

THIS WEEK:

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- Rule 404 (b); Distinctive Plan Purpose
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Jury Charges; Good Faith Defense

Ulbrich v. State, A21A1219, A21A1220 (3/14/22)

Appellants Ulbrich and Johnson were convicted of multiple counts of violations of the Georgia Racketeer Influenced and Corrupt Organizations Act (RICO), theft by deception, and practicing medicine without a license. Very briefly stated, the evidence showed that Johnson had been a licensed medical doctor and owned a cosmetic surgery practice. After he lost his license, he continued to see patients and perform surgeries. Ulbrich was a doctor in the practice who conspired with Johnson to deceive patients regarding Johnson's license to practice medicine.

Appellants argued that the trial court committed plain error in crafting its jury charge on practicing medicine without a license. Specifically, they objected to the trial court's instruction: "I charge you that engaging in unlicensed practice includes delegation by a physician a professional responsibility to a person who is not authorized to provide such services." Appellants contended that this charge effectively nullified their defense that Ulbrich was permitted to delegate certain medical tasks to Johnson under their reading of OCGA § 43-34-22.

However, the Court noted, immediately prior to the allegedly improper charge, the trial court instructed the jury on the law as set forth in OCGA § 43-34-22 (b) (8): "I charge you that nothing in this chapter shall be construed to prohibit the delegation by a physician to a qualified person other than a physician assistant of any acts, duties or functions which are otherwise permitted by law or established by custom."

And, the Court found, reading the charge in its entirety, the instructions as given were not erroneous. The charge appellants found objectionable is an almost exact rendering of language found in the medical board's rules and regulations. Ga. Comp. R. & Regs. 360-3-.05. Thus, both charges were apt statements of Georgia law and it was left to the jury to decide whether Johnson was "not authorized to provide such services" (and thus the delegation of duties would be unlawful) or whether he was "a qualified person" (and thus the delegation of duties were lawful). These characterizations were neither incompatible, nor confusing. Thus, the Court concluded, when viewed in context, the trial court's instruction was neither misleading nor dismissive of the appellants' defense.

Johnson argued that the trial court committed plain error by refusing to charge the jury on good faith reliance upon advice of counsel or on good faith as a defense. The Court noted that Johnson cited only to federal and Minnesota law, but no Georgia state authority that recognizes either a good faith or a good faith reliance on counsel defense to the charges here.

And the Court stated, it found no such authority. Therefore, Johnson could not show that the trial court erred, let alone plainly erred, by refusing to give the proposed charges

Furthermore, the Court stated, to the extent that Johnson contended that the trial court was required to give these charges because they went to his sole defense of lack of intent, this contention was meritless. First, the Court found that Johnson's reliance on *Price v. State*, 289 Ga. 459, 459-462 (2) (2011) was easily distinguishable because it involved the trial court's refusal to charge the jury on the affirmative and well-recognized defense of mistake of fact. Second, the trial court gave the appropriate pattern charges for the State's burden to prove his guilt beyond a reasonable doubt, including its burden to prove intent as an essential element of the offenses. Thus, the Court concluded, considering the jury charge as a whole, the trial court fully and fairly instructed the jury on the relevant law, and consequently, there was no error.

Merger; Rule 404 (b)

Gibson v. State, A21A1221, A21A1532 (3/15/22)

In Case No. A21A1221, appellant appealed his convictions for armed robbery, kidnapping, criminal attempt to commit rape, aggravated assault with a deadly weapon, aggravated assault with intent to rape, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon all in connection with the robbery and assault of a manager of a Subway restaurant. Appellant contended that the aggravated assault with a deadly weapon count should have merged into the armed robbery conviction. The Court agreed.

Here, the Court found, the evidence showed that the aggravated assault and the armed robbery were part of the same transaction because both counts arose from the same conduct. Specifically, the victim testified that, as she was handing cash from the opened cash register to appellant, he demanded that she "hurry up, hurry up. And then he hit [her] all on [the] backside. ... He hit [her] ... on [the] head ... with [the] gun." Thus, the Court concluded, the count of aggravated assault with a deadly weapon should have merged with the conviction for armed robbery. Consequently, appellant's conviction and sentence for aggravated assault with a deadly weapon was vacated.

Appellant also contended that the aggravated assault with intent to rape count should have merged into the conviction for criminal attempt to commit rape. Again, the Court agreed. The evidence produced at trial showed that appellant took a substantial step toward committing rape – that is, attempted rape – by forcing the victim to the back of the store, binding her hands, and removing her pants and underwear. The Court found that the same evidence supported appellant's conviction for aggravated assault with intent to rape based on either type of assault contained in OCGA § 16-5-20 (a). Therefore, the Court concluded, because appellant's conviction for aggravated assault with intent to rape was established by proof of the same or less than all the facts required to establish his conviction for attempted rape, the former merged into the latter under the required evidence test. Accordingly, the Court vacated appellant's conviction and sentence for aggravated assault with intent to rape.

In Case No. A21A1532, appellant was convicted of theft by shoplifting two bottles of carpet-cleaning solution valued at \$39.91 from a Walmart store. He argued that the trial court erred by admitting other acts evidence of a prior conviction for theft by shoplifting. The Court again agreed.

The record showed that the State submitted a certified copy of a prior conviction and explained that under Rule 404 (b), it sought to admit evidence of the conviction for the purpose of establishing appellant's identity because the evidence was "necessary" to show "how [the loss-prevention officer who observed the crime] determined – part of her determination [of] the identity of [appellant]." According to the State, the prior conviction involved the same "central facts" as the charged crime. Over appellant's objection, the trial court granted the State's motion and permitted it to introduce evidence of appellant's prior conviction to establish his identity.

The Court noted that when other acts evidence is offered to prove identity, the likeness of the offenses is the crucial consideration. The physical similarity must be such that it marks the offenses as the handiwork of the accused. Much more is demanded than the mere repeated commission of crimes of the same class, such as repeated murders, robberies, or rapes.

And here, the Court found, the evidence showed nothing more than that appellant had previously shoplifted from the same Walmart and fell far short of demonstrating a "signature crime" accomplished through a modus operandi unique to appellant. In fact, the only similarity shown between the crimes was that both occurred at the same Walmart, but, as evidenced by the loss-prevention officer's testimony, shoplifting from the Walmart store at issue was hardly a signature crime. Furthermore, similar locations alone is not sufficient evidence of identity in the absence of more unusual similarities to indicate a signature crime. Therefore, the Court determined, because the State did not establish that the features of the charged crime and the prior conviction, viewed individually, or as a whole, marked those crimes as the unique "signature" of the same perpetrator, the trial court abused its discretion by admitting evidence of the other act to show identity.

Having determined that the other acts evidence was improperly admitted, the Court next considered whether reversal of appellant's conviction was required. The Court found that although the evidence was legally sufficient to permit the jury to find appellant guilty of the charged crime, the State's case was not without its weaknesses. The State's theory of the case was that appellant, after paying for items totaling more than \$200, returned to an aisle where he had purportedly stashed two bottles of carpet-cleaning solution valued at less than \$40, placed the items in his cart, and exited the store without paying for them. But because the disputed incident occurred on an aisle not visible on security footage, the testimony of the loss-prevention officer was the only evidence establishing that appellant placed the bottles of carpet-cleaning solution in his cart before leaving the store. In fact, the Court noted, appellant's cross-examination of the officer, which the State characterized as "devastating," focused on the absence of security footage and elicited details about the cameras present throughout the store, confirmed that the average shopper would not know where the cameras were located or whether an area of the store fell in a blind spot, and emphasized that the crime occurred in one of the few areas of the store not visible on surveillance cameras. Thus, the Court concluded, given the less-than-overwhelming evidence presented at trial coupled with the acknowledged weaknesses of the State's case, "it could not say that the improper character evidence was so marginal that the jury's verdict was not likely to be impacted. Therefore, the Court found that the admission of the other acts evidence was not harmless and consequently, reversed appellant's conviction for shoplifting.

Rule 404 (b); Distinctive Plan Purpose

Burrell v. State, A20A1973 (3/15/22)

Appellant, who was 15 years old at the time of the offenses, was convicted of kidnapping with bodily injury, aggravated assault, terroristic threats, and battery. The evidence, very briefly stated, showed that appellant used a knife to attack Cook

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as she sat on the edge of her driveway one summer night. Appellant dragged Cook five to ten feet toward her house, telling her that he was taking her inside. As Cook attempted to free herself and fought for control of the knife, she came face-to-face with appellant and recognized him from a previous encounter. During the struggle, appellant hit Cook and attempted to overpower her, but Cook screamed and was able to secure the knife. Cook fell face down on the ground, and appellant landed on top of her; appellant bit Cook twice on the face and then “took off running.”

Pursuant to Rule 404 (b), the State presented the testimony of A. O., who was 16 years old at the time of trial. She testified that she and appellant attended school together and that they were in an on-again, off-again romantic relationship for years. A. O. testified that, in the early morning hours of April 7, 2013, — just three months before the incident with Cook — appellant entered her residence without permission and appeared at her doorway with a knife, telling her to keep quiet. After entering her bedroom and locking the door, appellant raped and sexually assaulted A. O. During the incident, appellant pressed the knife to A. O.'s hip, bit A. O. on her face and neck, and threatened to kill her family if she reported the incident.

Appellant argued that the trial court erred by allowing A. O. to testify pursuant Rule 404 (b). The Court stated that evidence admitted under Rule 404 (b) to show the defendant's plan or preparation often shows the planning of or preparation of the charged offense. In other cases, evidence of related or similar prior offenses has been admitted because it tended to prove that the defendant employed a ‘common scheme’ to commit a series of similar crimes. This approach blends the purpose of plan with the purpose of identity — showing that a distinctive plan was used tends to prove that the same person executed both plans. Thus, the Court stated, whether A. O.'s testimony was admissible under this “distinctive-plan purpose” turns on whether the evidence would be admissible to show identity.

Evidence offered to prove identity must satisfy a particularly stringent analysis. When extrinsic offense evidence is introduced to prove identity, the likeness of the offenses is the crucial consideration. The physical similarity must be such that it marks the offenses as the handiwork of the accused. In other words, the evidence must demonstrate a *modus operandi*. The extrinsic act must be a “signature” crime, and the defendant must have used a *modus operandi* that is uniquely his. The signature trait requirement is imposed to ensure that the State is not relying on an inference based on mere character — that a defendant has a propensity for criminal behavior. Evidence cannot be used to prove identity simply because the defendant has at other times committed the same commonplace variety of criminal act.

Appellant argued that the two offenses “were not similar enough to survive the ‘particularly stringent analysis’ required to admit crimes as ‘handiwork’ or ‘signature’ of the accused.” The Court recognized that A. O., a teenager, was a former intimate partner of appellant's and that Cook, an adult, was at most, an acquaintance. However, the Court found, both victims were known to appellant prior to the attacks. Further, there were striking similarities between the two events, which occurred only months apart. In each instance, appellant appeared at the victim's home armed with a knife, told the victim to keep quiet, held a knife to the victim's torso, attacked the victim, threatened her, and bit her in the face. Even though appellant argued that there was no evidence that he intended or attempted to rape Cook — noting [that he was not charged with rape — it was reasonable to infer from the evidence that appellant intended to seclude Cook in her residence for some nefarious purpose but was thwarted by Cook's resistance. Thus, the Court found, while the two crimes were not exactly the same, the manner in which they were carried out presented the same unique characteristics. Accordingly, the evidence was offered for a proper purpose.

Nevertheless, appellant argued, A. O.'s testimony had scant probative value, asserting that it was unduly prejudicial to permit the State to call appellant a rapist. However, the Court found, A. O.'s testimony was not elicited merely to cast appellant as a rapist; instead, it was central to establishing appellant's identity in this case. Appellant's defense at trial was that he was not the perpetrator; thus, the primary question at trial was who committed the crimes against Cook. Cook was the sole eyewitness, and while she identified appellant at the scene and at trial, her identification was based on meeting appellant once and seeing his face for a matter of seconds in the dark on the night of her attack. Therefore, the Court determined, A. O.'s testimony — which described a strikingly similar offense committed by someone whose identity was not in doubt — had substantial probative value. Although it may be highly prejudicial to be cast as a rapist — the evidence of the April 2013 incident was not a matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. While appellant was not charged with rape in connection with the incident involving Cook, he was facing charges that he attacked a woman with a knife and attempted to drag her into her house; although A. O.'s testimony was disturbing, there was nothing inherent in this evidence that would create a risk that appellant would be convicted on a ground different from proof specific to the offense charged.

Ineffective Assistance of Counsel; Scope of Appellate Record

McNeil v. State, A21A1769 (3/16/22)

Appellant was convicted of aggravated sexual battery, rape, child molestation, and incest. He contended that his trial counsel rendered ineffective assistance premised on information contained in records of the Department of Family and Children Services ("DFACS"), which were in the trial court's possession after an in camera review. The Court noted that in its order denying appellant's motion for a new trial, it did not consider the records because they had not been tendered or admitted into evidence or otherwise made a part of the trial court's record. Nevertheless, appellant asked the trial court to transmit the DFACS records to the Court on appeal. And, since the State did not oppose appellant's request, the trial court provided the DFACS records to the clerk of court and ordered that the clerk transmit them to the Court under seal, "along with the official record."

The Court stated that although the DFACS records were part of the materials sent to it by the trial court, the Court still must determine their relevancy for appeal purposes. And on appeal the Court may consider only the facts and evidence that were before the trial court when it ruled upon appellant's motion for new trial. Here, the Court found, the trial court determined that the DFACS records were not part of the evidence that was before it at the time of its ruling; and, while appellant had offered some criticism of the trial court's treatment of those records, he did not challenge on appeal that aspect of the trial court's ruling. Consequently, the Court concluded, it could not consider the DFACS records in deciding the appeal and thus, could not consider appellant's allegations of ineffective assistance premised upon information contained in the DFACS records.