

THIS WEEK:

- **Rule 609; Prosecutorial Misstatements**
- **Sufficiency of the Evidence; First Degree Child Cruelty**
- **Sufficiency of the Evidence; Joining Issue**
- **Juveniles; Jurisdiction of Offenses**

Rule 609; Prosecutorial Misstatements

Lawson v. State, A22A1100 (8/19/22)

Appellant was convicted of one count of aggravated child molestation. He contended that the trial court erred in admitting his prior convictions for impeachment purposes. The Court disagreed.

The Court noted that OCGA § 24-6-609 (a) (1) provides, in part, that evidence that an accused (who testifies) has been convicted of a crime punishable by death or imprisonment in excess of one year “shall be admitted if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the accused.” Furthermore, the introduction of evidence of a prior felony conviction is intended to afford the jury a basis to infer that the witness's character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. In other words, the introduction of evidence of a prior crime is a general attack on the credibility of the witness. Moreover, under our prior evidence code, Georgia trial courts undertaking the balancing test to determine if a prior conviction was admissible for impeachment purposes were to consider factors including: (1) the kind of felony involved and its impeachment value, (2) the time of the conviction and the defendant's subsequent history, (3) the similarity between the past crime and the charged crime (lest evidence of a similar crime create an unacceptable risk of prejudice); (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue.

Furthermore, the Court stated, while our current evidence code does not require trial courts to engage in this test, these factors continue to be a useful guide in making such a determination because federal courts have employed them under a prior version of the federal evidence rule that is substantively similar to our new evidentiary rule. In any event, a trial court's decision to admit a defendant's prior conviction under OCGA § 24-6-609 (a) (1) is reviewed for an abuse of discretion.

And here, the Court found, after hearing argument from the parties, the trial court determined the probative value of appellant's two prior convictions outweighed any prejudicial effect. In doing so, the court noted that the prior convictions—aggravated assault and possession of cocaine with intent to distribute—were not crimes of dishonesty but they were also not similar in nature to the offense for which appellant was being tried. Additionally, while not specifically noted by the trial court, appellant's credibility versus that of the victim was certainly important, especially given the victim's initial accusation against her cousin and appellant's attempt to explain how his semen was found inside the victim's vagina. Furthermore, before the State cross examined appellant, the trial court instructed the jury that his prior convictions were only being admitted for impeachment purposes; and during its jury charge, the court further instructed that credibility and whether a witness was impeached was solely for the jury to decide. Accordingly, the trial court did not abuse its discretion in admitting appellant's prior convictions into evidence for the purpose of generally attacking his credibility.

Nevertheless, appellant contended, his trial counsel rendered ineffective assistance by not objecting to the State's cross-examination of him. Specifically, during the State's cross examination, the prosecutor asked appellant about his two prior convictions, which appellant acknowledged. Immediately following that acknowledgment, the prosecutor asked: "And do you understand that under Georgia law that means that you're not entitled to belief; do you understand that?" Defense counsel did not object to this question, and appellant responded that he was unaware of this. The State asked no additional questions.

The Court stated that it agreed with appellant the State's question was not an accurate statement of the law. However, it was of no consequence. Even if trial counsel's failure to object constituted deficient performance, appellant failed to show that the error was so serious that it likely affected the outcome of the trial. Simply because a defendant has shown that his trial counsel performed deficiently does not lead to an automatic conclusion that he was prejudiced by counsel's deficient performance. And here, the Court found, the victim testified that appellant sexually assaulted her, and the sexual assault examination at the hospital indicated bruising to her vagina consistent with the manner of sexual abuse she described. Significantly, the DNA from semen found inside her vagina during the sexual assault examination matched DNA samples collected from appellant by law enforcement. Given these particular circumstances, the evidence supporting appellant's conviction was substantial, and, therefore, he failed to demonstrate a reasonable probability that, but for the alleged deficiency, the trial would have resulted in a different outcome. Thus, the trial court did not err in denying his claim of ineffective assistance of counsel.

Sufficiency of the Evidence; First Degree Child Cruelty

Flakes v. State, A22A1133 (8/19/22)

Appellant was convicted of cruelty to children in the first degree (OCGA §16-5-70 (b)) and criminal damage to property in the second degree. The evidence showed that appellant and his wife were dining at the same restaurant as the victims, M. G., her 16-year-old nephew, Z. C., and her daughter, C. S. Due to health problems, C. S. was coughing repeatedly. Appellant became agitated about the coughing and began to make derogatory comments. In response, M. G. explained the cough was not contagious, and moved her party to another section of the restaurant. Shortly thereafter, appellant approached their table, shouted obscenities, and threatened M. G. M. G. stood and asked appellant to leave them alone; instead, appellant spat in M. G.'s face and then threw his milkshake in her face. Appellant punched M. G. in the head multiple times, knocking her to the ground, and, when Z. C. attempted to break up the altercation, he struck Z. C. in the face twice. After appellant was pulled away by the restaurant employees, he struck M. G.'s phone out of her hand while she was attempting to call 911, destroying the phone. Appellant then fled the scene in his vehicle but was later apprehended at his home after a standoff.

Appellant argued that the evidence was insufficient to support this conviction for cruelty to children in the first degree because there was no showing that he knew Z. C. was under the age of 18, and therefore the intent element of the offense was lacking in this respect. However, the Court found, based on a plain reading of OCGA § 16-5-70 (b), there is no requirement to prove knowledge of the victim's age as an essential element of the offense. Rather, the only express term in the statute demonstrating any required mental state is "maliciously." OCGA § 16-5-70 (b). The basic elements of the offense must be shown by evidence establishing the age of the child, that the child suffered physical or mental pain, that the pain was cruel or excessive, that the defendant caused the pain, and that the defendant acted maliciously in so doing.

Nevertheless, appellant contended, to show malice, the State must prove he knew the victim's age. The Court disagreed. For the purposes of the child cruelty statute, malice implies the absence of all elements of justification or excuse and the presence of an actual intent to cause the particular harm produced, or the wanton and willful doing of an act with an awareness of a plain and strong likelihood that such harm may result. Thus, to act "maliciously" under the statute is to act

with the intent to cause harm or with an awareness that harm may result, not with an intent to harm a person the defendant knows to be a minor. Moreover, intent to cause the particular harm is peculiarly a question for the jury in child cruelty cases.

Furthermore, the Court stated, our rules of statutory interpretation dictate that it cannot simply add a knowledge element to the statute. Here, the plain language of OCGA § 16-5-70 (b) contains no knowledge requirement as to the child's age, and the Court declined to interpolate one. Thus, the Court concluded, the evidence was sufficient to support his conviction.

Sufficiency of the Evidence; Joining Issue

Watson v. State, A22A0772 (8/22/22)

Appellant was convicted of trafficking in heroin. He argued that the evidence was not properly before the Court because issue was not joined until after the testimony establishing the identity and weight of the suspected heroin. Consequently, he contended, the State failed to prove an essential element necessary to support his trafficking conviction. The State conceded that issue was not joined until after its crime lab witness testified, but nevertheless maintained the conviction should not be reversed because the issue was first raised in appellant's motion for new trial.

The Court stated that OCGA § 17-7-96, which governs the joining of issue, provides that “[t]he arraignment and plea of the person accused of committing a crime shall be entered on the indictment or accusation by the prosecuting attorney or other person acting as prosecuting officer on the part of the [S]tate.” The failure to object to a late arraignment before the verdict, however, is fatal to the claimed error that issue was not joined in a timely manner. The Court noted that in *Moss v. State*, 298 Ga. 613 (2016), the defendant was arraigned after the close of evidence but before the court sent the indictment back with the jury. There, the Supreme Court of Georgia stated that, because Moss never objected at trial to the lack of an earlier arraignment, any error in the lack of arraignment was waived by his failure to raise the issue prior to verdict. Moreover, Moss's rights were not affected by the late arraignment, as he did not assert that he was unaware of the charges against him, both sides participated in discovery and filed motions, and it was clear from his proceeding to trial that he was offering a plea of not guilty.

Accordingly, the Court concluded, based on *Moss*, appellant's failure to raise the issue or object before the verdict amounts to a waiver of the issue and was fatal to his claimed error.

Juveniles; Jurisdiction of Offenses

In re R. J. A., A22A1062 (8/22/22)

In March 2019, appellant was arrested for a rape which occurred when he was 16 years old. In April 2019, he was granted a bond which required a GPS ankle monitor and stated that he “shall only be allowed to leave his home for the purposes of school, work, necessary legal and medical appointments and one religious service per week.” In October 2019, he was indicted for the rape and a weapons violation. In December 2019, the superior court granted appellant's motion to transfer the case to juvenile court under OCGA § 17-7-50.1 because the State did not indict him within 180 days of his detention. The State consented to the transfer. On October 14, the State filed a delinquency petition against appellant, but 12 days later, moved to transfer the case back to superior court. The juvenile court agreed and entered a transfer order. Appellant appealed.

Initially, the State argued that the Court did not have jurisdiction over the appeal under OCGA § 15-11-564 (a), which allows for a direct appeal, rather than an interlocutory appeal, in a case in which juveniles filed a direct appeal from a

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juvenile court's order granting the State's motion to transfer their delinquency cases to superior court. The State argued that OCGA § 15-11-564 (a) did not apply because the order on appeal was not, in the State's words, "a traditional transfer of the case" under OCGA §§ 15-11-561 and 15-11-562, which pertain to a juvenile court's optional transfer of a delinquency action over which it had concurrent jurisdiction with the superior court. Instead, the juvenile court transferred the case back to the superior court on what were essentially jurisdictional grounds under OCGA § 15-11-560, which establishes the jurisdiction of superior courts and juvenile courts in cases involving felony allegations against juveniles. But, the Court noted, the State made no meaningful argument for why it should exclude a transfer for lack of jurisdiction from the direct appellate review permitted in OCGA § 15-11-564 (a).

The Court stated that the correctness of the juvenile court's decision to transfer the case back to the superior court broke down into three more fundamental questions: Could the juvenile court decide for itself whether it had jurisdiction to adjudicate the claims against appellant? If so, did the juvenile court lack jurisdiction to adjudicate those claims? And finally, if it lacked jurisdiction, was the juvenile court authorized to transfer the case back to the superior court? As to the first question, the Court stated that it is always the duty of a court to inquire into its jurisdiction and as between courts neither of which has corrective power over the other, one cannot render a judgment binding the other to assume jurisdiction of a case when it has none.

Next, the Court addressed whether the juvenile court lacked jurisdiction to adjudicate the case. The Court held that because appellant was released and remained on bond prior to the running of 180 days, he was not detained within the meaning of OCGA § 17-7-50.1. Consequently, the case did not run afoul of the time limitation set by that Code section. Therefore, even though the superior court cited OCGA § 17-7-50.1 as the basis for transferring the case to the juvenile court, the superior court continued to have exclusive jurisdiction over the case. The transfer did not have the effect of vesting jurisdiction in the juvenile court, and the fact that the State consented to the transfer did not alter this conclusion because parties cannot, by their consent, confer subject matter jurisdiction on a court that does not otherwise have it.

Finally, the Court stated, to the extent appellant argued that the juvenile court had no authority to transfer the case back to the superior court, it disagreed. "The juvenile court shall have jurisdiction to act as a court of inquiry with all of the powers and rights allowed courts of inquiry in this state[.]" OCGA § 15-11-7 (a). Among other things, a court of inquiry has a duty "to require [an accused] to appear and answer before the court competent to try him." OCGA § 17-7-23 (a). The Court was also not persuaded by appellant's arguments that the State should have taken different actions, such as directly appealing from the superior court's transfer order, rather than asking the juvenile court to transfer the case back. These arguments did not affect the juvenile court's jurisdiction, nor did they preclude the juvenile court from transferring the case to a court that can exercise jurisdiction over the trial.