial witnesses who were aware of the internal affairs investigation. Thus, the Court stated, although it was not pronouncing that the State must call every trial witness to meet its burden under *Kastigar*, here the State's failure to call additional witnesses greatly weakened its ability to show that Ward's trial was not tainted by derivative use of his protected statements.

Finally, the lead prosecutor admitted at the *Kastigar* hearing that Saulters's opinion of Ward's truthfulness was likely influenced by statements made by Ward during the *Garrity*-protected interview, and yet the State elicited this testimony from Saulters on rebuttal anyway. Saulters further confirmed that he had informed the prosecutors that his opinion of Ward's truthfulness was influenced by the *Garrity*-protected interview. Therefore, the Court found, this testimony provided a concrete example of trial evidence that was in fact influenced by Ward's protected statements. Accordingly, the Court agreed with the trial court that the State failed to meet its burden under *Kastigar* to prove by a preponderance of the evidence that it did not make derivative use of Ward's *Garrity*-protected statements. And, it so holding, the Court rejected the State's contention that the error was harmless.

Next, the State argued that the trial court erred in finding that Ward's trial counsel rendered ineffective assistance in not objecting to the derivative use of Ward's compelled statements. The Court again disagreed. The Court found that at the motion for new trial hearing, trial counsel explained that, although he knew that the State would not be able to admit Ward's internal affairs interview, he “did not remember thinking [the prosecutors] shouldn't have [the investigative file] in their file at all.” Thus, the Court determined, it was not a strategic decision not to follow up on the potential problem

with the prosecution's possession of the investigative file, it was merely an ignorance or overlooking of the issue by trial counsel.

Finally, the State argued that Ward failed to show prejudice for his ineffective assistance claim. However, the Court agreed with the trial court that there is a reasonable probability that the State's derivative use contributed to the verdict in Ward's trial. Consequently, the Court concluded, Ward was prejudiced by counsel's failure to raise the issue and therefore, Ward was entitled to a new trial.

Venue; Expert Testimony

Garland v. State, A21A1059 (11/1/21)

Appellant was convicted on two misdemeanor counts of violating the Georgia Open Records Act (the "Act"). Very briefly stated, the evidence showed that Boyd, a journalist working at a local television station, requested records from the City of Atlanta's Department of Watershed Management. Because the requested records involved the mayor and his family, the Director of Communications and Community Relations for the Department ("the Director") understood that she was required to obtain approval from the mayor's office before the records could be released and, consequently, she notified appellant of the request. Appellant worked as press secretary for then-Mayor. In that role, she was involved in responding to requests made for public records pursuant to the Act. In the course of responding to the request, appellant sent a series of text messages to the Director, instructing her to "be as unhelpful as possible," "drag [the request] out as long as possible," and "provide information in the most confusing format available." Appellant also sent the Director a text message instructing her to continue to "hold all [the records] until [Boyd] asks for [an] update."

Appellant argued that the State failed to prove that the crimes were committed in Fulton County. She contended that proper venue was the county from which her text messages originated, and that the State failed to prove she was in Fulton County when the messages were sent. The Court stated that as a general rule, "all criminal cases shall be tried in the county where the crime was committed." Ga. Const. of 1983, Art. IV, Sec. II, Para. VI. Venue is a jurisdictional fact the State must prove beyond a reasonable doubt in every criminal case. Venue may be established using either direct or circumstantial evidence, and the determination of whether it has been established rests solely with the jury.

Here, appellant was accused of violating OCGA § 50-18-74 (a) by knowingly and willingly frustrating Boyd's access to water billing records by intentionally instructing the Director to make it difficult for Boyd to obtain them. In other contexts, the Court noted, it has held that venue in communication-based crimes is proper in either the county in which the communication was sent or the one in which it was received. And here, the Court found, the evidence established that the Director worked for the Department of Watershed Management and that her office was in Fulton County; that the Department of Watershed Management managed the water billing records sought by Boyd; and that appellant's office in City Hall was located in Fulton County. The record further showed that upon receipt of Boyd's requests, the subject records were compiled and sent from the Director's office to appellant's office for her review and to await her authorization of release. Finally, the evidence established that the text communications were sent on business days and during business hours. Thus, the Court found, this evidence was sufficient to permit a rational jury to find beyond a reasonable doubt that venue in Fulton County was properly laid. This is true even if there was some evidence to suggest that appellant may not have been physically present in her office when she sent one of the text messages at issue.

Appellant argued that the trial court erred by allowing what she contended was unqualified and irrelevant expert testimony on behalf of the State. The Court found that the challenged witness held an undergraduate degree in journalism, a law degree, and a Ph.D. in journalism. At the time of trial, he was a professor of journalism at the University of Georgia, teaching both undergraduate and graduate students. He also taught media law and First Amendment law to law students at the university's law school. The witness worked as a consultant for news organizations, journalists, and professional journalism associations, helping them learn how to use public records laws. He further wrote for newspapers, magazines, and news websites, and gave presentations on media law and First Amendment issues. The witness had also specifically studied Georgia's Open Records Act.

Based on this evidence, the Court found that the trial court did not abuse its discretion in determining that the witness was qualified to testify as an expert in journalism and First Amendment law. And, although appellant took issue with the witness's focus on the general principles of open records laws, as opposed to Georgia's Open Records Act specifically, the Court stated that any perceived weaknesses in his qualifications were matters of weight and credibility for the jury in evaluating his testimony.

Nevertheless, appellant argued, the witness's testimony was both irrelevant and prejudicial. She specifically challenged the following statements, which the expert gave in response to the State's question about what he was hired to teach the news/professional organizations and journalists who hired him as a consultant: “[J]ournalists . . . rely on all kinds of sources of information . . . [and] will make public records requests to try to learn from documents how government is behaving. The public records are essential to journalism.” The expert did not finish his sentence because appellant's counsel objected, and the trial court sustained the objection.

First, the Court found, the trial court did not abuse its discretion by allowing the expert testimony. The challenged statements explaining how journalists used open records laws were relevant to the issue for which the trial court allowed the testimony; namely, to assist the jurors by providing context as to the standards and methods used in the trade of journalism.

Second, the Court rejected appellant's assertion that any alleged prejudice caused by the statements outweighed their probative value. Contrary to appellant's position, the expert did not testify as to the importance of the Act. Although it did appear that he began to comment on the importance of public records generally to journalism, he did not finish his statement because the trial court sustained appellant's objection following an unrecorded bench conference. And, the Court noted, the record did not reflect that appellant requested any further remedial action be taken by the trial court.

Rule 404 (b); Rule 403

Moody v. State, A21A1108 (11/1/21)

Appellant was convicted of aggravated assault and battery. The evidence showed that the victim noticed her elderly neighbor's front door was open, so she went to check on him. While she was there, appellant came into the house. The neighbor did not recognize appellant and wanted him to leave. The victim told appellant to leave. Appellant knocked the victim down and while she was on the floor, he repeatedly stomped on her head.

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 21, 2022

Issue 3-22

At trial, the State was permitted to use other acts evidence to show intent, motive, and identity. The other acts evidence showed that five years earlier, appellant got into an argument with his mother at her residence. When she told him to get out of her house, appellant threw her to the floor and punched her in the face several times. Appellant contended that the trial court erred in admitting this evidence. Specifically, while conceding that the evidence was relevant to intent, he contended that its prejudicial effect outweighed any probative value on the issue of intent. In a 2-1 decision, the Court affirmed appellant's conviction.

The Court agreed that the evidence was relevant to prove intent, but stated that other acts may be relevant to proving the general intent element of a charged crime; however, when applied to the many violent crimes that require only general intent, it should not be viewed by prosecutors or trial courts as an open invitation to admit evidence of marginally similar violent acts that involve the same general intent. Because general intent is not meaningfully disputed in many cases, while evidence that the defendant committed other violent acts is often quite prejudicial, trial courts should be especially careful in conducting the OCGA § 24-4-403 balancing in this context. Prosecutors and courts should also be wary of the temptation to use evidence that was admitted solely to show intent for other purposes, such as to argue identity or motive.

Thus, the Court looked to whether the evidence was properly admitted to prove identity and motive. The Court found that the two crimes, though similar, were not sufficiently uncommon so as to constitute a signature crime, and therefore, the prior crimes were not admissible under Rule 404 (b) to prove identity. As to motive, the State argued that the trial court properly admitted the other-act evidence because it showed that when appellant is "asked to leave a location by an older woman, [he] considers that sufficient provocation to strike that woman in the face repeatedly. ..." The Court found this to be the classic propensity argument used to prove the character of a person in order to show action in conformity therewith that is not permitted by Rule 404 (b). Therefore, the trial court erred by admitting such evidence for the purpose of motive as well.

Next, the Court addressed whether the evidence was admissible under Rule 403. The Court found that there were some similarities between the two incidents, and not too temporally remote to be probative. However, there was no substantial prosecutorial need for the other-acts evidence. The instant crimes involved general intent, and neither party alleged that appellant's actions against the victim were unintentional. Thus, the probative value of the evidence of the attack on his mother to prove appellant's intent in the charged crimes was minimal. And on the other side of the OCGA § 24-4-403 balance, it was undoubtedly prejudicial to be labeled a man with no respect for women, including his own mother, who beats them when asked to leave. Consequently, the Court determined, the unfair prejudice from the other act evidence clearly and substantially outweighed its minimal probative value, and the trial court therefore abused its discretion by admitting the evidence.

Nevertheless, considering the trial record as a whole and, weighing the evidence as reasonable jurors would, the Court concluded that the jury in this case would have found appellant guilty of the same crimes had the evidence of his assault on his mother not been erroneously admitted. Moreover, compared to the overwhelming other evidence of appellant's guilt, the Court did not view the other acts evidence as particularly compelling or prejudicial. Consequently, the Court found that it was highly probable that the trial court's error in admitting the independent offense evidence did not affect the jury's verdict, and a new trial was not required.