

## THIS WEEK:

- **Failure to Follow Precedent; Extraordinary Motions for New Trial**
- **Severance; Jury Charges**
- **Rule 807; Right of Confrontation**
- **Rule 404 (b); Identity**

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### Failure to Follow Precedent; Extraordinary Motions for New Trial

*Esposito v. State, S22D1240, S23A0104 (11/29/22)*

Appellant, who had been convicted of murder over 20 years ago, filed an extraordinary motion for new trial seeking DNA testing on two tree limbs and a pair of eyeglasses. The trial court, using an order prepared by the State, denied the motion on three alternative grounds. The first ground was that pursuant to OCGA § 5-5-41 (c) (7)(B), appellant failed to show the evidence has not been “altered in any material respect” regarding the two tree limbs and the eyeglasses. Specifically, appellant failed to show that the DNA of others has not been transferred to the objects over the past twenty years. In so deciding, the order noted that a decision by the Court of Appeals in *White v. State*, 346 Ga. App. 448, 455-456 (2) (2018) was contrary to its findings.

Appellant sought discretionary review. The State actively defended before the Court in its response to appellant's application with the following statement: “To the extent that *White* holds in contravention of the plain language of the statute, it was not binding on the trial court.” The Court granted appellant’s application on the issue of whether a trial court may refuse to follow a precedent of the Court of Appeals based solely on the trial court's disagreement with that precedent.

The Court determined that the Georgia Constitution states clearly: “The decisions of the Court of Appeals insofar as not in conflict with those of the Supreme Court shall bind all courts except the Supreme Court as precedents.” Ga. Const. of 1983, Art. VI, Sec. V., Par. III. Thus, the Court held, this provision in the Georgia Constitution plainly answers the question presented for review in the negative and that trial courts must follow the precedents of the Georgia Court of Appeals. In so holding, the Court noted that the State’s brief contained the following: “After further analysis and review of the issue, the State concedes it was in error and should not have made this argument to the trial court.”

Nevertheless, the Court found, despite the “serious flaw” of the trial court’s analysis as to the first ground for denying the motion, its review of appellant’s application revealed no apparent reversible error in the trial court's disposition of the other two alternative bases. Accordingly, as there remained no basis for considering appellant's appeal further, the Court vacated its prior order granting appellant's application for discretionary appeal, denied the application, and dismissed the pending appeal.

## Severance; Jury Charges

*Young v. State, S22A0969 (11/29/22)*

Appellant was convicted of felony murder and other crimes in connection with the shooting death of her husband. The evidence showed that she was having an affair with her codefendant Lee, who was living in the house with her and the victim, and that the two killed the victim to collect on the victim's \$1,000,000.00 life insurance policy.

Appellant contended that the trial court abused its discretion by denying appellant's pretrial motion to sever her trial from the trial of Lee because the evidence against Lee was strong and was unfairly counted against her. The Court stated that a trial court has the discretion to try jointly or separately defendants that have been jointly indicted for a felony where the death penalty is not sought. The relevant factors in ruling on a motion to sever are: (1) the likelihood of confusion of the evidence and law; (2) the possibility that evidence against one defendant may be considered against the other defendant; and (3) the presence or absence of antagonistic defenses. To show error in the denial of the motion to sever, appellant bears the burden of establishing that a joint trial was so prejudicial as to amount to a denial of her right to due process.

The Court noted that appellant and Lee were charged with the same offenses arising from the same incident, except for appellant's additional attempt to tamper with evidence charges, and the State alleged that the two conspired to kill the victim. As such, much of the evidence introduced at the joint trial was applicable to and admissible against both appellant and Lee, and there was not a high likelihood of confusion of the evidence and law.

Further, appellant and Lee did not raise antagonistic defenses, such as each one saying the other shot the victim, nor did appellant show the existence of a potentially antagonistic defense that prejudiced her trial. Moreover, appellant did not show that the outcome of her trial would have been different had she been tried separately from Lee nor that she was prejudiced by the joint trial. Accordingly, the Court concluded, appellant failed to show that the trial court abused its discretion in denying her motion to sever.

Appellant also argued that the trial court erred by improperly charging the jury on her felony and misdemeanor attempted tampering with evidence charges, thereby depriving her of due process. The Court noted that the indictment alleged that appellant took steps to conceal evidence "with the intent to prevent the apprehension" of Lee and herself, but the trial court also charged the jury using language from OCGA § 16-10-94 that tampering with evidence may be found if the intent was also to "cause the wrongful apprehension of any person or to obstruct the prosecution of any person[.]"

Nevertheless, the trial court read appellant's full indictment to the jury at the beginning of the trial and instructed the jury during the jury charge to carefully read and examine the indictment, which was sent back with the jury for deliberations. The trial court also charged the jury that each element of each crime must be proven beyond a reasonable doubt. As such, the Court held, any error in the jury charge's deviation from the indictment language was harmless because there was no reasonable probability that the jury could have convicted appellant based on the deviation from the indictment.

## Rule 807; Right of Confrontation

*Carter v. State, S22A1068 (11/29/22)*

Appellant was convicted of malice murder and possession of a knife during the commission of a felony in connection with the death of his 81-year-old grandmother. The relevant evidence showed that the State called numerous witnesses to testify to the nature of the victim and appellant's relationship prior to the victim's death. Carter, a social worker employed at the county medical center, with no apparent relation to appellant, testified that on May 25, 2018, approximately three weeks before her death, the victim visited the center to express her "concerns [and] emotions regarding her grandson." The

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victim told Carter that she was afraid of appellant, wanted him out of her home, and that appellant was verbally and emotionally abusive. Carter testified that the victim asked her not to contact the police because she did not want to involve law enforcement out of concern for appellant's safety. Carter further testified that the victim appeared frail, scared, and confused during the visit.

Fox, a close friend of the victim's, also testified at trial. Fox testified that, about six months before the victim's death, The victim expressed that she was afraid of appellant and that appellant had threatened to kill her. The victim also told Fox that if anything ever happened to her, "[Appellant] did it." Fox further testified that she had asked the victim why appellant was still staying with her, and the victim replied, "I just don't want to put him out because he ain't got nowhere to go."

Appellant contended that the trial court erred in allowing the testimony of Carter and Fox pursuant to Rule 807. The Court noted that OCGA § 24-8-807 provides in pertinent part that "a statement not specifically covered by any law but having equivalent circumstantial guarantees of trustworthiness shall not be excluded by the hearsay rule" upon the trial court's determination that the declarant is unavailable to testify and that "the interests of justice will best be served by admission of the statement into evidence." Whether there are exceptional guarantees of trustworthiness is a determination that focuses on the declarant and the circumstances under which the declarant made the statement to the witness. Such guarantees of trustworthiness must be equivalent to cross-examined former testimony, statements under a belief of impending death, statements against interest, and statements of personal or family history as these categories of hearsay have attributes of trustworthiness not possessed by the general run of hearsay statements that tip the balance in favor of introducing the information if the declarant is unavailable to testify. The Court noted that it has previously upheld the introduction of out of court statements under the residual hearsay exception where the trial court determined that the statements were trustworthy because of the unavailable declarant's "close relationship" with the witness, because the unavailable declarant had no reason to concoct a story, and because the unavailable declarant made consistent statements to multiple witnesses. The Court also stated that although Rule 807 is to be used very rarely and only in exceptional circumstances, it will not overturn a trial court's finding that the statement is admissible under the residual hearsay exception absent a finding that the trial court abused its discretion.

And here, the Court found, the trial court did not abuse its discretion in admitting the victim's out of court statements. The record showed that the victim had a close relationship to Fox and revealed that she had no motive to lie to Fox and Carter about her issues with appellant. Therefore, the trial court was authorized to conclude that there were circumstantial guarantees of trustworthiness such that it could admit the victim's out of court statements under Rule 807. Although the trial court noted concern that the victim had appeared confused and was possibly suffering from dementia when she made the out of court statements to Carter and Fox, the trial court found that her mental state did not impair the trustworthiness of her statements and uncertainty about an unavailable declarant's mental state alone is not sufficient for the Court to overturn the trial court's admissibility ruling when other factors of trustworthiness support the trial court's exercise of discretion in applying Rule 807.

Appellant also argued that the trial court erred in admitting the testimony of Carter and Fox under the Confrontation Clause. The Court noted that the Confrontation Clause generally prohibits the admission of out-of-court testimonial statements made by a declarant who is unavailable for cross-examination. A statement is testimonial if its primary purpose was to establish evidence that could be used in a future prosecution. Nontestimonial statements include statements made to law enforcement that are intended to describe current circumstances that required immediate police action.

Here, the Court found, the victim's statements to Carter concerning appellant's emotional and verbal abuse and her desire to get appellant out of her home were not testimonial, as they were not made to assist a future prosecution. Rather, the record showed that the victim specifically requested that Carter not contact law enforcement because she did not want to incriminate appellant. Similarly, the victim's statement to Fox indicating that if anything ever happened to her, "[Appellant]

did it,” was nontestimonial as the statement was made to a friend without any expectation that the statement would be later used at a trial. Thus, the victim's statements were nontestimonial in nature. Therefore, the Court concluded, the Confrontation Clause was inapplicable, and appellant's claim of a Confrontation Clause violation failed.

## **Rule 404 (b); Identity**

*Allen v. State, A22A0969 (10/12/22)*

After his first trial ended in a mistrial, appellant was convicted of armed robbery, aggravated assault, and other crimes. The evidence, very briefly stated, showed that on July 8, 2016, two men approached a man, his wife and child, as they walked in a parking lot at approximately 10 p.m. The two men, wearing white shirts and shorts, pointed guns at the two adult victims and robbed them. A second armed robbery occurred less than two weeks later at a convenience store about a mile away from the first crime scene. A videotape of this second robbery showed that one of the robbers was wearing a distinctive pair of shoes. Police posted still images from this video on the department's Facebook page. Acting on a tip, police identified appellant as he came out of an area grocery store and arrested him. At the time of his arrest, appellant was wearing the same shoes as in the video of the second robbery. After appellant's arrest as to the second robbery, the male victim, who had recognized appellant from the Facebook post, picked his mug shot out of a photo lineup. The male victim also identified appellant at trial as one of the two men who had robbed him but did not identify any shoes or hat that appellant may have worn at that time. The female victim never identified appellant.

Over appellant's repeated objections, the State was permitted under Rule 404 (b) to use evidence of the convenience store robbery for the limited purpose of proving identity. Appellant contended that this evidence of the second robbery, including the videotape, the still photographs taken from it, and the shoes seen there and worn by appellant at the time of his apprehension, had no probative value and that the admission of this highly prejudicial evidence required a new trial. The Court agreed.

The Court stated that although the State argued that the videotape was admissible to establish not only appellant's identity but also the police's “actions in helping identify the suspect,” the law is clear that evidence of the conduct of police officers during an investigation is not admissible when that conduct is not relevant to the issues at trial — here, whether appellant committed the first armed robbery against these two victims. Further, other acts evidence offered for the purpose of showing identity must be so similar as to demonstrate that the other act and the charged offense were “signature crimes,” with the defendant using a modus operandi that is uniquely his.

Next, the Court noted that the State's proffered justification for the introduction of the video of the second robbery was the establishment of generic “similarities” between the two robberies, including the two men's use of guns, their wearing of shorts (in July), their flight on foot, and the mere days between the two crimes occurring in the same town. However, the Court stated, much more is demanded in order to authorize the admission of identity evidence than the mere repeated commission of crimes of the same class, such as repeated murders, robberies, or rapes. Furthermore, the prosecutorial need for the introduction of the second video was minimal: the male victim repeatedly identified appellant as his assailant, and the State was not authorized to use evidence of the second robbery for any purpose other than establishing his identity. Therefore, the Court concluded, the trial court abused its discretion when it authorized the repeated playing of a videotape of the second robbery, the probative value of which was substantially outweighed by the danger of undue prejudice.

Finally, the Court addressed whether the error was harmless. Here, the Court found, the record showed that although the male victim claimed to be “a hundred percent” certain of his identification of appellant in the second photo lineup, and although he identified appellant as his attacker in the second trial, he expressed doubt about this identification while under oath in the first trial. Although this recantation was explained at the second trial as the product of fear, the fact remained

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that no physical evidence, such as stolen goods or a weapon, was recovered or introduced, such that the only relevant and admissible evidence establishing appellant as a perpetrator of the first robbery was the male victim's identification of him.

Moreover, the jury was improperly charged that the second robbery could be used for the purpose of identity, and the prosecution emphasized appellant's identity in the first crime as proved by the video of the second, which amounted to precisely the kind of propensity argument that Rule 404 (b) is designed to guard against. Consequently, the Court could not say that the evidence against appellant was so overwhelming, or the improper character evidence was so marginal, that the jury's verdict was not likely to be impacted. Therefore, the Court vacated appellant's convictions, reversed the trial court's denial of appellant's motion for new trial, and remanded the case for a new trial.