Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING FEBRUARY 18, 2022
Issue 7-22

THIS WEEK:

- Rule 403; Cross-Examination
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- Right to Speedy Trial; *Barker-Doggett* Factors

Rule 403; Cross-Examination

Fossier v. State, A21A1735 (12/29/21)

Appellant was convicted of four counts of aggravated child molestation and one count of child molestation. The evidence showed that he molested a twelve-year-old boy. He first contended that the trial court erred in admitting under Rule 413 evidence that in 2003 he committed a sexual assault of a female victim. Specifically, that the evidence was too remote in time to be relevant. The Court disagreed.

Appellant contended that the probative value of the prior sexual assault evidence was substantially outweighed by the danger of unfair prejudice because there was a lapse of 15 years between the prior and current offenses and there were factual differences between the cases, including the age and sex of the victims. But, the Court stated, temporal remoteness and a difference in the victims' sex do not demand exclusion. Indeed, the lapse of time between the prior occurrences and the offenses charged goes to the weight and credibility of such testimony, not its admissibility. Thus, the Court concluded, given the strong presumption in favor of admissibility of such evidence, the Court could not say that the trial court abused its discretion in allowing the other acts evidence to be admitted.

Next, appellant argued that the trial court erred in allowing the State to introduce evidence of his other prior convictions while cross-examining him. The Court again disagreed.

The record showed that in his opening statement, appellant's attorney told the jury that appellant had a pattern of crime and drug use, that he had pled guilty to multiple crimes, that he had been to prison, and that he stabbed a cell mate. Appellant subsequently testified on direct examination that he had been in trouble with the police before the 2003 sexual assault conviction; that while in prison he stabbed a cell mate who had threatened to sexually assault him; that he has a lengthy and continuing history of drug abuse; that he has probation violations related to his drug use; and that he has prior convictions for possession of methamphetamine, aggravated assault, family violence battery, cruelty to children, and failing to register as a sex offender. He explained the circumstances surrounding those prior convictions and testified that the victim's cousin (with whom the victim was living when the molestation occurred) knew about his criminal history, including his prior sexual assault conviction, before they began living together. He also testified that he was incarcerated when he learned of the charges in the instant case.

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The Court stated that the prosecution, like any other party, has the right to conduct a thorough and sifting cross-examination and to pursue the specifics of a topic the defendant introduced. Thus, when a defendant testifies and admits prior criminal conduct, the State is authorized to fully explore the issue on cross-examination. Therefore, the Court concluded, given appellant's admission of his extensive criminal history, the prosecutor was entitled to cross-examine him regarding the extent of that history. Accordingly, the trial court did not abuse its discretion in allowing the evidence to be admitted.

Loitering or Prowling; Sufficiency of the Evidence

Bowles v. State, A21A1602 (1/4/22)

Appellant was convicted of first-degree burglary and loitering or prowling. The evidence, briefly stated, showed that Mr. and Mrs. Reis lived on the same street with Sanford, Floyd and Booher. One afternoon, Ms. Reis noticed appellant and another man standing near her open garage door in her driveway and a gold car parked in the road in front of their house. The two men said they found several nametags, but Ms. Reis testified, those nametags had been inside the family vehicle in the garage. Ms. Reis asked them to leave, and they asked her to drive them somewhere. She refused and after the two men left, Mr. Reis checked the vehicle and noticed a pair of sunglasses missing. Mr. Reis then saw the gold car parked a couple of doors down, and at the Sanford residence. Sanford was not at home and the men walked around the property. The men then drove back to the Reis property and offered Mr. Reis some candy. The men in the gold car then pulled up to the Floyd residence and asked Ms. Floyd for assistance with a vehicle "around the corner." Floyd declined, and the men slowly drove off. Floyd felt uneasy about the men, and she warned her children to stay inside. Finally, Booher received an alert from a neighbor that someone was in his garage trying to steal his car. Booher checked his garage and saw that his car door was open, and that the car battery cable had been disconnected. Floyd reported that she saw the gold car parked in Booher's driveway.

Floyd and Mr. Reis reported the incident and the gold car's license plate number to law enforcement. Law enforcement located the vehicle and initiated a traffic stop. The reporting officer identified appellant as the driver and asked him about what he and the other man had been doing in the area. Appellant reported that they were trying to locate a set of keys that was inside one of the houses in the subdivision. The reporting officer did not believe appellant's answer because appellant could not identify a specific house and because he found the answer to be "wild [and] ambiguous."

Appellant contended that the evidence was insufficient to sustain his two convictions for loitering or prowling. Specifically, he argued that the evidence was not sufficient to establish that his actions were unusual or would cause alarm because the evidence only established that he and the other man turned around in the Sanfords' driveway and then had a brief conversation with Floyd in the street. Upon consideration of the entire record, the Court disagreed.

The Court concluded that the State presented sufficient evidence to support appellant's convictions for loitering at the Sanford and Floyd residences. As for the Sanford residence, the State presented evidence that Mr. Reis observed appellant's vehicle parked at Sanford's house at a time when Sanford was not at home and when no one was authorized to be at her residence. Appellant also pulled up to Floyd's residence and asked her to leave with him. These acts occurred just after the Reises discovered appellant on their property committing a burglary, and it also occurred just before appellant was seen on Booher's property committing a burglary. Floyd also testified that she found the acts suspicious enough that she warned her children to remain inside, and she felt the need to track appellant and to contact law enforcement after contacting the Reises, who knew of the prior burglary. Thus, the Court found, a reasonable jury could conclude from the record that appellant's actions on the Sanford and Floyd properties were not entirely harmless activities but were instead actions which would create a justifiable and reasonable alarm for the safety of property in the vicinity.

Nevertheless, citing OCGA § 16-11-36 (b), appellant argued that his actions were not suspicious because he did not attempt to flee from the homeowners or law enforcement and because he complied with every request by the homeowners to leave. However, the Court stated, the fact that appellant did not attempt to flee, did not refuse to identify himself, or did not attempt to conceal himself from law enforcement standing alone, does not mean that the evidence was insufficient to support a finding of prowling or loitering. Pursuant to the loitering statute, law enforcement provided appellant with an opportunity to explain his presence in the vicinity, and it was for the jury to decide whether the explanation that appellant gave the officers for his presence and conduct was true and, if true, whether it dispelled the immediate public safety concern. And here, the Court found, the jury was free to reject appellant's explanation about his actions given that no evidence at trial confirmed his story that he was attempting to locate lost keys. Accordingly, the Court concluded that the evidence at trial was sufficient to support appellant's convictions for loitering or prowling.

Search & Seizure; K-9 Alerts

State v. Arroyo, A21A1358 (1/4/22)

Arroyo charged with trafficking in cocaine. The trial court granted his motion to suppress, and the State appealed.

The evidence showed that a police officer received a tip from a CI that the informant had seen "several" kilograms of cocaine inside Arroyo's apartment. The investigator and a K-9 unit arrived at the apartment complex shortly after noon. Although the investigator first testified that the complex did not have an exterior gate, he later testified that there was such a gate, that it was open "during business hours" and shut at night, and that "you ha[d] to have a key fob or a number to get in at the gate — the call box." The investigator could not recall whether he and his partner actually did anything to assist the gate opening when they entered the complex. The officers bypassed the leasing office to avoid any "tipp[ing] off" of tenants, understanding as they did so that unauthorized visitors could be asked to leave.

The investigator testified that the front door to Arroyo's apartment, designated as Apartment G, was located on an upper floor, with three other apartments' doors opening onto the same open-air corridor "inside the building." When the K-9 officer conducted a leashed dog sniff along the corridor, the dog alerted only in front of Apartment G. The officers then obtained a warrant and located the cocaine in the apartment.

The State argued that the trial court erred when it granted the motion to suppress because the area where the open-air sniff occurred was not part of the protected curtilage. The Court stated that the search of the area outside of the apartment doorway at issue here, conducted without a warrant, is presumed to be invalid, and the State has the burden of proving otherwise. Although the boundaries of the curtilage are clearly marked for most homes, the analysis becomes more complicated when the residence is an apartment in a multi-family dwelling in an urban area. Citing *United States v. Dunn*, 480 U.S. 294 (107 SCt 1134, 94 LE2d 326) (1987), the Court stated that there are four factors to be considered in defining the extent of a curtilage: 1) the proximity of the area claimed to be curtilage to the home; 2) whether the area is included within an enclosure surrounding the home; 3) the nature of the uses to which the area is put; and 4) the steps taken by the resident to protect the area from observation by people passing by.

And here, construing the record in favor of the trial court's judgment, the Court concluded that the trial court did not err when it suppressed the evidence at issue. As to the first *Dunn* factor, proximity, the evidence supported a conclusion that the open-air sniff took place at or immediately in front of the apartment door and that this area was within the protected curtilage. As to the second *Dunn* factor, enclosure, some evidence showed that the apartment complex had an exterior gate that sometimes excluded

the general public from the entire property, including the corridor in front of the apartment itself. The same evidence could also be construed as an attempt to limit the nature of the uses to which the area is put to visits by tenants and their authorized guests.

The Court stressed that in the absence of evidence of record *demanding* a finding contrary to the judge's determination, it will not reverse a ruling sustaining a motion to suppress. And here, the Court found, the trial court was authorized to weigh the evidence before it as to proximity, exclusion, and use, and then to conclude that Arroyo had some reasonable expectation of privacy in the area immediately outside of his apartment door as within the curtilage of that apartment. The Court therefore affirmed the trial court's suppression of the evidence later recovered from the apartment as the product of an unreasonable search of the protected curtilage by the K-9 unit.

Prosecutorial Misconduct; Ineffective Assistance of Counsel

McNeal v. State, A21A1482 (1/5/22)

Appellant was convicted of incest and sexual battery. The victim was his 20-year-old daughter. He argued that the trial court erred under OCGA § 17-8-75 when it failed to take "remedial measures" during the State's closing arguments. The Court disagreed.

The record showed that the State argued in closing that, "offenders carefully select their victims. They want people that nobody's going to believe. They pick people that are vulnerable, especially vulnerable adults like [the victim in the instant case], and children. They select them. They're vulnerable. You can groom them." Trial counsel objected on the basis that this information was not in evidence, and the trial court overruled the objection.

The Court found that the evidence supported the State's deductions, in its argument, that the victim was vulnerable. The victim testified that she contacted her father in the middle of the night seeking a place to stay because she had a "falling out" with her grandmother, with whom she had been living. The victim and her young children, who were two years old and four months old at time, had no other place to stay. There also was some evidence to support the State's deduction that appellant had groomed her. The victim testified that appellant did not approach her sexually until the day after she had arrived. He got her alone and offered to take care of her if she would take care of him, telling her he would "make sure I didn't need anything" and that she "reminded him" of her mother.

Nevertheless, appellant contended, the trial court erred in not taking corrective action in response to his objection to the State's argument. The Court again disagreed. If a mere objection is overruled and defense counsel makes no further request for any curative action, the only authorized argument on appeal would be that the failure to sustain the objection was erroneous. In no case will the trial judge's ruling be reversed for not going further than requested. And here, the Court found, appellant made no request for curative action. The failure to give an unrequested curative instruction does not create reversible error. Accordingly, the Court noted, it could consider this portion of appellant's argument only under the plain error rule. However, because the trial court did not err, the Court held there was no plain error.

Next, appellant argued that his counsel rendered ineffective assistance of counsel. The record showed that the trial court denied appellant's motion in limine to allow counsel to introduce evidence of what he termed a "prior false accusation by the alleged victim in this case" that appellant had molested her when she was a child. However, while cross-examining the victim, appellant's counsel asked some explicitly phrased questions about what she had told law enforcement regarding the sexual acts that formed the basis of the appeal. Immediately following those questions, and despite the trial court's order, counsel then asked, "Did you

tell [law enforcement] that [appellant] had ever tried to sexually assault you in the past?" The State objected, the victim said that she was "piss[ed] . . . off" and asked to leave, and the trial court sent the jury out. Outside the presence of the jury, the trial court chastised appellant's counsel for disregarding its order.

Appellant contended that it can never be reasonable for trial counsel to violate a court order, and, the Court noted, his brief cited extensively to colloquies in the transcript that took place outside the presence of the jury. But, the Court stated, professional deficiency is only part of the *Strickland* equation assessing whether counsel rendered ineffective assistance. Appellant is required to show both that counsel was professionally deficient, and that absent that unprofessional conduct, a reasonable probability exists that the outcome of trial would have been different.

And here, the Court found, appellant's trial attorney testified that he asked the question hoping to cast doubt on the victim's credibility, as appellant had been in jail during the portion of the victim's childhood when she allegedly said he molested her. Decisions about what questions to ask on cross-examination are quintessential trial strategy and will rarely constitute ineffective assistance of counsel. In particular, whether to impeach prosecution witnesses and how to do so are tactical decisions. Further, counsel's question elicited no evidence, as the victim did not answer, and the trial court specifically instructed the jury that the statements of counsel are not evidence. While the jury certainly heard the question, because the jury was sent out, it did not hear the inflammatory colloquies to which appellant cited on appeal. Moreover, there was nothing to indicate that the question, albeit in violation of the trial court's order, created a substantial likelihood of a different result at trial. Accordingly, the Court concluded, appellant failed to meet both prongs of the *Strickland* test.

Right to Speedy Trial; *Barker-Doggett* Factors

Williams v. State, A21A1654 (1/5/22)

Appellant was convicted of several crimes including false imprisonment and aggravated battery. He contended that the trial court erred in denying his motion to dismiss based on his constitutional right to a speedy trial. The Court disagreed.

The Court noted that a defendant's claim that this right was violated is analyzed in two stages. First, the trial court makes a threshold inquiry whether the interval from the arrest, indictment, or other formal accusation to the trial is long enough to be considered presumptively prejudicial. If not, the claim fails. A one-year delay is typically presumed to be prejudicial. And here, the Court found, more than two years elapsed between appellant's arrest and the start of trial, so the trial court did not abuse its discretion in concluding that this delay raised a presumption of prejudice.

If the delay is presumptively prejudicial, the trial court goes to stage two: application of the United States Supreme Court's four *Barker-Doggett* factors. (*Barker v. Wingo*, 407 U.S. 514, 530 (92 SCt 2182, 33 LE2d 101) (1972); *Doggett v. United States*, 505 U.S. 647, 652 (112 SCt 2686, 120 LE2d 520) (1992)). Those factors include (1) whether the delay before trial was uncommonly long, (2) whether the government or the criminal defendant is more to blame for the delay, (3) whether, in due course, the defendant asserted his right to a speedy trial, and (4) whether he suffered prejudice as the delay's result.

As to the length of the delay, although long, the trial court weighed this factor "only nominally against the State" in light of the seriousness of the crimes with which appellant was charged and the fact that the State announced ready at most trial calendars; the majority of the delays were caused by issues with appellant securing suitable trial counsel. Thus, the Court found, because there is no bright-line rule that all uncommonly long delays must be weighed heavily against the State, and because the delay was

mostly attributable to appellant's difficulties retaining trial counsel, the trial court did not abuse its discretion in giving only slight weight to this factor against the State.

As to the reason for the delay, the Court stated that it could not say that the trial court abused its discretion in reaching that conclusion. As the trial court found, leading up to his eventual trial, appellant fired two attorneys and then invoked his right to represent himself. As a result, the court continued the case three separate times—twice so conflict counsel could be appointed, and a final time to give appellant time to prepare to represent himself. And although the State sought one continuance because a witness wasn't available, the evidence showed that the State did not deliberately attempt to delay trial in order to hamper appellant's defense or to gain a tactical advantage. Thus, the Court found, the trial court did not abuse its discretion in finding that this factor weighed heavily against appellant.

The trial court found that appellant asserted the right to a speedy trial: he filed multiple pro se speedy-trial motions while he was represented by an attorney, which had no legal effect, and he also filed a speedy trial demand in December 2017 and January 2018, after he dismissed his counsel. But, the Court noted, as the trial court pointed out, he was tried "at the very next opportunity." Thus, the Court determined, the trial court did not abuse its discretion by weighing this factor only slightly against the State.

As to the fourth factor, the Court found that the trial court did not abuse its discretion by finding that the prejudice factor did not favor appellant. Appellant was in jail for around two years before his trial because he could not post bond. But he made no showing that he was subjected to any unusual oppression as a result of his incarceration, and although he testified that the pre-trial delay caused him anxiety and depression, he failed to present evidence that these effects went beyond that which are always present during a criminal prosecution. Nor did he show that his ability to present a defense was affected by the delay in bringing his case to trial—that is, that it left him unable to adequately prepare for his case or caused helpful witnesses or evidence to become unavailable to him. Thus, the Court determined, the trial court acted within its discretion to decline to weigh the prejudice factor in appellant's favor.

Finally, the Court concluded that the trial court carefully applied the "sensitive and difficult balancing process" for assessing constitutional speedy-trial claims and did not abuse its discretion in holding that appellant's right to a speedy trial was not violated.