

## THIS WEEK:

- Reconstruction of Trial Transcripts
- Evidence of Gang Activity
- Jury Charges
- *Miranda*; Other Acts Evidence

---

### Reconstruction of Trial Transcripts; OCGA § 5-6-41

*Aaron v. State*, A22A0511 (6/7/22)

Appellant was convicted of criminal attempt to commit malice murder, possession of a knife during the commission of a felony, and other offenses. In his initial appeal, appellant contended that he had been deprived of his constitutional right to self-representation at trial, *Faretta v. California*, 422 U.S. 806, 835-36 (V) (95 S Ct 2525, 45 LE2d 562) (1975), but that the record did not reflect his unequivocal assertion of that right because a "pertinent albeit tiny portion of the trial transcript" from the morning of jury selection had been omitted. Because the transcript appeared to be incomplete, the Court remanded the case so the trial court could hold a hearing under OCGA § 5-6-41 (f) and (g) to "make the record conform to the truth." *Id.* at (f). See *Aaron v. State*, Ga. App. (Case No. A20A2001, decided January 29, 2021) (unpublished) ("*Aaron I*").

On remand, the trial court held that hearing. Crediting the testimony of the court reporter and appellant's trial counsel, which was consistent with its own recollection, the court found that the transcript was not, in fact, incomplete. Although the transcript contained an error, the court found that the court reporter had "appropriately addressed" the error, and that the transcript "now accurately reflects" what transpired. The court then concluded that appellant never made an unequivocal assertion of his right to represent himself. Therefore, the court held that its failure to hold a *Faretta* hearing was not error and did not entitle appellant to a new trial.

Appellant contended that the trial court erred in reconstructing the trial transcript, and that he is therefore entitled to a new trial. The Court stated that the process for supplementing or reconstructing a transcript is generally adequate—and the reconstructed transcript is thus deemed complete—so long as a hearing is held and testimony about the content of the missing portion is adduced from those who were present during the proceedings in question. And here, the Court found, the trial court followed the required process. The court held a hearing and heard testimony from two of the three participants in the discussion at issue as well as the court reporter who took down the proceedings. The contested portion of the transcript was, as appellant admitted, "tiny," making it far easier to reconstruct than, say,

several entire days of testimony. The trial court was able to make credibility assessments of the three witnesses and was also able to compare their testimony to the court's own recollection of the proceedings. Thus, the Court found no error in the general process the trial court used to reconstruct the transcript.

Nevertheless, appellant argued, the trial court should have held a second reconstruction hearing to allow him to call the prosecuting attorney to testify. He also contended that because the State, "without warning," elected not to call the prosecutor to testify at the initial remand hearing, the reconstruction of the transcript was necessarily incomplete. But, the Court noted, he cited no authority, and the Court could find none, that requires the court to hear testimony from every trial participant to comply with OCGA § 5-6-41 (f). In fact, citing *Mosley v. State*, 300 Ga. 521, 525 (2) (2017), the Court noted that our Supreme Court has approved a transcript reconstructed with the testimony of fewer than all the original testifying witnesses.

Moreover, the Court found, appellant had the opportunity to call the prosecutor to testify at the original remand hearing, but he opted not to do so. Having squandered that opportunity, he could not now complain that the process for reconstructing the transcript was flawed or that the transcript, as it now stands, was incomplete. Therefore, the Court found no abuse of discretion in the trial court's refusal to reopen the evidence in a second remand hearing.

Finally, appellant contended that the trial court erred by "failing to certify it was unable to recall what transpired" on the date of the *Jackson-Denno* hearing. Specifically, appellant contended that he told the trial court he wanted to represent himself at that hearing conducted a day before jury selection. But, the Court found, the court's order, which stated that the testimony at the remand hearing was consistent with its recollection, reflected that the court was able to recall the proceedings in question. Thus, the court had no basis for certifying that it was unable to recall what had transpired, and so the Court concluded, this argument was meritless.

### **Evidence of Gang Activity; OCGA § 16-15-9**

*State v. Thomas*, A22A0264 (6/7/22)

In a 45-count indictment, Thomas, Hamilton, Urena, and Waller (collectively, "appellees") were charged with, among other things, aggravated assault, armed robbery, and numerous violations of the Georgia Street Gang Terrorism and Prevention Act (OCGA § 16-15-1 et seq.). As part of its pre-trial motions, the State filed a "notice and motion" to introduce a wealth of evidence of appellees' purported gang activity gathered during its investigation, including, as relevant here, certain prior felony convictions of Thomas, Urena, and Waller. The State sought to admit this evidence pursuant to OCGA § 16-15-9 and indicated its intent to introduce each defendant's prior convictions against all appellees for purposes of proving

the existence of a criminal street gang and criminal gang activity. In the motion, the State indicated its opposition to bifurcation of the gang-related charges and to severance of appellees' trials.

Following a hearing, the trial court denied the State's motion "to admit any single defendant's conviction(s) in this multi-defendant case." Relying on *State v. Jefferson*, 302 Ga. 435 (2017), the trial court concluded that "admission of any convictions of one co-defendant is unconstitutional to the remaining three co-defendants." As a caveat to its ruling, the trial court noted that if appellees' trials were severed, it would permit the State to introduce evidence of a defendant's own convictions at that defendant's trial, but the trial court reiterated that it would not allow the introduction of "any conviction against one in a trial of all four." The State appealed.

The Court noted that OCGA § 16-15-9 provides that "the commission, adjudication, or conviction of [criminal gang activity, as defined by OCGA § 16-15-3 (1), (2)] by any member or associate of a criminal street gang shall be admissible in any trial or proceeding" "[f]or the purpose of proving the existence of a criminal street gang and criminal gang activity[.]" In *Jefferson*, our Supreme Court considered the constitutionality of OCGA § 16-15-9, ultimately deeming it unconstitutional "to the extent that it authorizes the admission of the convictions of non-testifying non-parties as evidence of a criminal street gang." *Jefferson*, 302 Ga. at 443. As the Court explained, convictions of third-party gang members "that are used to show an underlying element of another defendant's crime are among the types of 'plainly testimonial statements' that cannot be admitted into evidence without running afoul of Sixth Amendment protections where the defendant has not had a prior opportunity to conduct cross-examination and the witness is unavailable." (Citation omitted.) *Id.* at 442. Accordingly, the Court held, the trial court's finding that the prior convictions of one defendant are inadmissible against the remaining co-defendants represents a faithful application of *Jefferson*, so it affirmed that portion of the trial court's ruling.

However, the Court stated, it could not affirm the remaining portion of the trial court's ruling — namely, that a defendant's own prior convictions are inadmissible against that same defendant at the appellees' joint trial — as that ruling rests exclusively on an overly broad reading of *Jefferson*, a reading that is contradicted both by *Jefferson* itself as well as by subsequent decisions of our Supreme Court. In fact, the Court found, the Supreme Court has repeatedly emphasized the limited scope of *Jefferson*'s holding. *Jefferson* operates to exclude "evidence that third-party gang members have committed any of the [offenses enumerated in OCGA § 16-15-3]" for use as proof against a particular defendant. (Citation and punctuation omitted; emphasis in original.) *Anthony v. State*, 303 Ga. 399, 409 (8) n.16 (2018). And our Supreme Court has been quite clear that *Jefferson* is not implicated where a defendant objects to the admission of evidence of his own criminal activity (and not the criminal activity of third-party gang members. Therefore, the Court concluded, the trial court abused its discretion by relying on *Jefferson* to exclude evidence of a defendant's own prior convictions for use against that same defendant at a joint trial. Accordingly, the Court reversed that part of its ruling and remanded for further proceedings

In so holding, the Court emphasized that its decision is confined to the narrow question of whether *Jefferson* requires the wholesale exclusion of the appellees' prior convictions. While there may be good reason to exclude evidence of one defendant's own prior convictions for use against that same defendant at the appellees' joint trial, the Court stated that it concluded only that *Jefferson* does not supply such a reason. And because its holding is a limited one, its decision should not be read to express any opinion concerning whether the evidence of the prior convictions here ultimately should be excluded, a question which is reserved, at least in the first instance, to the trial court and its sound discretion. Thus, the Court left it to the appellees on remand to raise further challenges to the admissibility of the prior convictions, should they choose to do so. Likewise, the Court stated, it expressed no opinion on the State's extensive arguments, which the trial court had not yet considered, regarding the admission of the prior convictions through avenues other than OCGA § 16-15-9.

#### **Jury Charges; OCGA § 40-6-274**

*Herrington v. State*, A22A0283 (6/8/22)

Appellant was convicted of hit and run and tampering with evidence. The evidence, briefly stated, showed that early one morning, a motorist found a dead body on the side of the road. It appeared that the victim was hit by a car. A tip led the police to appellant. Appellant's vehicle had damage consistent with hitting something. When questioned, appellant stated that he thought he hit a deer.

Appellant contended that the trial court erred by failing to give his requested jury charge on OCGA § 40-6-274. The Court disagreed.

The Court stated that under the plain language of OCGA § 40-6-274, its exemption applies only to "a traffic accident in which there is no personal injury or in which no second party and no property of a second party is involved." And here, the Court found, the evidence did not "involve[ ] a traffic accident in which there is no personal injury or in which no second party and no property of a second party is involved[.]" OCGA § 40-6-274.

Nevertheless, appellant argued the exemption should extend beyond the boundaries established in the statutory text to cases where there *is* personal injury or the involvement of a second party or second party's property, but the driver does not know that. The Court stated that the Legislature certainly could have extended the protections of the statute to cover such drivers; but it didn't, and the Court is without authority to rewrite statutes.

Moreover, the Court stated, this was not a situation where it must read a "knowledge" requirement into OCGA § 40-6-274 to give that statute meaning or avoid an absurd result. As written, the statute provides an exemption from duty and protection from prosecution to drivers in certain types of accidents,

whether or not the driver knows that the accident fell into one of the delineated categories. A driver's knowledge that he falls within the statute is simply not determinative. And the Court noted, even if it were to so expand the exemption under OCGA § 40-6-274, it would not be at all clear that appellant would fall under its protection because he admitted that he realized he had hit something, which he believed to be a deer.

Thus, the Court found, appellant was not entitled to a jury charge on OCGA § 40-6-274. However, the Court noted, the trial court did instruct the jury that the jury must find all the elements of hit and run charged in the indictment, including the requirement that appellant "knowingly" failed to stop and comply with his statutory obligations under OCGA ' 40-6-270. And appellant conceded at the hearing on his motion for new trial that the elements of hit and run had been properly charged. That charge afforded appellant the foundation to which he was entitled for his lack-of-knowledge argument. And his counsel argued to the jury that appellant lacked the knowledge necessary to be convicted of hit and run. Under these circumstances, the Court concluded, the trial court did not err in declining to give appellant's requested charge on OCGA § 40-6-274.

### **Miranda; Other Acts Evidence**

*State v. Berrien*, A22A0448, A22A0449 (6/9/22)

Berrien was indicted on one count of rape. Before trial, the trial court granted the defense's motion to suppress a pre-arrest statement Berrien made to investigators without first being given *Miranda* warnings. The court also granted the State's motion under Rule 413 to admit evidence of a prior rape that Berrien was accused of. The State appealed from the suppression ruling, and Berrien cross-appealed the ruling admitting the evidence of the prior alleged rape.

The State's proffer of evidence showed that the victim reported to police that Berrien, with whom she had previously had an "on-and-off consensual sexual relationship," asked to come to her home one evening in June 2019. The victim agreed, and Berrien arrived late in the evening with two bottles of Sangria and a hookah. After finishing one glass of Sangria and starting another, the victim "began to feel as if she had no control over her body" and noticed that Berrien was looking at her "with . . . a sinister grin on his face." The victim alleged that Berrien helped her onto her bed, took off her pants, and began penetrating her vagina with his fingers. According to the victim, she asked him to stop, but he continued, and she felt "paralyzed" from the Sangria. Berrien held her in place and ultimately began "pounding" into her vagina with his penis, refusing to stop despite her repeated pleas and her effort to "block him with her hand." Afterward, the victim vomited and "began yelling at [Berrien] for what he'd done." He claimed he had done nothing wrong, and she then passed out. The next day, the victim reported the attack and underwent a sexual assault examination.

As to the statements made by Berrien, the Court noted that a person is considered to be in custody and *Miranda* warnings are required when a person is (1) formally arrested or (2) restrained to the degree associated with a formal arrest. Unless a reasonable person in the suspect's situation would perceive that he was in custody, *Miranda* warnings are not necessary. In other words, whether a person is "in custody" for *Miranda* purposes depends on whether a reasonable person in the suspect's situation would perceive that he was at liberty to terminate the interview and leave. In making this determination, courts must consider the totality of the circumstances, viewed from the standpoint of a reasonable person, without regard for the subjective views of the suspect or the interrogating officer. To this end, courts look at things like the location and duration of the questioning, statements made during the interview, and whether the suspect was physically restrained during, and released after, the questioning.

And here, the Court found, considering the totality of the circumstances, Berrien was not in custody at the time of his interview. Berrien drove himself to and from the interview, which was scheduled at a time of his choosing, and he was interviewed for less than an hour, free of physical restraints in an unlocked room, where he was allowed to keep his cell phone and was left alone for a break. He was told during the interview that he was not being "accused of" anything, and one of the detectives even referred to Berrien's leaving the station after the interview. Although he would have needed assistance to leave the building, a reasonable person in Berrien's shoes would have perceived that he was free to end the interview and leave. Consequently, because Berrien was not in custody for his interview, he was not entitled to a *Miranda* warning at that time, and the failure to give that warning was not a valid basis for suppressing his statements made during the interview. Accordingly, the Court reversed the trial court's order suppressing Berrien's statement.

In his cross-appeal, Berrien contended that the trial court erred in admitting evidence of his alleged sexual assault on S. R. under OCGA § 24-4-413. He contended that the evidence was not relevant and will be unduly prejudicial, noting that investigators declined to pursue criminal charges. The Court disagreed.

The Court noted that the State's proffer showed that S. R. went to a medical center in February 2019 for a sexual-assault examination. She reported to police that the previous night, Berrien, whom she described as a "friend" that she had known "for about a month," had come to her apartment to have drinks and smoke marijuana. She recalled falling asleep with her clothes on, but woke up the next morning in her bed, unclothed, "[feeling] like she had had sex." When Berrien was later interviewed by police, he admitted to having sex with S. R., but he claimed it was consensual. The police ultimately declined to bring charges.

Berrien first contended that the evidence was not relevant because he was never charged with any crime and thus "there was no evidence presented that an offense of sexual assault occurred." But, the

Court stated, criminal charges are not required for the admission of other acts evidence under OCGA § 24-4-413. Rather, it is enough that the evidence would enable a jury to find by a preponderance of the evidence that the defendant committed the other offense. And here, the State proffered S. R.'s testimony detailing the assault, and the police report reflects that Berrien admitted he had sex with S. R. on the night in question. If offered at trial, this evidence would be sufficient for a jury to find by a preponderance of the evidence that Berrien had non-consensual sex with S. R. while she was intoxicated and unconscious. Therefore, because this evidence bears on Berrien's propensity to engage in non-consensual sex, it would be relevant here, where consent is an essential element of the charged offense and is the primary issue in dispute.

Nevertheless, Berrien argued, the evidence should be excluded because its probative value will be substantially outweighed by the risk that it would unfairly prejudice him at trial. The Court stated that the probative value of the evidence is substantial. The probative value of specific evidence depends on two things: (1) the need to establish the fact for which the evidence is offered, which in turn depends on that fact's significance in the case and whether that fact is disputed, and (2) the "marginal worth" of the evidence in establishing the fact, which depends on what other evidence is available. Here, the issue of consent is both essential and disputed, so the need to establish this fact is strong. And the marginal worth of the other-act evidence is high because the other available evidence on consent just pits the victim's word against Berrien's.

And on the other side of the ledger, the Court found, the risk of unfair prejudice from this evidence is relatively low. The four-month time span between the prior act and the crime charged here was short and so did not support a finding of undue prejudice. And the similarity between the two incidents—each involving allegations that Berrien had sex with unconscious victims who had become intoxicated in his company—minimizes the risk of inflaming the jury based only on the accused's general propensity towards criminality. Therefore, the Court concluded, the trial court's determination that this evidence was admissible under Rule 413 was not an abuse of discretion.