

THIS WEEK:

- **Street Gang Prosecutions; Rule 418**
- **Evidence of Pornographic Material; Relevance**
- **Ineffective Assistance of Counsel; Evidentiary Decisions**
- **Ineffective Assistance of Counsel; Jury Charges**

Street Gang Prosecutions; Rule 418

State v. McKinney, A22A1509 (11/29/22)

McKinney and Conley were indicted on twelve counts of violating Georgia's Street Gang Terrorism and Prevention Act, two counts of aggravated assault, and one count each of possession of a firearm during the commission of a felony and possession of a firearm by a convicted felon. The offenses related to incidents occurring in June 2020. The State filed its notice of intent to introduce evidence of prior criminal gang activity pursuant to OCGA §§ 16-15-1 et seq., and 24-4-418. The State originally sought to introduce three prior acts against McKinney: (1) an incident occurring on February 13, 2016, when McKinney shot himself in the foot with a 9mm pistol and then hid the gun in nearby bushes; (2) an incident occurring on May 4, 2015, when McKinney took a stolen firearm to school in Hazelwood, Missouri, and pointed it at a classmate's head; and (3) an incident occurring on April 3, 2017, when McKinney robbed two victims at gunpoint of an iPhone7.

After a hearing, the trial court granted the request as to the third incident, but not as to the first two. The trial court found that "in reading OCGA § 24-4-418 and its reference to OCGA §§ 16-5-3 and 16-15-4 and those statutes in conjunction with one another that a nexus between the prior act and an intent to further gang activity must be established for the evidence to be admissible under OCGA § 24-4-418 in this case" and the first two incidents did not show that nexus. The State appealed.

The State contended that the trial court's ruling ignored the plain text of Rule 418 and legislative intent. In particular, the State argued that in excluding the two alleged prior gang acts, the trial court ignored subsection (1) (J) of Code section 16-15-3, which establishes that "criminal gang activity" includes "[a]ny criminal offense in the State of Georgia, any other state, or the United States that involves violence, possession of a weapon, or use of a weapon, whether designated as a felony or not, and regardless of the maximum sentence that could be imposed or actually was imposed."

The Court noted that Rule 418 has not been cited by our appellate courts and has never been substantively construed. In applying the well know principles of statutory construction, the Court concluded that the State's interpretation of the statute is correct and that evidence of criminal gang activity that shall be admitted under Rule 418 is that activity defined in OCGA § 16-15-3. On its face, the statute does not require a nexus between a defendant's commission of the predicate act and an intent to further the gang activity. Therefore, the Court concluded, the trial court erred in excluding the prior acts on this basis.

Nevertheless, the Court stated, Rule 418 must be viewed within the broader context of the Evidence Code. Although an appellate court of this State has never expressly held that the trial court must apply the balancing test set forth in Rule 403, in deciding whether to admit the alleged prior acts of criminal gang activity under Rule 418, the Supreme Court of Georgia

approved of its use in *Overstreet v. State*, 312 Ga. 565, 575-576 (2) (2021). Accordingly, the Court remanded the case to the trial court for a determination of the admissibility of the alleged prior acts of criminal gang activity under Rule 403.

Evidence of Pornographic Material; Relevance

Rider v. State, A22A1727 (12/2/22)

Appellant was convicted of multiple sex offenses against three children who were siblings as well as drug offenses. The evidence showed that the children's parents were friends with appellant, who also was the mother's drug dealer. The children were repeatedly left alone with appellant at his house, where appellant abused each of them separately and on different occasions in his bedroom.

Relying solely on *Simpson v. State*, 271 Ga. 772 (1999), appellant argued that the seizure of legal adult pornography from his bedroom in connection with the execution of the search warrant was improper and that the trial court thus should have granted his motion to suppress. However, the Court stated, *Simpson* addressed the admissibility of sexually explicit material at trial under the rules of evidence, not whether such material can be lawfully and constitutionally seized by the police when executing a search warrant.

Nevertheless, appellant contended, *Simpson* mandated that evidence of adult pornography found in his bedroom was not relevant in a child molestation case. Furthermore, he argued, because the evidence of the pornography was inadmissible under the rule set out in *Simpson*, the admission of the evidence was unfairly prejudicial. The Court disagreed.

The Court noted that appellant was tried in 2015 and *Simpson* was decided long before the enactment of Georgia's new Evidence Code and relied on general principles pertaining to relevance, character evidence, and prejudice - considerations that are now specifically controlled by the new Evidence Code. And under Rule 401 of our new Evidence Code, the trial court acted within its discretion in allowing the State to introduce evidence of the pornography found in appellant's bedroom. Evidence of the pornographic movies and magazines was relevant and highly probative because it corroborated the children's claims that appellant had such movies and magazines in his bedroom and showed those materials to them. Furthermore, given that appellant was specifically charged with several counts of child molestation based on allegations that he showed the children images of adult pornography, evidence of the pornography found in his bedroom was relevant and carried significant probative weight because it assisted the State in proving those allegations. Additionally, the Court noted, only a few photographs of the seized pornographic movies and magazines were introduced into evidence; the movies and magazines were not themselves admitted into evidence and played or shown to the jury.

Accordingly, the Court concluded, under these circumstances, the trial court was authorized to find that evidence of the pornographic movies and magazines found in appellant's bedroom was relevant and probative under Rule 401, and that the probative value of the pornography was not substantially outweighed by the danger of unfair prejudice under Rule 403. Therefore, the Court held, the trial court did not err in admitting the pornographic materials at trial.

Ineffective Assistance of Counsel; Evidentiary Decisions

Aitken v. State, A22A1264 (12/9/22)

Appellant was convicted of multiple counts of child molestation and aggravated child molestation for acts against J. P. and R. B. The evidence showed that the two victims were skateboarders who knew appellant because he started a skateboard company, sponsored teams for skaters (including pre-teens and teenagers) and built a skateboard park near his loft apartment. Skaters regularly spent time and stayed the night at appellant's loft. There, skaters, including those who were underage, drank alcohol and smoked marijuana at the loft. The criminal conduct occurred in the loft by appellant while

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the victims were intoxicated and/or drugged. Revelation of the molestation of both victims came to light years after the conduct occurred.

In March 2016, J. P. was arrested for theft of a controlled substance. Appellant contended that J. P. gave false statements to law enforcement during that arrest, and he argued, his trial counsel was deficient for failing to cross-examine J. P. on those statements under OCGA § 24-6-608 (b) (1). However, the Court stated, OCGA § 24-6-608 (b) places the decision whether to admit specific instances of conduct within the trial court's discretion, and in denying appellant's motion for new trial, the trial court stated that he would not have permitted this line of cross-examination. Also, trial counsel thoroughly tested J. P.'s credibility through other avenues of cross-examination, satisfying any Sixth Amendment concerns. Thus, the Court found, because appellant failed to establish that questions regarding J. P.'s statements to police during his March 2016 arrest would have been allowed at trial, he did not carry his burden to show that trial counsel performed deficiently.

Moreover, the Court found, even though appellant's trial counsel testified at the new trial hearing that he had no strategic reason for failing to pursue impeachment of J. P. in this manner, that testimony was not enough to overcome the strong presumption of reasonable performance by showing that no reasonable lawyer would have done what his lawyer did or would have failed to do what his lawyer did not. Decisions about what questions to ask on cross-examination are quintessential trial strategy and will rarely constitute ineffective assistance of counsel, and the Court could not say that trial counsel's decision not to cross-examine J. P. about inconsistent statements that he made to police in an unrelated matter was so patently unreasonable that no competent attorney would have followed such a course, especially given trial counsel's robust efforts to challenge J. P.'s credibility in other ways.

Nevertheless, appellant argued, the Court must also consider if trial counsel's alleged failures resulted from inadequate preparation rather than from unwise choices of trial tactics and strategy. The Court agreed but found nothing in the record suggesting that inadequate preparation was behind the failure of appellant's trial counsel to cross-examine J. P. on the statements he made during his March 2016 arrest.

Next, appellant argued that his trial counsel was ineffective for failing to introduce expert testimony on the authenticity of a Facebook post that R. B. sent appellant shortly after R. B. took marijuana from appellant's loft. In that post, which was not admitted at trial but was included in the record for purposes of appeal, R. B. apologized to appellant for stealing from him, expressed admiration and respect for him, and stated that he trusted him. The defense sought to use the Facebook post to discredit R. B. and undermine his outcry.

The Court noted that appellant's trial counsel tried to admit the post into evidence as an exhibit during appellant's trial testimony. At that point in the trial, both R. B. and appellant had already testified about the post. R. B. testified that he wrote appellant a message apologizing for taking the marijuana, but he did not recall specific details about the message. When shown the Facebook post, R. B. testified that he did not recognize it and did not recall writing it, but he agreed that he "probably said" some of the comments found in that post, including that he respected, trusted, and looked up to appellant. Appellant testified that R. B. had sent him an apology via Facebook and identified the Facebook post as a true and accurate copy of the message R. B. had sent him. The trial court sustained the State's objection to the admission of the Facebook post on hearsay grounds. When appellant's trial counsel argued that the purpose of the exhibit was to establish that R. B. had made prior inconsistent statements, the trial court responded that counsel could ask appellant about the post but that the court was "not going to admit the whole exhibit." Trial counsel then asked appellant questions about the post.

During closing argument, the prosecutor questioned the authenticity of the Facebook post, stating that R. B. "could not authenticate [it] on the stand probably because it's not a real Facebook message." In fact, before trial appellant's trial

counsel had obtained an expert opinion that the message was authentic, but he did not present that evidence at trial. Trial counsel testified at the hearing on the motion for new trial that he had no strategic reason for not presenting the authentication evidence and characterized it as a “complete screwup on [his] part.”

Appellant argued that, had his trial counsel presented the authentication evidence, he would have succeeded in getting the Facebook post admitted as a trial exhibit. But, the Court found, even assuming deficient performance, appellant failed to show a reasonable probability that the outcome of the trial would have been different. Although R. B. did not recall the specific Facebook post, he did recall sending appellant a written apology and he testified that his apology likely would have included many of the statements from the post that were most damaging to his credibility, such as the statements that he respected and trusted appellant. Trial counsel also presented other evidence that challenged both R. B.'s credibility generally and the credibility of his outcry, such as pointing out inconsistencies between R. B.'s trial testimony, his statements to police, and his statements to the forensic interviewer.

Finally, the Court found, there was other strong evidence of appellant's guilt, including eyewitness descriptions of activities at the loft; J. P.'s testimony about the similar acts that appellant had committed against him, and the evidence of appellant's flight to avoid arrest. Therefore, the Court concluded, given the strong evidence of his guilt, appellant did not demonstrate that his trial counsel's failure to present the authentication evidence affected the jury's verdict.

Ineffective Assistance of Counsel; Jury Charges

Wood v. State, A22A1474 (12/9/22)

Appellant was convicted of aggravated assault. Briefly stated, the evidence showed that appellant, the victim and Julia, appellant's girlfriend, all worked at the same restaurant and lived in the same apartment complex. The victim had previously been romantically involved with Julia, but Julia now lived with appellant. The victim sent Julia a message through social media. Appellant did not like the message. The victim and other restaurant employees went to the appellant's apartment to talk and settle the matter. Appellant came to the door armed with a bat. Appellant struck the victim in the head with the bat.

Appellant contended that his trial counsel was ineffective for failing to object during the State's cross examination of him. The record showed that the prosecutor questioned appellant about the inconsistencies between his version of events and the testimony of the other witnesses, and asked appellant to comment on the veracity of the other witnesses. The Court stated that it is improper to ask a testifying witness whether another witness is lying. Here, the State asked appellant to comment on the veracity of the other witnesses, including asking him whether the other witnesses were “just all making [their testimony] up” or whether they were lying. Accordingly, the Court found, the State's line of questioning was improper. Nevertheless, even assuming that trial counsel was deficient in failing to object to this line of questioning, appellant failed to show that the failure to object affected the outcome of his trial because appellant refused to comment on the witnesses' veracity, and the jury had other evidence from which it could assess the credibility of the other witnesses, namely, their testimony. Accordingly, the Court held that this claim of ineffective assistance was not persuasive.

Next, appellant argued that the trial court plainly erred in failing to charge the jury on simple assault because it is an essential element of aggravated assault. The Court noted that a simple assault occurs where an individual “attempts to commit a violent injury to the person of another” or “[c]ommits an act which places another in reasonable apprehension of immediately receiving a violent injury.” OCGA § 16-5-20 (a). To convict a defendant of aggravated assault, the State must prove both that the defendant committed a simple assault and that he did so “[w]ith a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury[.]” OCGA § 16-5-21 (a) (2).

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The Court stated that although simple assault is an element of aggravated assault, a charge on simple assault is not always required to complete the definition of aggravated assault. For example, there is no harmful error in failing to charge on simple assault when the evidence shows that the perpetrator of the aggravated assault acted intentionally and neither negligence nor reckless conduct is an issue in the case. A charge on simple assault is not necessary if, under the facts charged and the proof presented, the jury could not convict the defendant of aggravated assault without implicitly finding that a simple assault had occurred. In contrast, an instruction on simple assault is required in those cases where a defendant is charged with aggravated assault even though the victim was not injured.

Appellant argued that because he claimed self-defense, there was a question of negligence or reckless conduct, requiring an instruction on simple assault. But, the Court found, given the circumstances of this case, it was not persuaded. The evidence was undisputed that appellant struck the victim in the head with a bat cutting through to the victim's skull. The question for the jury was whether appellant was guilty of aggravated assault or whether he was not guilty because his use of the bat was justified. Because the undisputed evidence showed that appellant caused the victim serious bodily injury using a deadly weapon or an object which, when used offensively, is likely to, or actually results in serious bodily injury, the trial court did not err, much less commit plain error, in failing to charge the jury on simple assault.