

THIS WEEK:

- **Rule 413 (b); Rule 403**
- **Juveniles; Conditions of Probation**
- **Rule 413; Closing Arguments**
- **Closing Arguments; OCGA § 17-8-75**
- **Negotiated Plea Agreements; Merger**

Rule 413 (b); Rule 403

State v. Ippisch, A22A1676 (1/13/23)

Ippisch was indicted for committing one count of rape and one count of kidnapping a woman in 2019 (“Person 1”). Very briefly stated, the evidence showed that Person 1 went with friends to a bar owned by Ippisch. Person 1 was the designated driver that night. Ippisch served her a glass of water. After she consumed the water, Person 1 “blacked out [and] couldn't remember a lot after that.” Person 1 stated that while she was in a semi-conscious state, Ippisch took her against her will behind a stage curtain and raped her as she sat on a bar stool.

The State sought to introduce other acts evidence through the testimony of another woman (“Person 2”). Person 2 testified that she met Ippisch through friends, and after a night of drinking alcohol at Ippisch's bar, Person 2 accepted his invitation to join him and others at an after-hours party at his apartment. Person 2 recalls drinking drinks made by bar employees, as well as from a bottle of wine given to her by Ippisch. “The last thing I remember [was] definitely not wanting to have sex with him [because] he was making some flirtatious jokes. ... And the next thing that I knew I was waking up in his bed naked. He told me that we had had sex ... I was very uncomfortable with the situation. ... I just wanted to leave, and so I did.” She further testified that she later indulged “an unrealistic fantasy ... that maybe [she] could get a confession out of him” if she started dating Ippisch and “having sex with him consensually.” Person 2 and Ippisch then engaged in a consensual sexual relationship for about six weeks during the summer of 2014. Ippisch did confide certain bad and possibly illegal behavior to Person 2, but he did not admit to having nonconsensual sex with Person 2.

The trial court denied the State's motion to admit the testimony pursuant to Rule 413 (b). The trial court found that the testimony was “relevant to the issues of lustful disposition and intent,” but determined that the evidence should not be admissible under Rule 403 because “the probative value of the evidence is weak because the evidence is confusing and unclear.” The trial court also stated that even if the jury believed Person 2's allegations, “there is the risk that the Defendant will be convicted because of their belief of what the evidence says about his character, rather than what it says about the facts of the case being tried.” The State appealed.

The Court stated that when applying Rule 403 balancing to evidence of prior offenses of sexual assault, the trial court must consider that such evidence is naturally prejudicial. However, generally, it is not unfairly prejudicial; rather it is prejudicial for the same reason it is probative: it tends to prove the defendant's propensity to engage in sexual assault. Thus the Court found, the trial court's concern about unfair prejudice to Ippisch's character was unfounded. Even in a vacuum, the allegations in this case are inherently unseemly, and Person 2's account goes no farther (and arguably less far) than the alleged offense at issue. Further, in this particular context, it is not improper to attempt to prove a propensity to commit

the illegal sex act or to prove an inappropriate lustful disposition toward non-consenting sex partners. And, the Court found, because the prejudice to Ippisch stems from a proper use of the evidence to prove his “propensity to engage in non-consensual sex” with an unconscious or semi-conscious partner, the prejudice resulting from that is not unfair prejudice. Notably, Person 2 explicitly testified that Ippisch “had sex with me knowing that I wasn't consenting and [was] doing it on purpose.” This is precisely what makes her testimony probative, and in the context of a sexual assault case, it does not make it unfairly prejudicial. Thus, weighing this prejudice in the Rule 403 analysis was improper.

The Court also determined that conversely, the probative value was substantial in this case. 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 Ippisch's. Therefore, the probative value of Person 2's testimony, which is already strongly presumed to be admissible under Rule 413, is heightened by the alleged facts and circumstances of this case.

Next, with respect to the trial court's characterization of Person 2's testimony as “inherently confusing” because she dated Ippisch after the initial alleged assault, the Court stated that Person 2's subsequent conduct has no bearing on her account of the initial assault. Person 2 consistently maintained that she never consented to Ippisch having sex with her while she was unconscious or semi-conscious, even if Ippisch asserted a different view. And Person 2 explained that dating Ippisch was a misguided effort to “get a confession out of him.” Moreover, as a legal matter, Person 2 was not required to corroborate her account of the nonconsensual sex with other facts or her subsequent conduct, nor did the trial court need to make a preliminary finding that the alleged prior similar conduct in fact occurred before admitting it into evidence. Instead, all that is required is that the State show that a jury could find by a preponderance of the evidence that the defendant committed the act, which Person 2's testimony alone authorized.

Finally, the Court noted, the trial court raised two other potential problems with Person 2's testimony: it would result in a mini-trial within a trial, and a jury might not be able to follow instructions for properly considering Person 2's testimony. The Court found that the latter concern is largely resolved by considering the more expansive purposes properly allowed for Rule 413 evidence. And the former concern is always present in any case involving allegations of sexual assault not witnessed by a third party. But given Rule 413's strong presumption in favor of admissibility, excluding evidence on that basis alone is improper absent other weightier concerns not present in this case. Accordingly, based on the standards set forth in Rule 413 and 403, as developed by Georgia case law, as well as the circumstances and testimony at issue in, the Court concluded that the trial court abused its discretion by excluding Person 2's testimony on the present record.

Juveniles; Conditions of Probation

In re M. B., A22A1175 (1/13/23)

M. B., a juvenile, was adjudicated delinquent based on her admission that she committed acts that would be considered felony theft by taking if she were an adult, and the juvenile court placed her on probation for one year. The record showed that between October 2021 and January 2022, the juvenile court held four hearings concerning her probation, changing some of the requirements, especially concerning M. B.'s family and her infant child. The juvenile court also appointed a guardian ad litem (“GAL”) for M. B.

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

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M. B. first contended that the juvenile court abused its discretion by allowing dependency allegations and findings of neglect on the part of M. B.'s mother to affect the outcome of the November 2021 review hearing following M. B.'s delinquency disposition. Specifically, she challenged the court's consideration of her probation officer's testimony regarding M. B.'s brother, his possible mental health and behavioral issues, and his having accidentally dropped M. B.'s infant; information about M. B. failing to receive necessary medical care for a postpartum issue; and testimony regarding unstable housing and educational neglect attributable to M. B.'s mother. She further challenged the court's consideration of evidence that she had been using an inappropriate babysitter to care for her infant. She contended that the juvenile court erred by making a finding in her delinquency case that her mother neglected her. She argued that the court allowed these facts to affect the outcome of her delinquency case and that all findings of neglect or mention of dependency allegations involving her mother should be stricken from the orders in M. B.'s delinquency case. The Court disagreed.

The Court stated that juvenile courts have the authority to modify their orders based on changed circumstances if doing so would be in the best interest of the child, and the Court reviews a juvenile court's modification of disposition for abuse of discretion. Here, in its order following the November 2021 review hearing, the juvenile court acknowledged that M. B.'s case was not a dependency case and that DFCS was not a party to the proceeding, but it found that M. B. was being neglected, that she had unmet medical, educational, emotional, safety, and housing needs, and that DFCS's involvement was reasonable and had prevented M. B.'s removal from her home. The juvenile court further stated that “[i]t is essential that DFCS, Juvenile Court Probation, the [GAL], and the attorneys coordinate and ensure that the neglect of [M. B.] does not continue.” Under these circumstances, the Court concluded, M. B. failed to show that the juvenile court abused its discretion by allowing testimony about M. B.'s home environment and lack of medical care to best determine her needs or by articulating its concerns about M. B.'s home environment. The circumstances presented at the hearing were relevant to determining the scope of a disposition that is “best suited to [M. B.'s] treatment, rehabilitation, and welfare,” as authorized by OCGA § 15-11-601 (a), and the challenged order merely reflected those considerations.

M. B. also argued that the juvenile court abused its discretion by imposing probation conditions relating to the care of her infant and her own medical care and life skills. She contended that all orders pertaining to her infant and all mention of the infant should be stricken. But, the Court found, OCGA § 15-11-601 (a) (3) states in part that a juvenile court may make “[a]n order placing [a] child on probation under conditions and limitations the court prescribes, and which may include the probation management program.” The juvenile court directed, as a reasonable condition of probation, that M. B. and her child receive “appropriate medical and dental care.” Given the broad discretion given juvenile court judges, the stated purposes of the delinquency article of the juvenile code, and the absence of express authority to the contrary, the Court found no abuse of discretion.

Next, M. B. argued that the juvenile court abused its discretion in the October 2022 disposition order by directing DFCS to monitor M. B.'s care for herself and her infant child because neither DFCS nor her infant were a party to the initial delinquency proceeding. The record reveals that M. B. did not appeal the original disposition order requiring the cooperation and active participation of M. B. and her family with DFCS. Orders of disposition are final judgments, directly appealable under OCGA § 5-6-34 (a) (1). Generally, a notice of appeal from a final judgment must be filed “within 30 days after entry of the appealable decision or judgment complained of.” Here, M. B. timely appealed the orders from her subsequent review hearings but did not file a notice of appeal until more than 30 days after the entry of the original probation order requiring M. B. and her family to cooperate with DFCS. Thus, the Court held that it did not have jurisdiction to consider M. B.'s challenge to the initial delinquency adjudication. But, the Court noted, in any event, OCGA § 15-11-601 (a) (1) prohibits placement into non-temporary DFCS custody as a disposition for a delinquent act (unless the child is also adjudicated dependent). The provision that M. B. sought to challenge was a direction to DFCS to “monitor” M. B.'s care; she was not placed into DFCS's custody. This was consistent with the applicable statutory language.

Finally, M. B. argued that the juvenile court abused its discretion by calling the GAL to testify as to the facts of the GAL's own motion. She cited OCGA § 24-6-614 (a), which states that “[t]he court may, on its own motion, call a court appointed expert, call a witness regarding the competency of any party, or call a child witness or, at the suggestion of a party, call such witnesses, and all parties shall be entitled to cross-examine such witnesses. In all other situations, the court may only call witnesses when there is an agreement of all of the parties for the court to call such witnesses and all parties shall be entitled to cross-examine such witnesses.”

The Court stated that a GAL is an individual appointed to assist the court in determining the best interests of the child. The role of a GAL in delinquency proceedings is the same as provided for in all dependency proceedings under Article 3 of the Juvenile Code. A GAL must attend all court hearings and other proceedings to advocate for the child's best interests. The court also may compel a child's GAL to attend a hearing relating to such child and to testify. And here, the Court found, while M. B. complained that the GAL was not qualified as an expert witness, a GAL is considered an expert witness and is expected to be called as the court's witness. M. B.'s GAL testified and was subject to examination by the court, the State, and M. B. Under these circumstances, the juvenile court did not abuse its discretion by allowing the GAL to testify.

Rule 413; Closing Arguments

Mulkey v. State, A22A1452 (1/17/23)

Appellant was convicted of child molestation of his stepdaughter. Pursuant to Rule 413, the State presented evidence that appellant molested his daughter at a time when she was the proximate age of the victim. The evidence showed that although the State attempted to prosecute appellant for the prior act against his daughter, the trial court dismissed the indictment on constitutional speedy trial grounds.

Appellant contended that because the charges related to the other act evidence were dismissed based on a violation of his right to a speedy trial, the admission was unfairly prejudicial. Specifically, he argued that the delay in that prosecution resulted in the unavailability of critical defense witnesses. Therefore, he contended, the admission of the evidence was unfairly prejudicial under Rule 403 because he was forced to defend against the prior allegations without those critical witnesses. The Court disagreed.

The Court noted that exclusion of evidence under Rule 403 is an extraordinary remedy which should be used only sparingly since it permits the trial court to exclude concededly probative evidence. Here, the trial court considered the prior-bad-acts evidence that appellant sexually abused his daughter, noted that Rules 413 and 414 strongly presume inclusion, and determined the probative value of that evidence was not substantially outweighed by its prejudice. And indeed, the facts underlying the dismissed charges that appellant sexually abused daughter were strikingly similar to the facts underlying the charges that he sexually abused his stepdaughter; the approximately eight years between those incidents were not unduly remote, and appellant's primary defense—which was based on questioning his stepdaughter's credibility—increased the State's need to admit his prior bad acts. Consequently, the trial court did not abuse its discretion in admitting the evidence of appellant's prior bad acts.

Furthermore, the Court noted, in *State v. Atkins*, 304 Ga. 413, 419-21 (b) (1) (2018), the Supreme Court explicitly held that even an *acquittal* of similar charges does not bar admission of them under Rule 404. Therefore, it can hardly be contended that conduct which is the subject of a charge dismissed on procedural (albeit constitutional) grounds should be afforded greater due process protection than conduct which is the subject of an actual trial and acquittal. Accordingly, the trial court did not err in admitting appellant's prior bad acts into evidence.

Next, appellant contended that his trial counsel rendered ineffective assistance by failing to object when during closing arguments, the prosecutor referred to appellant “skating on a technicality” in reference to the dismissed charges relating to appellant’s daughter. Specifically, appellant contended that the remarks violated OCGA § 17-8-75. But, the Court noted, appellant cited no caselaw in support of his argument that prosecutor’s remarks ran afoul of OCGA § 17-8-75. And, the Court stated, this was not surprising given that a prosecutor is granted wide latitude in the conduct of closing argument, the bounds of which are in the trial court's discretion, and within that wide latitude, a prosecutor may comment upon and draw deductions from the evidence presented to the jury. Thus, while the prosecutor's argument equating a constitutional violation to a technicality was perhaps hyperbolic, it was essentially shorthand for explaining that appellant was never tried or acquitted on the charges and did not stray beyond the wide latitude afforded to prosecutors when drawing inferences from evidence presented to the jury. Consequently, the Court concluded, even if appellant's trial counsel had objected, such an objection would have been futile, and the failure to pursue a futile objection does not constitute ineffective assistance.

Closing Arguments; OCGA § 17-8-75

Hong v. State, A22A1268 (1/23/23)

Appellant was convicted of rape and aggravated stalking. He contended that the trial court erred by failing to rebuke the prosecutor or grant a mistrial due to the prosecutor's improper comment regarding the strength of appellant’s case. The Court disagreed.

The record showed that during closing arguments, appellant's counsel made remarks, either directly or indirectly, about the prosecutor to which she took offense. For example, defense counsel stated, "I do not want to stand here and give you a dramatic reading of a Power Point performance[.]" which presumably was a comment on the manner in which the prosecutor presented her closing argument. He also said that the prosecutor "stands before you, highly indignant. God knows she's indignant, isn't she?" In response to these comments, the prosecutor said, "And I'd ask that we [refrain] from attacking the prosecutor personally and talk about the facts of the case. I realize that if you don't have a strong case, maybe that is what you want to do. But I would ask that he refrain." In response to the comment about the strength of appellant's defense, his counsel moved for a mistrial, which the trial court denied. Appellant's counsel did not ask for any curative instructions about the prosecutor's comment, but the trial court stated on its own that it would not be providing any.

First, as to appellant’s motion for a mistrial, the Court stated that it is within the sound discretion of the trial court to grant or deny a motion for mistrial, and such ruling will not be disturbed unless it resulted from a manifest abuse of that discretion. When determining whether the trial court abused its discretion, the Court stated it considers the allegedly improper statement, other evidence against the accused, and the actions of the trial court and counsel dealing with the impropriety. And when considering requests for mistrial during closing arguments, a closing argument is to be judged in the context in which it is made. And here, the Court found no manifest abuse of discretion. The prosecutor's comment was a single sentence interposed as an objection following defense counsel's remarks concerning the tactics and demeanor of the prosecutor.

Second, as to the trial court's sua sponte refusal to rebuke the prosecutor in front of the jury, the Court stated that even if the trial court erred by failing to rebuke counsel, any such error was harmless because the evidence of appellant’s guilt was strong. Moreover, the trial court instructed the jury both before opening statements and after closing arguments that the lawyers' statements were not evidence. As a result, the Court found that it was highly probable that the trial court's alleged error in failing to comply with OCGA § 17-8-75 did not contribute to the verdicts.

Negotiated Plea Agreements; Merger

Torres-Toledo v. State, A22A1544 (1/25/23)

Appellant pled guilty to one count each of armed robbery and aggravated assault with a deadly weapon, and the trial court imposed a total sentence of 15 years in prison, to be followed by 25 years on probation. He contended the trial court erred by allowing the State to breach its obligation under the alleged plea agreement to reduce the charges to a single count of simple robbery. Specifically, that he agreed to withdraw a motion to withdraw a plea of guilty in another case if the State reduced the armed robbery to simple robbery. The Court disagreed.

The Court stated that a plea bargain agreement is a contract under Georgia law which binds both the prosecutor and defendant. Public policy and the great ends of justice generally require the enforcement of plea agreements. Nevertheless, a trial judge has wide discretion to accept or reject a negotiated plea. And here, the Court noted, appellant failed to address the basis on which the trial court denied his request to reduce the armed robbery charge to simple robbery — i.e., that no negotiated plea agreement was presented to the trial court by the court's deadline. Therefore, the Court concluded, he waived any appellate challenge he may have had to the court's ruling in that regard by failing to raise it in his appellate brief.

Furthermore, the Court found, appellant also failed to identify any record evidence — other than his own self-serving assertions — establishing what terms, if any, the parties may have settled on as a part of any potential plea agreement. And he similarly identified no record evidence showing that he withdrew a motion to withdraw a guilty plea in another proceeding, whether pursuant to any plea negotiations in the current case or for any other reason. But, the Court stated, even if he had, where, as here, a trial court announces that it does not intend to follow a sentencing recommendation included as part of plea negotiations, the State is authorized to withdraw any consent it may have given to a negotiated plea. Thus, appellant simply did not meet his burden of establishing any error by the trial court or wrongdoing by the State with respect to the State's failure to comply with a potential plea agreement.

Nevertheless, although not raised by either party, the Court noted a merger issue. Here, appellant's indictment alleged that he committed both crimes against the same victim on the same date. And during his plea hearing, the State similarly alleged that, after the victim declined to lend appellant money, appellant “produced a knife, which he used to stab and cut [the victim] while asking for money” and that, “upon seeing a large amount of blood in the front of his car,” the victim gave appellant “some cash, keys, and a wallet.” Consequently, the Court concluded, because the same assault was used to support both charges, the trial court should have merged appellant's convictions.