

## THIS WEEK:

- Authentication; Video of a Video
- Cross-Examination; Fifth Amendment Rights
- Motions for Directed Verdict; Prosecutorial Misconduct
- Right to Be Present; Critical Stages of Trial

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### Authentication; Video of a Video

*Holley v. State, A21A1380 (3/9/22)*

Appellant was convicted of two counts of homicide by vehicle in the first degree and one count each of reckless driving, failure to exercise due care, and failure to stop at a stop sign. The evidence showed that appellant drove her vehicle through a stop sign and collided with another vehicle. At trial, Boyd, the aunt of two of appellant's children, testified that after the collision, her mother showed her a video posted on appellant's Facebook account. Boyd used her cell phone to record the Facebook video from her mother's phone. The recording made by Boyd was admitted by the trial court and played for the jury. The seven-and-a-half-minute video memorialized the events immediately prior to, during, and following the collision.

Appellant contended that the trial court erred in admitting, over her objection, the Facebook video recorded by Boyd and purportedly posted by appellant. She argued that the video shown to the jury was “a video (on Boyd's phone) ... of a video (on Boyd's mother's phone) ... of a video (on a Facebook page),” and it should have been excluded because the State failed to authenticate it. The Court disagreed.

The Court noted that Boyd testified at trial that she knew appellant shared information on Facebook and that she was familiar with appellant's Facebook posts because, although Boyd did not have her own Facebook account, she used her mother's account to keep up with her family. According to Boyd, the video she recorded was posted on appellant's Facebook account, and she recognized the people in the video. Boyd identified those people at trial as appellant and her three children. Boyd also identified a picture of her nine-year-old niece (who was killed in the collision) to corroborate the video identification. In addition, Boyd testified that the State's exhibit, which she initialed after viewing it with the investigator, was an accurate, unaltered depiction of the video she saw on her mother's phone and the exact video she recorded from Facebook and gave to an officer. Based on this testimony, the trial court was authorized under OCGA § 24-9-901 (b) (1) to find that the State established a prima facie case that the recorded video accurately reflected the contents of the video posted on appellant's Facebook account.

Nevertheless, appellant contended, the video was not properly authenticated because Boyd failed to testify about any distinctive characteristics of the Facebook account, including biographical information, an IP address, a phone number, or other information identifying the Facebook account as belonging to her. However, the Court stated, although OCGA § 24-9-901 (b) (4) permits authentication through “[a]pppearance, contents, substance, internal patterns, or other

distinctive characteristics, taken in conjunction with circumstances[.]" here, the State presented ample circumstantial evidence to authenticate the video under OCGA § 24-9-901 (b) (1) — "[t]estimony of a witness with knowledge that a matter is what it is claimed to be[.]" And, the Court noted, the State was not limited to authenticating the video through appellant's preferred method. Accordingly, the Court concluded, the trial court did not abuse its discretion by admitting the recorded video into evidence at trial and leaving the ultimate question of its authenticity to be decided by the jury.

## **Cross-Examination; Fifth Amendment Rights**

*Fuller v. State, A21A1481 (3/10/22)*

Appellant was convicted of multiple crimes related to an armed robbery of a convenience store. He was tried together with his two codefendants, Pabon and Hill. After the State rested its case, Pabon decided to enter a guilty plea, agreeing to a sentence of 25 years, with 10 years to serve in confinement. While entering his plea, outside the presence of the jury, Pabon announced, without prompting, "I did want to state something for the record. [Appellant] was not with me at the time." Pabon then stated his reluctance to testify, and his counsel stated that Pabon intended to exercise his right to remain silent. Counsel for Hill called Pabon as a witness. Even though Pabon's counsel repeated that Pabon intended to remain silent, Pabon answered questions asked by Hill's counsel, replying that Hill was not with Pabon during the robbery and that Hill was not the getaway driver. Counsel for appellant then sought to question Pabon. Pabon was given a brief recess to consult with his attorney, and when he returned, Pabon's attorney announced that Pabon would assert his right to remain silent and answer no more questions. After some further discussion between the attorneys and the court, counsel for appellant asked the trial court, "With that, Judge, I'm prohibited from continuing to question this witness?" The court responded: "I would think that would stop it." The court then instructed Pabon to leave the witness stand.

Appellant contended that the trial court committed plain error when it cut off his questioning of Pabon after Pabon communicated his desire to assert his Fifth Amendment right to remain silent. The Court noted that the trial court correctly conceded in its order on appellant's motion for new trial that it committed error by allowing Pabon to assert his Fifth Amendment right to remain silent without examining whether his testimony may have subjected him to prosecution for some other offense. However, the Court stated, although Pabon had pleaded guilty, he had not yet been sentenced, so he likely was entitled to assert his Fifth Amendment right to remain silent. When a witness manifests his intention to claim Fifth Amendment protection, the court must conduct a hearing outside the presence of the jury to determine whether the testimony sought potentially could incriminate the witness. And here, the court failed to conduct such an inquiry in appellant's case.

Nevertheless, the Court determined, the error probably did not affect the outcome. Although Pabon should not have been excused from the witness stand without further inquiry, it was clear from the record that he did not want to answer further questions from appellant's counsel. Pabon's attorney was continuously advising Pabon to remain silent, and Pabon repeated multiple times that he did not intend to answer any more questions. An unanswered question does not furnish grounds for a mistrial. Instead, when a witness declines to answer on cross examination certain pertinent questions relevant to a matter testified about by the witness on direct examination, all the witness' testimony on the same subject matter should be stricken. Therefore, had the court followed the proper procedure, appellant would still not have been entitled to the testimony he desired from Pabon; he would have been entitled merely to striking Pabon's testimony that Hill was not with him during the robbery. Thus, the Court concluded, there was no plain error.

## Motions for Directed Verdict; Prosecutorial Misconduct

*Fincher v. State, A21A1807 (3/11/22)*

Appellant was convicted of three counts of aggravated assault, two counts each of aggravated stalking and false imprisonment, and one count each of burglary, cruelty to children in the third degree, criminal trespass, influencing a witness, and battery. He contended that the trial court erred in denying his motion for directed verdict as to Count 6 of his indictment for aggravated stalking because the indictment was fatally defective due to it not alleging criminal conduct. The State conceded the issue.

The Court noted that Count 6 of the indictment charged appellant with aggravated stalking “in violation of a condition of pretrial release, ... [by] unlawfully contact[ing A. B.] at or about [*appellant's*] residence, without the consent of [A. B.], for the purpose of harassing and intimidating [A. B.] ...” (Emphasis supplied.) A person commits aggravated stalking when he “in violation of a ... condition of pretrial release ... follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person.” OCGA § 16-5-91 (a). The term “place or places” is defined as “any public or private property occupied by the victim *other than the residence of the defendant.*” (Emphasis supplied.) OCGA § 16-5-90 (a) (1);

The standard of review for the denial of a motion for a directed verdict of acquittal is the same as for determining the sufficiency of the evidence to support a conviction: the evidence must be sufficient for a rational trier of fact to find beyond a reasonable doubt that the defendant was guilty of the charged offense. The evidence must be viewed in the light most favorable to support the verdict and the defendant no longer enjoys a presumption of innocence; moreover, an appellate court determines evidence sufficiency and does not weigh the evidence or determine the credibility of witnesses.

And here, the Court found, even under this deferential standard, it was clear that appellant should have been granted a directed verdict as to Count 6 given that the indictment as to that charge was void. The law excludes one's own residence from the places where aggravated stalking can occur when the victim is present at that residence. The conduct which formed the basis of Count 6 occurred while both appellant and the victim were at his residence. Thus, it could not form the basis of an aggravated stalking charge. Therefore, the Court concluded, the trial court erred in failing to grant a directed verdict as to this count of the indictment and in failing to grant appellant's motion for new trial as to this count. Accordingly, the Court reversed the denial of the motion for new trial as to this charge and remanded this issue to the trial court to vacate that conviction and re-sentence appellant.

Appellant also argued that he received ineffective assistance of trial counsel because counsel did not object to an inflammatory comment during the State's closing statement. Specifically, he contended that his trial counsel's failure to object to the State's opening line of its closing, wherein the prosecutor stated, “Ladies and gentlemen of the jury, the Defendant is a pill-pushing, girl-pimping monster, and there's just no way to sugarcoat that. There's no girl in your community between the ages of 18 and 25 that is safe with him running around doing what you've heard about.”

The Court agreed that the State should not have made such a statement during closing because it is manifestly improper for a prosecutor to argue to the jury during the guilt-innocence phase of any criminal trial that if found not guilty, a defendant poses a threat of future dangerousness. However, relying on *Mason v. State*, 274 Ga. 79, 80-81 (1) (c) (2001)

and premitting whether it was deficient for trial counsel not to object to this improper statement, the Court found that appellant's claim of ineffectiveness failed because he could not show prejudice. In *Mason*, the Supreme Court found that despite the impropriety of a prosecutor's future dangerousness comments, there was no prejudice because it was not reasonably likely that the comments affected the outcome of the case. And here, just like in *Mason*, the evidence against appellant was strong. Therefore, the Court concluded, appellant was not prejudiced and his ineffective assistance claim provided no basis for reversal.

## Right to Be Present; Critical Stages of Trial

*Bland v. State, A21A1547 (3/11/22)*

Appellant was convicted of five counts of aggravated child molestation, two counts of child molestation, and one count of enticing a child for indecent purposes. Very briefly stated, the record showed that after the State had presented its evidence and rested, appellant presented several defense witnesses and then began to testify in his own defense. But before appellant addressed the specific allegations of abuse in this case, the trial court interrupted his testimony and indicated that the trial would resume the following day. The next morning, which was a Friday, appellant did not appear in court and his counsel informed the judge that appellant was hospitalized with injuries sustained after he had jumped from a vehicle while on the way to the courthouse. The judge immediately revoked appellant's bond, announced that he was under arrest, and directed the sheriff's department to monitor his hospital room. The judge recessed the case until the following Monday morning. However, the judge then brought in a couple of jurors and had colloquies with them.

On Monday, defense counsel told the court that appellant wished to be present at trial and he submitted a video-recorded statement from appellant informing the court that he still wanted to be heard at trial and that his testimony was crucial to his case. Defense counsel moved for a continuance which the court denied. The court then found that appellant had waived his right to be present and continued the case without him.

Appellant contended that the trial court violated his constitutional right to be present during critical stages of his trial. The Court agreed.

The Court found that appellant was absent from multiple critical stages, including the judge's colloquies with two jurors and dismissal of one of those jurors, and the judge's colloquy with an alternate juror about his impartiality, all of which occurred before the judge actually ruled that appellant had waived his right to be present. Other critical stages of the trial which were held in appellant's absence included the court's dismissal of a second juror and apparent replacement of the two dismissed jurors with alternate jurors; the court's various colloquies with and instructions to individual jurors; the closing arguments of the attorneys; and the return of the verdict.

Relying on *Hunter v. State*, 263 Ga. App. 747 (2003), the State argues that the trial court properly found that appellant had waived his right to be present. The Court noted that in *Hunter*, it found that a defendant who had left court during a break in his trial and attempted to commit suicide by slitting his wrists was "thereafter voluntarily absent from the proceeding, [and thus] waived his right to be present at the remainder of the trial." *Hunter*, at 748 (1).

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING MAY 13, 2022

Issue 19-22

As an initial matter, the Court stated, because of the material differences between this case and *Hunter*, it need not address the question of whether it was appropriate for the *Hunter* Court to have determined, without reference to any expert testimony on the matter, that an attempted suicide constituted a voluntary waiver of the right to be present at trial. And in any event, there was no evidence that appellant's act of jumping from the vehicle was an attempted suicide. Also, there was no evidence presented to the trial court as to any circumstances surrounding the incident; there was no evidence explaining why he jumped; and there was no testimony from appellant, as there was from the accused in *Hunter*, stating that he wanted to commit suicide. Given the lack of evidence, the Court found that the State's characterization of the incident to be mere speculation and distinguishable it from *Hunter*.

Moreover, the Court found, appellant expressly informed the court in his recorded statement that he wanted to return to the trial. So unlike *Hunter*, the judge here had a clear statement from the accused that he was not voluntarily waiving his right to be present for the remainder of the trial. Furthermore, appellant indicated in his recorded statement that he wanted to finish his trial testimony that had been interrupted by the court. Thus, the Court found, the continuance of the trial without appellant deprived him of his right to testify.

Consequently, the Court concluded, given these critical differences with *Hunter*, and pretermittting the question of whether *Hunter* was correctly decided, the trial court erred in relying on *Hunter* to find that appellant had voluntarily waived his right to be present at his criminal trial. Accordingly, the judgment was reversed, and the case remanded for a new trial.