

## THIS WEEK:

- Rule 404 (b); Evidence of Flight
- Ineffective Assistance of Appellate Counsel; Proof of Third-Party Guilt
- Records Restriction; Pleas of Nolo Contendere
- Terroristic Threats; Attempted Murder

### Rule 404 (b); Evidence of Flight

*Jenkins v. State, S21A1127 (1/19/22)*

Appellant was convicted of felony murder and other crimes in connection with an August 6, 2014, home invasion in Duluth. The relevant evidence, briefly stated, showed that on August 21, the police learned that appellant was involved in the home invasion and issued an arrest warrant for him. On the night of August 27, Savice, an acquaintance of appellant, picked up appellant in Atlanta to give him a ride to Lawrenceville. When appellant first got into Savice's car, Savice heard appellant do a Google voice search for a Duluth homicide or home invasion. While they were traveling, the men encountered a police roadblock, and appellant told Savice to turn around. Savice made a U-turn in the middle of the street, at which point the police officers started pursuing his car. Savice was initially driving the speed limit, but appellant pulled a gun, pointed it at Savice, and instructed him to get away from the police officers. Savice sped up, and appellant directed him into a residential area. The men soon realized the police officers were no longer behind them, and Savice stopped the car. Appellant jumped out of the car and ran. Shortly after the incident, appellant spoke with his friend Dunning and told her "everything" about the home invasion and told her about the roadblock and the police chase in Savice's car, explaining that he knew he was wanted for the home invasion, so he pointed the gun at Savice and told him to drive away from the roadblock.

Appellant argued that the trial court erred in admitting the testimony of Savice and Dunning because it was inadmissible under Rule 404 (b). The Court disagreed.

The Court agreed with the trial court that the testimony was properly admitted as flight evidence, which is generally intrinsic and not subject to Rule 404 (b). Evidence of flight is generally intrinsic, as the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, is admissible as evidence of consciousness of guilt for the charged offense, and thus of guilt itself. The Court stated that interpretations of an act of flight should be made cautiously and with a sensitivity to the facts of the particular case, including whether the defendant was aware that he was under investigation or had other reasons to flee and the timing of the flight. The Court also noted that flight evidence may be inadmissible where there exists a significant time delay from the commission of the crime, or the point at which the suspect becomes aware that he is the subject of a criminal investigation, to the time of flight.

And here, the Court found, although appellant's act of fleeing from the police roadblock occurred three weeks after the home invasion, the record showed that the home invasion had become highly publicized at that point, and Savice testified that he heard appellant search for information on his cell phone about a Duluth homicide/home invasion shortly before the men encountered

the roadblock. Then, according to Savice, when they saw the police, appellant forced Savice at gunpoint to evade them. The record further demonstrated that, at the time of these events, appellant knew he was wanted by the police for his involvement in the home invasion — he told Dunning as much. Thus, this evidence of appellant's flight from the roadblock to avoid being apprehended for the home invasion was part of the same “chain of events” and “inextricably intertwined” with the home invasion itself, despite the approximately three-week interval between the two incidents.

Nevertheless, appellant contended, the evidence was inadmissible under Rule 403. The Court again disagreed. Here, the Court found, any prejudicial impact from the flight evidence presented was outweighed by its probative value, as the evidence showed that appellant had a guilty conscience for his participation in the home invasion and wanted to avoid being apprehended. And, the Court stated, even if the trial court had erred in admitting this evidence, any such error was harmless given the weight of the other evidence admitted against appellant at trial.

## **Ineffective Assistance of Appellate Counsel; Proof of Third-Party Guilt**

*Bowen v. Noel, S21A1133 (1/19/22)*

Noel was convicted of three counts of felony murder predicated on separate counts of aggravated assault, aggravated battery, and first-degree child cruelty, and convicted of the predicate counts as well. The evidence showed that in 2007, nine-month-old Terrell Williams (“Terrell”) died while in Noel’s sole care. During the trial, Noel blamed Williams (Noel’s intimate partner and mother of Terrell) for Terrell’s injuries and tried to present evidence of three prior violent acts Williams had committed in Illinois. Specifically, in 2004, she struck a fellow high school student with a padlock and pleaded guilty to battery, receiving a one-year sentence. In 2007, she was charged with domestic battery for pushing her adult aunt to the ground; it was not clear whether this resulted in a conviction. In 2008 — between Noel’s 2007 indictment and his 2009 trial in this case — Williams pleaded guilty to domestic battery with bodily harm, which Noel characterized as the stabbing of an ex-boyfriend, and she was sentenced to 18 months of probation.

The State moved in limine to exclude this evidence. Initially, Noel contended that it was admissible under former OCGA § 24-9-84.1 as impeachment evidence. However, counsel then stated, “I’m not offering this information to impeach her. I’m going to be asking her questions about the offenses for the purposes of showing her propensity for violence and inability to control her anger,” adding that “nothing could be more germane” to his defense. Following a lengthy exchange, counsel concluded by disavowing any intention of impeaching Williams: “... I’m not seeking to impeach her. That’s not the goal here. That’s not what I need to do. I’m only asking the questions to establish her propensity for violence and inability to control her anger, which is absolutely relevant to the facts in this case.” The trial court barred the evidence as irrelevant.

After his conviction was affirmed on direct appeal, he filed a habeas petition challenging his appellate counsel’s failure to raise the admissibility of the contested evidence of Williams’s prior violent acts, both as impeachment under former OCGA § 24-9-84.1 and as proof of third-party guilt. The habeas court concluded that appellate counsel provided ineffective assistance and granted the petition. The State appealed.

Noel contended that the habeas court correctly ruled that the evidence was admissible under former OCGA § 24-9-84.1. But, the Court found, the claim was not preserved at trial. Under the old Evidence Code, to preserve for any sort of review on appeal a claim that the trial court improperly excluded evidence under a particular theory, a defendant had to argue at trial that the evidence was admissible under that theory. Here, the Court found, Noel’s trial counsel ultimately did not seek introduction of the contested evidence for impeachment under former OCGA § 24-9-84.1. Although counsel initially referenced that statute

and impeachment, he concluded by saying only that the evidence was admissible to show Williams's propensity to anger, expressly disavowing an impeachment theory. Thus, the Court concluded, Noel's asserted OCGA § 24-9-84.1 error was not preserved, so appellate counsel was not deficient for failing to raise it.

Next, the Court found that premitting any discussion on performance, Noel failed to show prejudice from any deficiency by counsel regarding proof of third-party guilt. The Court noted that the case against Noel was not overwhelming, but neither was it particularly weak. But prejudice requires more than just a consideration of the strength of the case against Noel. It requires considering the marginal effect the introduction of the excluded evidence would reasonably have had. Here, the Court found, that effect was not reasonably likely to have been significant. None of the three incidents regarding Williams involved violence against a young child. Noel was allowed to introduce evidence that more directly gave rise to an inference of Williams's guilt — her throwing Terrell into a car seat only a few days earlier, the possibility that Terrell was beaten by one of Williams's belts, and Williams's inappropriate demeanor on the way to and at the hospital. Thus, the Court determined, whatever additional inference — beyond that already arising from the admitted evidence — that might arise from three incidents of violence against adults over a four-year period was simply too tenuous to constitute prejudice in the context of this case.

Furthermore, the Court stated, this conclusion was reinforced when it compared the excluded evidence here with the evidence in other cases admitted as raising a reasonable inference of third-party guilt. The other acts in those cases had as a victim either the same person as the charged crime or a similarly vulnerable child. This distinction does not necessarily mean that the contested evidence was properly excluded from the trial; again, the Court expressed no view on that subject. But it did mean that the inference of Williams's guilt flowing from that evidence would have been substantially weaker than in those other case, which, in turn, undercut Noel's effort to carry his higher burden of showing prejudicial deficiency in appellate counsel's performance. Therefore, the Court concluded, in the light of the evidence against Noel and the comparatively weak implication of guilt the contested evidence cast on Williams, Noel was not prejudiced by any deficient performance by appellate counsel as to this issue.

## **Records Restriction; Pleas of Nolo Contendere**

*Doe v. State, A21A1750 (12/17/21)*

In 2011, as part of a negotiated plea, appellant pled nolo contendere to one count of misdemeanor habitual violator. In early 2021, appellant filed a petition for restriction pursuant to OCGA § 35-3-37 (j) (1) and (m), but later amended his petition to seek restriction pursuant to the recently amended provisions of OCGA § 35-3-37 (j) (4). The trial court ruled that appellant was not entitled to restriction because he was not convicted of the misdemeanor offense since he pled nolo contendere instead of guilty.

Appellant contended that the trial court erred in ruling that a nolo contendere plea is not a conviction within the meaning of OCGA § 35-3-37 (j) (4) (A), and that he is, therefore, ineligible for record restriction. The Court agreed.

The Court noted that subsection (j) (4) (A) allows a defendant to request record restriction access to criminal history records where the defendant has been convicted of a misdemeanor provided that the defendant has completed the terms of his or her sentence and has not been convicted of any crime in any jurisdiction for at least four years prior to filing a petition. If the defendant satisfies these requirements, the trial court must then weigh the benefits of a proposed judicial action against the harms.

The Court stated that it is well settled that a plea of nolo contendere constitutes a conviction. A plea of nolo contendere itself cannot be used in another case as an admission of guilt. However, a defendant sentenced under such a plea is held to have been

adjudged guilty and convicted. This is in accordance with general law that a sentence based on a plea of nolo contendere is a conviction but that the plea is technical only and does not constitute an admission of guilt in any other case, not even in a civil case involving the same act. Accordingly, the Court held, because the trial court erred in concluding that a plea of nolo contendere is not a conviction under subsection (j) (4) (A), it did not proceed to apply the statutory balancing test. Consequently, the Court reversed the trial court's denial of appellant's petition for record restriction under OCGA § 35-3-37 (j) (4) (A) and remanded the case back to the trial court to weigh the competing interests of the harm to appellant's privacy against the public's interest in access to appellant's criminal record.

## **Terroristic Threats; Attempted Murder**

*Stapleton v. State, A21A1789 (12/27/21)*

Appellant was indicted for terroristic threats (Count 1) and attempted murder (Count 2). Appellant apparently intended to shoot-up an elementary school. He filed general and special demurrers to both counts. The trial court denied the motions but granted appellant a certificate of immediate review. The Court granted appellant's petition for interlocutory appeal.

Appellant argued that Count 1, charging terroristic threats, was deficient because it did not allege that he communicated the alleged threat or intended that it be communicated to the named victims, an essential element of the offense. The Court noted that Count 1 charged that appellant "did with the purpose of terrorizing [numerous individuals], threaten to commit a crime of violence to wit: Murder by way of a Burn/aka Kill aka/Hit List." Thus, the indictment clearly recited the language of the statute that sets out all the elements of the offense of terroristic threats. And, while it is true that the crime of making terroristic threats focuses solely on the conduct of the accused and is completed when the threat is communicated to the victim with the intent to terrorize, that the message was not directly communicated to the victim would not alone preclude a conviction where the threat is submitted in such a way as to support the inference that the speaker intended or expected it to be conveyed to the victim. Furthermore, this requirement is implicit in the two essential elements of terroristic threats set forth in OCGA § 16-11-37: (a) that the defendant threatened to commit a crime of violence against the victim, and (b) that the defendant did so with the purpose of terrorizing the victim. Thus, the Court concluded, because Count 1 recites the statutory language setting out all the elements of the offense under OCGA § 16-11-37 (b) (1) (A) and (b) (2) (A), the count is sufficient to withstand a general demurrer.

Next, appellant contended that Count 2 was also subject to a general demurrer. The Court noted that in Count 2, the State charged appellant with criminal attempt to commit murder by alleging that he created a "hit list," created a list of supplies to carry out the murders and brought a firearm to school. Appellant argued that these acts did not constitute substantial steps toward the commission of a crime. The Court disagreed.

The Court stated that the purpose of the "substantial step" requirement is to impose criminal liability for attempt only in those instances in which some firmness of criminal purpose is shown and to remove very remote preparatory acts from the ambit of attempt liability. Thus, mere acts of preparation, not proximately leading to the consummation of the intended crime, will not suffice to establish an attempt to commit it. To constitute an attempt there must be an act done in pursuance of the intent, and more or less directly tending to the commission of the crime. In general, the act must be inexplicable as a lawful act, and must be more than mere preparation. Yet it cannot accurately be said that no preparations can amount to an attempt. It is a question of degree and depends upon the circumstances of each case. In other words, between the preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement towards the commission after the preparations are made.

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

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Here, the Court found, merely procuring a gun, *or* walking to a particular place, with intent to kill, is insufficient to cross the line between preparation and attempt, but in this case, there is an alleged act of procuring the gun *and* bringing it to a particular place with the intent to kill. And, while making lists of intended victims and supplies, alone, might amount to mere acts of preparation, the alleged act of bringing a gun to school is direct movement towards the commission after the preparations are made. Thus, the Court concluded, the acts alleged in Count 2 of the indictment show the firmness of criminal purpose needed to satisfy the substantial step requirement. Consequently, if appellant admitted the allegations precisely as set forth in Count 2, he would be guilty of criminal attempt to commit murder, and Count 2, therefore, was sufficient to survive appellant's general demurrer.

Next, appellant contended that the trial court erred in denying his special demurrers to Counts 1 and 2. The Court noted that the true test of the sufficiency of an indictment to withstand a special demurrer is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

With regard to Count 1, appellant argued that Count 1 "leaves unanswered" to whom the alleged threat was communicated or how he intended or expected it to be conveyed to the alleged victims. Appellant argued that Count 2 failed to specify how he planned to murder anyone or how a list is a means to commit murder. Because of these omissions, appellant contended that he cannot know what he must be prepared to defend.

But, the Court stated, while the indictment could have been made more definite and certain, that is not the test of the sufficiency of an indictment. Indeed, while the defendant is entitled to know the particular facts constituting the alleged offense to enable him to prepare for trial, it is not necessary for the State to spell out in the indictment the evidence on which it relies for a conviction. Accordingly, the Court concluded, because the allegations of the indictment were sufficient to be easily understood by the jury, to allow appellant to prepare his defense, and to protect him from double jeopardy, the trial court's decision overruling his special demurrer was authorized.