

THIS WEEK:

- State's Right of Appeal; Evidentiary Issues
- Merger; Units of Prosecution
- Rule 404 (b); Rule 403

State's Right of Appeal; Evidentiary Issues

State v. Petty, A21A1711 (3/1/22)

Petty was charged with DUI (less safe). In January 2020, the court ordered that the State could not offer evidence of implied consent or Petty's refusal to take the requested breath test. In April 2021 and the day before the trial was scheduled to start, Petty filed a motion in limine requesting a pre-trial ruling as to whether he would be permitted to question the arresting police officer about certain topics, including the officer's failure to acquire a search warrant for Petty's blood, given the DUI less safe (drugs) accusation. After a hearing, in June 2021, the court held that it would not open the door or "undo" the trial court's previous suppression of evidence that Petty had refused the breath test if Petty "ask[ed] questions pertaining to the issue of obtaining a warrant through a magistrate for a blood sample." The trial court further held that Petty could not "ask whether or not a blood test would have shown the amount of alcohol in his system." The State appealed.

The State argued that the trial court erred in its pre-trial ruling that Petty could question the arresting officer about the lack of a search warrant to obtain Petty's blood, without opening the door to evidence of Petty's refusal to submit to chemical testing. However, the Court did not reach the merits, finding that it lacked jurisdiction to hear the appeal.

The Court noted that OCGA § 5-7-1 (a) (4) permits the State to appeal, "[f]rom an order, decision, or judgment suppressing or excluding evidence . . . or excluding the results of any test for alcohol or drugs." OCGA §5-7-1 (a) (5) provides, pertinently, that the State may appeal "[f]rom an order, decision, or judgment excluding any other evidence to be used by the state at trial on any motion filed by the state or defendant at least 30 days prior to trial and ruled on prior to the impaneling of a jury or the defendant being put in jeopardy[.]" Thus, paragraph (a) (5) permits appeals from orders excluding evidence other than the evidence with which OCGA § 5-7-1 (a) (4) is concerned.

Here, the Court found, the June order from which the State appealed did not suppress any evidence, but instead concluded that if Petty pursued a certain area of inquiry during cross-examination, the inquiry would not open the door to the admission of Petty's breath test refusal. The trial court noted at the hearing on the related motion in limine, that the "January of 2020 [order] was to keep evidence out, and this is just a pretrial ruling on . . . whether this evidence can be deemed admitted [under certain circumstances] and allowed before the trial." And, OCGA § 5-7-1 (a) (4) does not authorize an appeal where, as here, the order is the result of the exclusion of evidence based upon some general rule of evidence. Accordingly, the Court held, as OCGA § 5-7-1 (a) (4) does not authorize appeal from an order which excludes

evidence based upon some general rule of evidence, the State could not pursue an appeal of the June order under that provision.

Likewise, the Court found, the State's appeal was foreclosed pursuant to OCGA § 5-7-1 (a) (5). Even assuming without deciding that the State could directly appeal the June order under OCGA § 5-7-1 (a) (5), that provision requires that the motion be filed at least 30 days before trial. The subject motion was filed one day before trial and the hearing on the motion in limine was held on the same day as the scheduled trial. Thus, as the requirements set forth in OCGA § 5-7-1 (a) (5) were not met, the Court held that it lacked jurisdiction.

Accordingly, because the State's appeal was not authorized by OCGA § 5-7-1 (a) (4) or OCGA § 5-7-1 (a) (5), the appeal was dismissed.

Merger; Units of Prosecution

Pavlov v. State, A21A1246 (3/2/22)

Appellant was convicted of three counts of aggravated child molestation, three counts of child molestation, and one count of false imprisonment. Relying on the "unit of prosecutions" analysis used in *Scott v. State*, 356 Ga. App. 152 (2020), he contended that the trial court erred by failing to merge his child molestation convictions for sentencing purposes. Specifically, he argued that his convictions for child molestation should merge because they arose out of the same "short series of transactions in the same location." The Court disagreed.

The Court found that unlike *Scott*, this was not a case in which the sexual acts alleged in the different counts were part of a "single uninterrupted course of conduct." Rather, the indictment alleged that the various sexual contacts occurred sometime "between the 1st day of January, 2009 and the 31st day of December, 2010," and the victim's testimony shows that appellant kissed her on the neck as well as fondled her breasts and genitals on several separate nights in her bedroom as well as in the car while parked at a gas station. Because the evidence showed that the acts of molestation alleged in the three counts did not involve a single, uninterrupted course of conduct, the trial court did not err by failing to merge the sentences.

Next, appellant contended that under *Scott*, the trial court erred by failing to merge his aggravated child molestation convictions for sentencing purposes because they arose out of the same "short series of transactions in the same location." The Court noted that the indictment described the aggravated child molestation charges as follows: Count 1 (alleging aggravated child molestation for placing his penis in the victim's mouth), Count 2 (alleging aggravated child molestation for placing his penis on the victim's anus) and Count 3 (alleging aggravated child molestation for placing his mouth on the victim's vagina)

The Court again found that appellant's reliance on *Scott* was mistaken. *Scott* held that multiple touches to a victim, during a single uninterrupted course of conduct could not be charged as separate acts of child molestation after construing the statute's ambiguous use of the word "any" in favor of the defendant. But the statute does not repeat that ambiguous word in describing aggravated child molestation. Instead, that offense is more precisely defined as "an offense of child molestation which act physically injures the child or involves an act of sodomy." OCGA § 16-6-4 (c) (emphasis supplied). Unlike the

word "any"-which, as *Scott* explained, could denote "a full spectrum of quantities, including: (1) one; (2) one, some, or all regardless of quantity; (3) one or more; (4) great, unmeasured, or unlimited in amount; and (5) all"-the phrases "which act" and "an act" refer unambiguously to a single act that injures the child or, relevant here, a single act of sodomy. *Scott*, 356 Ga. App. at 158 (5). Thus, the Court concluded, each distinct act of sodomy is a unit of prosecution for aggravated child molestation. Consequently, because here the counts of aggravated child molestation involved three distinct acts of sodomy – penile-oral sodomy, penile-anal sodomy, and oral-vaginal contact-across two different nights, the trial court did not err by failing to merge those distinct acts for sentencing.

Rule 404 (b); Rule 403

Wright v. State, A21A1655 (3/2/22)

Appellant was convicted of possession with intent to distribute a Schedule I controlled substance ("spice"), possession of a Schedule II controlled substance (oxycodone), and possession of a firearm during the commission of a crime. The evidence, very briefly stated, showed that in 2015, officers went to a home, looking for a fugitive. The homeowner gave consent for the officers to search. Appellant and another person were also at the house. Upon entering a bedroom appellant had just vacated and was then unoccupied, an investigator found an open black book bag behind the door. The investigator saw suspected drugs inside the open book bag. The investigator went out to the porch where the three occupants were waiting and asked who owned the bag. Appellant claimed it as his and so was everything in it. At trial, however, appellant claimed that the only bag he had with him at that time was a small red and black bag that contained diapers and other items for his child, and that neither the black book bag - which he knew nothing about - nor its contents were his. He further testified that he had gone into the room where the black book bag was found to look out of a window when the officers arrived. According to appellant, he never told officers that he owned the black book bag but instead simply claimed ownership of the red and black bag he brought with him.

Appellant contended that the trial court erred when, during the first part of his bifurcated trial, it admitted evidence of the facts underlying his 2011 convictions for possession with intent to distribute marijuana and possession of a firearm during the commission of a crime. The trial court admitted this evidence for the limited purposes of establishing appellant's knowledge, intent, and lack of mistake. Specifically, he argued that the extrinsic other acts evidence was not relevant to an issue other than his character and that the probative value of the other acts evidence was substantially outweighed by its unfair prejudice. A divided Court agreed.

First, the Court stated that for purposes of Rule 404 (b), "knowledge" refers either to a special skill, such as safe-cracking, bomb-making, or document forgery, or to specific knowledge based on past experiences such as a trespass conviction used to establish a defendant's knowledge that he was not welcome on the premises. Knowledge is also properly in issue when the defendant claims that he or she was unaware that a criminal act was being perpetrated. In such cases, the hypothesis justifying the admission of other-acts evidence is similar to that invoked with intent: the likelihood that repeated instances of behavior, even if originally innocent, will have resulted in the defendant's having the requisite state of knowledge by the time of the charged crime. But here, there was no allegation that any special knowledge or skill was required for any of the offenses at issue. Moreover, appellant did not claim that he was unaware that items in his possession contained drugs and a gun - he merely disclaimed ownership of the black book bag outright. Thus, the Court found, appellant's knowledge was not at issue in this case, and the trial court therefore erred in admitting the other acts evidence on this basis.

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The Court also found that the trial court erred in admitting the evidence to show lack of mistake. The Court found that appellant never claimed, nor was there any evidence to suggest, that he accidentally or mistakenly possessed the drugs and gun at issue in this case. Consequently, whether the charged offenses resulted from an accident or mistake was irrelevant.

However, the Court found, appellant's prior convictions were relevant to show his intent because the same intent was required in both cases, and he did not affirmatively seek to withdraw intent as an element to be proved by the State as to each offense in this case. Nevertheless, appellant contended, the evidence was inadmissible under Rule 403.

Here, the Court noted, the jury was tasked with choosing between two competing versions of events. Under the State's version - based entirely on the investigator's testimony - appellant claimed sole ownership of the black book bag "and everything in it." Under appellant's version - based entirely on his testimony - (i) he had only one bag with him: a small red and black bag; (ii) he knew nothing about the black book bag or its contents; and (iii) he never claimed ownership of the black book bag or its contents but instead simply claimed ownership of the red and black bag he brought with him. These versions were mutually exclusive: if the jury believed the investigator, it would have to disbelieve appellant; if the jury believed appellant, it would have to disbelieve the investigator. Regardless of which version of events the jury believed, however, in neither scenario was there any likelihood that the jury would find that appellant possessed the items in the black book bag but intended neither to possess the drugs and gun nor to distribute the drugs, given the volume of drugs, the packaging, the presence of a scale and a gun in the same bag, and the absence of personal-use paraphernalia. Therefore, the Court found, the prosecutorial need for the other acts evidence to show intent was minimal.

The danger of unfair prejudice, on the other hand, was significant. The only direct evidence of appellant's guilt came from the testimony of a single witness. And given appellant's testimony that two bags were present (both of which were at least partially black) and that he never claimed ownership of the black book bag, as well as his explanation for why he was in the room with the black book bag, a reasonable juror could have found that appellant intended to claim ownership only of the small red and black bag, and not the black book bag. Viewed in that context, the danger of unfair prejudice from the admission of the facts underlying the prior convictions was high, as it encouraged the jury to find that, because appellant had possessed drugs and a gun together in the past, he was more likely to have done so here, which, the Court found, was plainly prohibited by Rules 403 and 404 (b).

Nevertheless, the Court stated, it is cognizant that courts must view other acts evidence in a light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact. But even assuming the temporal proximity and general similarities between the prior acts and charged offenses arguably could weigh somewhat in favor of admissibility, on the facts of this case, the absence of any meaningful prosecutorial need significantly outweighed those factors. And given the limited quantity of evidence from which the jury was tasked with choosing between two diametrically opposed versions of events (again, on the specific facts of this case), the danger that the jury would misuse the evidence for improper propensity purposes - the very essence of unfair prejudice - substantially outweighed any potential probative value that may be attributed to the other acts evidence. Therefore, the Court found, the trial court abused its discretion in admitting the other acts evidence on this basis, as well.

Finally, the Court addressed the harm to appellant. The Court found that absent the other acts evidence, the remaining evidence of appellant's guilt was not overwhelming, but rather rested primarily on the testimony of a single witness. And

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the jury reasonably could have found from appellant's testimony that he intended to claim ownership only of the small red and black bag, and not the black book bag. Furthermore, the jury was erroneously charged that it could consider the prior acts evidence for multiple improper reasons. As a result, the Court concluded, the evidence was not so overwhelming, and the improper other acts evidence was not so marginal, to render it highly probable that the error did not contribute to the verdict. Therefore, the Court reversed appellant's convictions.

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