

THIS WEEK:

- Demand for Speedy Trial; Retrials
- Other Acts Evidence; Rule 404 (b)
- Hearsay; Excited Utterances
- Search Warrants; Probable Cause
- Right to be Present; Fatal Variance

Demand for Speedy Trial; Retrials

Smith v. State, S22A0271 (5/17/22)

Appellant was convicted of felony murder in a second trial after the first trial ended with a deadlocked jury. He contended that his trial counsel provided ineffective assistance by failing to move for his acquittal under OCGA § 17-7-171 (b) after the State failed to try him on the felony murder charge within the period authorized by the speedy trial statute for capital cases. The Court disagreed.

The record showed that appellant filed his demand for speedy trial on October 17, 2011, during the September 2011 term of court. Appellant was first tried from December 12 to 20, 2011, during the next court term, the November 2011 term. Therefore, the Court found, he was given a trial during the time period prescribed by the statute. Appellant was convicted of aggravated assault (Count 2) and aggravated battery (Count 3) at that trial, but because the jury could not reach a verdict as to the felony murder charge under Count 1 of the indictment, the trial court declared a mistrial as to that count.

The Court stated that where a defendant has filed a demand for trial, a mistrial resulting from other than inevitable accident such as the death or sickness of the judge or one or more of the jurors does not constitute a trial that satisfies the State's obligation under the demand for trial statutes. Thus, pursuant to appellant's speedy trial demand, which was filed in the September 2011 term of court, he was required to be retried by the end of the March 2012 term of court, which was the third full term of court after the filing of the speedy trial demand.

However, the Court found, subsequent proceedings prevented such a retrial during the remainder of the November 2011 term and the next two terms of court. On January 3, 2012, before the November 2011 court term expired, appellant filed a plea in bar to prevent his retrial on the felony murder charge. Consequently, the Court determined, during the pendency of that motion, the State had no obligation to try appellant because he was not appearing in open court announcing ready for trial, nor was he seeking a trial under the indictment. To the contrary, he was seeking to prevent such a trial. Additionally, the record was silent as to whether appellant was present in court and announced ready for trial during the holiday period between the end of his trial on December 20, 2011, and the filing of the plea in bar on January 3, 2012, and appellant did not point to any evidence that juries were impaneled and qualified to try his case during that time frame.

The record further showed that the trial court denied appellant's plea in bar on February 8, 2012, and appellant appealed that ruling the next day. This occurred in the January 2012 term of court. The Court noted that the parties did not dispute that "the demand clock" was tolled during the pendency of the appeal. Further, the Court stated, it has established that (1) the demand clock does not begin to run again until the remittitur has been filed in the trial court following the appeal; and (2) the State has the remainder of the term in which it is filed and one additional regular term in which to try the defendant.

And here, the Court noted, it affirmed the trial court's denial of the plea in bar on February 18, 2013, and the remittitur was filed in the trial court on March 8, the last day of the January 2013 term of court. The March 2013 term began on Monday, March 11, and appellant was tried on the felony murder charge during that term, from April 22 to May 2, 2013. Thus, the Court concluded, appellant was tried during the term following the filing of the remittitur, and no speedy trial violation occurred. Accordingly, the trial court correctly determined that trial counsel was not ineffective in failing to file a meritless motion of acquittal.

Other Acts Evidence; Rule 404 (b)

Houkpatin v. State, S22A0564 (5/17/22)

Appellant was convicted of felony murder for the death of his two-year old stepson, Noel. The evidence, very briefly stated, showed that appellant and Donique Howell met in early 2012 and married less than two years later. By January 2014, the couple had a child, E. H., together and lived with Howell's minor children from prior relationships — K. H., C. H., R. H., A. H., and Noel, who was two years and nine months old. On the morning of January 25, Howell left the children in appellant's care when she went to work. Noel died that morning and after an autopsy, the medical examiner concluded that Noel's manner of death was homicide, and the cause of his death was asphyxia from chest compression that fractured his ribs.

Appellant argued that the trial court abused its discretion in admitting evidence that he had physically assaulted Noel and the other children prior to Noel's death. The trial court admitted the evidence under Rule 404 (b) for the purposes of showing intent, motive, and opportunity.

The Court concluded that the other-acts evidence that appellant had squeezed Noel and A. H. around the rib cage was admissible, at least as to appellant's intent. The Court found that as to the first prong of the Rule 404 (b) test, appellant made intent a material issue in the case by pleading not guilty and not taking affirmative steps to remove intent as an issue. The evidence that appellant squeezed Noel and A. H. around the rib cage, causing them to cry, was relevant to that issue, as it evinced his intent unlawfully to cause them "cruel and excessive physical pain." The State predicated the felony murder count on cruelty to children in the first degree, so it was required to prove that appellant intended to inflict "cruel and excessive pain" and as a result caused Noel's death. The other-acts evidence was therefore relevant to prove appellant's intent to cause Noel's fatal injury.

As to the second Rule 404 (b) prong, in evaluating the probative value of other-acts evidence offered to prove intent, the Court noted it must consider the overall similarity between the other acts and the charged crimes, the acts' temporal remoteness, and the prosecutorial need for them. Appellant argued that the other-acts evidence had no probative value on

the issue of intent because he “either intentionally squeezed Noel to death, or he did not.” But, the Court stated, the required intent was whether appellant intended “unlawfully and maliciously” to cause Noel “cruel and excessive physical pain,” and the prior acts were highly probative on that point given the overall similarities between the offenses, their temporal proximity, and the prosecution's need for them. Appellant's squeezing of Noel and A. H. around the rib cage was the same type of act alleged to have caused Noel's death — chest compression causing asphyxiation. And these acts occurred within two years of Noel's death.

Nevertheless, appellant contended, the prosecution's need for the other-acts evidence was minimal because he did not claim mistake or accident as a defense. The State responded that the prosecution's need was high because the other-acts evidence negated appellant's defense that he never hurt the children, someone else committed the injurious act, and performing CPR on Noel contributed to his rib fractures. But, the Court found, even if not critical to the State's prosecution, the other-acts evidence helped rebut appellant's defenses and proved that he acted with malicious intent to cause Noel “cruel and excessive pain.” Moreover, given the substantial similarities between the other acts and the charged crime, the two-year gap between the offenses did not diminish the probative value of the other-acts evidence. The Court further stated that the evidence was, of course, prejudicial to appellant, but Rule 403's exclusionary force is meant to be applied “sparingly” — primarily when the other-acts evidence has scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. Given the substantial probative value of the evidence in proving appellant's intent, the trial court did not abuse its discretion in determining that unfair prejudice to appellant did not substantially outweigh it.

With respect to the remaining prong of Rule 404 (b), appellant argued that the State did not submit sufficient proof for the jury to find by a preponderance of the evidence that he committed the other acts. The Court noted that in challenging the admission of the other-acts evidence before the trial court, appellant argued that the incidents were based on statements from Howell's children, the children never previously reported the incidents, and their statements were not corroborated. But, the Court found, testimony about prior acts of violence committed against the witness or that the witness observed firsthand is sufficient to meet the third prong of Rule 404 (b). And here, K. H. testified that she saw appellant squeeze Noel and A. H. around the rib cage. Because the State met its burden of meeting the Rule 404 (b) test, at least with respect to the issue of intent, the trial court did not abuse its discretion in admitting the other-acts evidence of appellant's squeezing Noel and A. H. for this purpose.

Next, the Court addressed the other-acts evidence of purported child abuse. The Court noted that some of appellant's other acts towards the children, such as slapping or hitting them, may have been less violent and may not have involved the same intent as the predicate offense of cruelty to children in the first degree. But even if those acts were inadmissible, their admission was harmless error. Here, the evidence pointed to an adult causing Noel's injuries, appellant was the only adult present when the injuries occurred, the injuries were caused by a forceful squeezing around the rib cage, and appellant had previously squeezed Noel in the same manner. Given this evidence, the Court found it was highly probable that the admission of evidence that appellant also hit his stepchildren on several occasions did not contribute to the jury's verdict. Therefore, the admission of this evidence was harmless.

Finally, appellant contended that the trial court erred in denying his motion to present Rule 404 (b) evidence of alleged violent acts by K. H. and C. H. that would have shown that these witnesses had the opportunity to commit the crimes against Noel. Specifically, he argued that the trial court abused its discretion in denying his Rule 404 (b) motion because

his proposed evidence showed C. H.'s and K. H.'s motive for accusing him of killing Noel, their opportunity to commit the charged crimes against Noel, and their intent in doing so. The Court disagreed.

The Court noted that to introduce evidence implicating another person in the commission of the crimes with which a defendant is charged, the defendant must show that it raises a reasonable inference of the defendant's innocence, and either directly connects the other person with the corpus delicti or shows that the other person has recently committed a crime of the same or similar nature. Evidence that merely casts a bare suspicion on another or raises a conjectural inference as to the commission of the crime by another is not admissible.

And here, the Court found, to the extent that appellant argued on appeal that he was prevented from presenting any evidence that C. H. and K. H. were violent towards the victim or each other, the claim was meritless. The trial court allowed him to present his testimony concerning incidents that occurred prior to Noel's death. To the extent that appellant complained about evidence contained in the DFCS records, that claim was also meritless. Appellant pointed to no evidence in the DFCS records directly connecting C. H. or K. H. to Noel's death, no incidents that were the same or similar in nature to the charged offenses, and no incidents that occurred near in time to Noel's death. In fact, the DFCS records show that the incidents in question occurred three to four years *after* Noel's death. Thus, the Court concluded, the proffered evidence did not support even a bare suspicion that C. H. or K. H. killed Noel. Therefore, the trial court did not abuse its discretion in excluding the evidence from the DFCS records.

Hearsay; Excited Utterances

Munn v. State, S22A0100 (5/17/22)

Appellant was convicted of malice murder and other crimes arising out of the shooting death of Chambers. Very briefly stated, the evidence showed that children and adults were outside in an apartment complex parking lot. The children were playing. A grey car sped by and pulled into a parking space. As the driver, later identified as appellant, began walking toward the apartments, Chambers confronted appellant about almost hitting the kids playing, and the driver pulled out a weapon and pointed it at Chambers. Chambers put his hands up and asked, "You going to shoot me?" Appellant shot him to death and then drove away in another car. There were numerous eyewitnesses, including McGee and Williams.

Appellant argued that it was error for the trial court to admit the recording of the responding officer's body camera video into evidence over objection because the video contained witness statements (specifically from Williams and McGee) telling the officer that the shooter shot Chambers for no reason— which, he argued, violated his right to confrontation guaranteed by the Confrontation Clause and was inadmissible hearsay. The Court disagreed.

Here, the Court found, the officer arrived at the scene approximately ten minutes after the shooting occurred and before the ambulance had arrived. As the officer was attempting to secure the scene and putting up crime scene tape, he was asking people to get out of the way when several onlookers, including Williams and McGee, made unsolicited comments directed to the police about what had just happened, including that "he shot him for no reason" and "he did that s**t for no reason." Thus, the Court found, even if these statements were considered testimonial, both Williams and McGee testified at trial and were subject to cross-examination, so the admission of their statements did not violate the Confrontation Clause.

Nevertheless, the Court stated, because it determined that the admission of the statements on the officer's body camera footage did not violate the Confrontation Clause, normal rules regarding the admission of hearsay apply. A statement that would otherwise be excluded as hearsay may be admissible as an excited utterance, where the statement relates to a startling event and is made while the declarant was under the stress of excitement caused by the event. Furthermore, the excited utterance need not be made contemporaneously with the startling event. Rather, the court should consider the totality of the circumstances in determining whether the statement was made while the declarant was still under the stress or excitement that the startling event caused.

And here, the Court found, the video recording showed that the witnesses were screaming and crying as they made their unsolicited statements; the statements were made approximately ten minutes after the shooting, while Chambers was still on the scene bleeding to death; and the witnesses were still under the stress of the shooting. Accordingly, the Court concluded, the trial court did not abuse its discretion in admitting these statements as excited utterances.

Search Warrants; Probable Cause

Pickens v. State, A22A0042 (4/22/22)

Appellant was convicted of aggravated child molestation, aggravated sexual battery, and child molestation. He contended that the trial court erred in denying his motion to suppress. Specifically, he argued that the warrant to search his residence was invalid because the magistrate court lacked probable cause to issue it. The Court disagreed.

Briefly stated, the affidavit set out that Tatum gave her cell phone to appellant. Thereafter, photographs and video recordings of child sexual abuse began to appear on Tatum's Google account, which was associated with that phone. Tatum sought advice from Long, her sister-in-law, providing her with the username and password for the Google account, and Long contacted law enforcement. Long described what she had seen on the Google account to the law enforcement officer dispatched to the call. Using the username and password that Tatum had provided to Long, the responding officer also viewed some of the materials on the account. The officer stated in the search warrant affidavit that he saw images of child sexual abuse on the Google account, that those images displayed appellant's face and his distinctive hand tattoo. The officer also stated in the search warrant affidavit that another officer "was able to obtain a Geo tag from a picture that is on the account," which "show[ed] that the picture was taken at [a specified address]."

The Court found that the officer's statements in the warrant affidavit gave the magistrate court a substantial basis for concluding that probable cause existed to issue the search warrant. Nevertheless, appellant asserted, the search warrant affidavit contained material omissions. Specifically, he argued that the affidavit omitted the fact that the affiant officer had not corroborated aspects of the information that Tatum had provided to Long, such as Tatum's reasons for giving appellant the phone and her assertion that the Google account and phone were hers. And he argued that the affidavit omitted the fact that the specific image containing the geotag did not itself depict child sexual abuse.

The Court stated that because appellant contended that the affidavit contained material omissions, it must assume that the omitted material was truthful and reexamine the affidavit with that material added to determine whether it provided probable cause to issue a warrant. The Court found that even if Tatum's assertions to Long lacked veracity, that did not

undermine the fact that the affiant officer himself saw images of child sexual abuse on the Google account, that those images displayed appellant's face and his distinctive hand tattoo, or that the affiant officer independently confirmed appellant's identity through means such as social media. Those facts, which were all set forth in the search warrant affidavit, did not depend on Tatum's credibility, and they clearly established probable cause that appellant had engaged in acts of child sexual abuse.

In addition, the Court stated, omission of the fact that the only photograph containing a geotag did not itself depict abuse did not detract from the probable cause established by the search warrant affidavit. The magistrate court could still conclude from the totality of the circumstances set forth in the affidavit that appellant lived at the address associated with the geotag, that he likely kept digital media storage devices at his residence, and that those devices likely contained the images of child sexual abuse seen on the Google account. Keeping in mind that the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants, the Court found that, notwithstanding the alleged material omissions related to the geotagged photograph, the affidavit would have provided the magistrate a sufficient basis to find probable cause to issue a search warrant for appellant's residence.

Right to be Present; Fatal Variance

Hardy v. State, A22A0627 (4/25/22)

Appellant was convicted of one count each of violating the Computer or Electronic Pornography and Child Exploitation Prevention Act (Count 1) and attempted child molestation (Count 2). The evidence showed that a detective posed as a man with a stepdaughter and posted an advertisement on Craigslist in which the detective sought to pimp his underage stepdaughter. Appellant answered the ad and was eventually arrested.

Appellant contended that the trial court violated his rights under the Americans with Disabilities Act of 1990 ("ADA"), 42 USC § 12101 et seq., and to due process and a fair trial by failing to ensure that he could communicate effectively in light of his hearing impairment. The Court noted that prior to trial, appellant requested "a qualified interpreter for hearing impaired persons during all proceedings in this case." As a result, three sign-language interpreters were used during trial — two acted as "proceedings interpreters" and one acted as a "defense table interpreter." On the first day of trial, they arrived and met with appellant and his lawyers approximately 30 minutes before the trial started. At that time, they learned that appellant's sign-language proficiency was somewhat diminished from disuse, as a result of which the interpreters provided him with "straight English interpreting," rather than "American Sign Language," which has its own vocabulary, syntax, and grammar.

The Court stated that a defendant is denied a fair trial if interpretation errors significantly hinder his or her presentation of a defense or alter in a meaningful way the evidence submitted to the jury. Because appellant's claim on this issue was akin to a challenge to a trial court's decision regarding the appointment of an interpreter, the Court stated it would normally review the enumeration of error for abuse of discretion. However, the Court found, it did not need to decide whether the trial court abused its discretion because appellant waived appellate review of the trial court's handling of his hearing impairment by failing to raise any timely objections to the use of interpreters during his trial. The Court noted that the parties did not cite, and research did not reveal, any Georgia appellate decisions applying waiver principles in this context to a claim premised on alleged ADA violations. Nevertheless, the Court saw no reason why a criminal defendant's

decision to couch an inadequate interpretation claim as an alleged ADA violation should have any bearing on the application of waiver principles here.

Furthermore, the Court found, even if appellant had not waived this claim, he did not identify any record evidence establishing that he could not understand the proceedings sufficiently to meaningfully participate in his own defense. Absent any such prejudice, appellant's claim failed on the merits. And while appellant maintained that prejudice should be presumed based on alleged ADA violations, he cited no authority supporting that claim in the context of a criminal trial, and the Court declined to apply any such presumption here.

Appellant next contended that his trial counsel rendered ineffective assistance by failing to move for a directed verdict of acquittal based on a fatal variance between the allegations in the indictment and the proof adduced at trial. The Court noted that Count 1 of appellant's indictment alleged, in relevant part, that he "intentionally utilize[d] an internet service and electronic device to entice another person believed by [him] to be a child under 16 years of age, for the purpose of committing the act of enticing a child for indecent purposes. ..." (Capitalization omitted.) Appellant argued that there was no evidence that he (a) enticed a person he believed to be a child, (b) did so for the purpose of enticing another child for indecent purposes, or (c) communicated with a person he believed to be a child.

The Court found that appellant's first and third claims ignored the evidence in this case. While he maintained that he communicated only with the detective, who was posing as the child's stepfather, the jury was entitled to find that appellant was enticing a person he believed to be the stepdaughter through his communications with the detective/stepfather, given his question asking if the stepdaughter had seen his picture and the detective's messages to the effect that the stepdaughter "was really turned up" after seeing the picture and wanted appellant to bring wine coolers. Appellant's message asking if the stepdaughter "like[d] to give head" and stating that he had "protection" further authorized the jury to find that appellant believed that he was enticing the stepdaughter through his communications with the detective/stepfather.

Next, the Court found that appellant's second claim misread the indictment. Even if unartfully drafted, the indictment did not require a transaction involving two different children (or persons believed to be children). Given its most natural reading, the plain language of the indictment rather required the State to prove only that appellant enticed another person believed to be a child for the purpose of committing the act of enticing a child for indecent purposes, even if both were the same child. Accordingly, the Court concluded, the allegations in Count 1 adequately (a) informed appellant of the charges against him to enable him to defend himself and not be taken by surprise and (b) protected him against another prosecution for the same offense. Consequently, appellant could not establish either deficient performance or prejudice based on his trial counsel's failure to move for a directed verdict on this ground.