Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING MAY 12, 2023
Issue 19-23

THIS WEEK:

- **Rape Shield Statute; Exceptions**
- **Custodial Statements; Sixth Amendment Right to Counsel**
- **Motions in Arrest of Judgment; Appellate Court Jurisdiction**
- **Jury Charges; Consent**

Rape Shield Statute; Exceptions

Freeman v. State, A23A0174 (3/3/23)

Appellant was convicted of rape, first degree burglary, aggravated assault, and robbery by force. He contended that the trial court erred in failing to grant a motion in limine in which his counsel sought to cross-examine the victim as to her prior sexual history as an exception to Georgia's Rape Shield Statute, OCGA § 24-4-412. The Court disagreed.

The record showed that the victim testified that at the very beginning of the attack, appellant removed her underwear while she was lying on the ground. A crime scene specialist testified that she collected the underwear from the crime scene and that she tested a stain or area of discoloration on the interior lining using an acid phosphate test, which showed the "presumptive presence of semen." The specialist explained that this "presumptive presence" does not mean that "it's definitely semen." When asked on cross-examination if "you can test for it and get a positive test for it within 24 to 48 hours, depending on conditions," the specialist replied that "Yes, it's possible." According to appellant, the victim had told a detective investigating the crime in an email exchange that she had not had sex for five days prior to the rape. This information was shared with appellant as part of pretrial discovery, but not introduced at trial.

After the crime scene specialist testified, appellant made an oral motion in limine pursuant to the Rape Shield Statute, arguing that the victim's statement to police was contradicted by the positive semen test and that he was, therefore, entitled to cross-examine the victim as to her prior sexual history due to the discovery of semen at the crime scene. The trial court denied the motion in limine.

Appellant argued that he needed to impeach the victim because his sole defense was that he knew the victim and had consensual sex with her in the same room earlier that evening. Thus, since the victim denied knowing him, the defense needed to prove her to be untruthful. Appellant also contended that his confrontation rights were violated by the denial of his motion: "He had the right to prove that the sex he had with [the victim] was consensual, and that the assailant was somebody else."

However, relying on *White v. State*, 305 Ga. 111 (2019), the Court stated that a natural reading of the text of OCGA § 24-4-412 indicates that evidence of a complaining witness's past sexual behavior may not be introduced by any party at a trial involving a prosecution for rape unless such evidence falls under a specific exception contained in the statute itself. Evidence of a complaining witness's past sexual history that falls outside of a specific exception contained in OCGA § 24-4-412 is inadmissible in any prosecution to which the Rape Shield Statute applies and may not be introduced by either party as direct evidence or on cross-examination of the complaining witness or other witnesses. Thus, the Court found, there was no merit to appellant's contention that he was entitled to cross-examine the victim as to her prior sexual history

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due to the discovery of semen at the crime scene in order to prove that the sex he had with the victim was consensual and that the assailant was somebody else. The underwear was never tested, and appellant did not offer any evidence of the source of the alleged semen. And, to the extent appellant sought to cross-examine the victim in order to test her veracity there is no exception written into the statute for any party to introduce evidence of a complaining witness's sexual behavior that is otherwise relevant but that falls outside of the scope of the statutory exceptions contained in OCGA § 24-4-412 (b). Consequently, to the extent appellant suggested that the exception provided in subsection (b) (4) applies and that he was denied his constitutional right of confrontation, the Court again disagreed.

Finally, relying on *Jones v. Goodwin*, 982 F.2d 464 (11th Cir. 1993), the Court noted that the victim never testified that she had not had sex for five days prior to the rape. The statement was made in an email to a detective that was only made out of court. Because the jury was never made aware of the statement, there was nothing for appellant to impeach. Moreover, as the State contended, nothing about the victim's past sexual behavior with other people showed that she knew — or did not know — appellant or consented to the sexual encounter with him. Therefore, the Court concluded, the trial court correctly denied appellant's motion in limine.

Custodial Statements; Sixth Amendment Right to Counsel

Maxwell v. State, A22A1697 (3/3/23)

Appellant was convicted of two counts of rape, two counts of false imprisonment, criminal attempt to commit rape, aggravated sodomy, and aggravated assault. The charges stemmed from attacks on three victims, one of whom he attacked in 2014 and the other two who were attacked within a two-month period in 2017.

The evidence showed that in 2018, while he was in custody for charges related to the third victim's rape and represented by counsel for those charges, an investigator questioned him about both of the first two victims. Appellant unsuccessfully sought to suppress the statements made to the investigator.

Appellant argued that the trial court erred in denying his motion to suppress his custodial statement because the interview was in violation of his right to counsel under the United States and Georgia constitutions. The Court disagreed.

First, the Court found that appellant's argument that the custodial interview violated his Sixth Amendment right under the United States Constitution was foreclosed by *Texas v. Cobb*, 532 U.S. 162 (186 S.Ct. 1335, 149 LE2d 321) (2001). In *Cobb*, the Supreme Court held that the Sixth Amendment right to counsel attaches only to charged offenses and that there is no exception for uncharged crimes that are "factually related" to a charged offense. Further, when the Sixth Amendment attaches, it includes offenses that, even if not formally charged, would be considered the same offense under the test set forth in *Blockburger v. United States*, 284 U.S. 299 (52 SCt 180, 76 LE2d 306) (1932): "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." And here, the Court found, at the time of the custodial interview, appellant had not been charged with any offenses related to the sexual assaults of the first two victims and thus his Sixth Amendment right to counsel under the United States Constitution had not yet attached.

Next, with regard to appellant's argument that the interview was in violation of his right to counsel under the Georgia Constitution because the Georgia Constitution's right to counsel provision should be interpreted more broadly than the Sixth Amendment, the Court found that appellant waived this argument for ordinary appellate review because he did not make his argument prior to or during trial, and it is well-accepted that a constitutional challenge may not be raised for the first time in a motion for new trial. Further, in challenging a trial court's denial of a motion to suppress, a defendant may

not argue on appeal grounds that he did not argue (and obtain a ruling on) before the trial court. Here, the Court found, although appellant's motion to suppress generally raised Sixth Amendment issues, it did not cite to *Cobb*, mention the *Blockburger* test, or advance any argument that the Georgia Constitution's right to counsel provision should be given a more expansive interpretation than the Sixth Amendment.

Nevertheless, the Court stated, the unavailability of ordinary review did not end its analysis because the new Evidence Code permits plain error review of certain unpreserved evidentiary errors affecting substantial rights. An error is plain only if it is clear or obvious under current law. An error cannot be plain where there is no controlling authority on point. And here, citing *Chenoweth v. State*, 281 Ga. 7 (2006), the Court found, our Supreme Court has yet to decide whether the right to counsel provision of the Georgia Constitution should be interpreted more broadly than the Sixth Amendment and in accordance with the argument advanced by appellant. Thus, given the lack of authority supporting appellant's position, there was no clear or obvious error in the trial court's denial of his motion to suppress his custodial statements. Accordingly, there was no plain error.

Motions in Arrest of Judgment; Appellate Court Jurisdiction

Porter v. State, A22A1719, A23A016 (3/6/23)

Appellant was convicted of fleeing or attempting to elude a police officer and speeding. After his conviction, but before his notice of appeal, he filed a "motion for declaration of mistrial and void judgment and dismissal of all charges arising out of the false October 2, 2020 affidavit [from the deputy]" and an "amended and corrected motion for declaration of mistrial and void judgment, to arrest judgment, and to vacate conviction of count one of the indictment that arose out of the false October 3, 2020 affidavit of [the deputy] by which both the arrest warrant and indictment were obtained[.]" In the motion, appellant argued that the deputy knowingly presented false testimony in the arrest affidavit, and as a result, the arrest warrant, indictment, conviction, and sentence were all unlawful. Appellant also argued that the trial court made an inappropriate statement regarding defense counsel's strategy, and that this statement was prejudicial and harmful. He also filed a timely notice of appeal.

The Court stated that at least part of this motion should not be construed as a motion in arrest of judgment. Courts are not bound by the designation given motions by the parties, and a court must look to substance over nomenclature. A motion for an arrest in judgment is for any defect not amendable which appears on the face of the record or pleadings and is typically utilized as a post-judgment motion to attack the sufficiency of the indictment. And here, the Court found, appellant challenged, among other things, the trial court's statement as prejudicial and harmful, which was not a defect on the face of the record or pleadings and such an argument is typically raised in a motion for new trial.

And, the Court noted, although appellant later withdrew that claim, he requested a ruling regarding his other argument that the arrest warrant, indictment, conviction, and sentence were all unlawful due to the allegedly knowing false statement by the deputy. Thus, whether construed as a motion for new trial or a motion in arrest of judgment, the motion was timely because it was filed within 30 days of the judgment and within the same term of court. Also, the Court noted, both motions for new trial and motions in arrest of judgment are resetting post-judgment motions under OCGA § 5-6-38 (a).

Accordingly, the Court concluded, because the motion remains pending in the trial court, it lacked jurisdiction over appellant's appeals. If the motion is denied, the judgment from which appellant seeks to appeal will stand, and the notices of appeal previously filed by appellant then will ripen.

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Jury Charges; Consent

Whipkey v. State, A22A1722 (3/6/23)

Appellant was convicted of multiple crimes perpetrated against two 14-year-old girls, E. G. and A. D.: rape (E. G.); two counts of enticing a child for indecent purposes (E. G., A. D.); two counts of aggravated child molestation (E. G., A. D.); and one count of aggravated sexual battery (A. D.). He argued the trial court plainly erred in its jury charge on aggravated sexual battery because the wording of the charge relieved the State of its burden to show that A. D. did not consent.

The Court noted that OCGA § 16-6-22.2 (b) provides that: "A person commits the offense of aggravated sexual battery when he or she intentionally penetrates with a foreign object the sexual organ or anus of another person *without the consent of that person*." (Emphasis supplied.) The Court found that the trial court first properly charged the jury using this statutory language. It then charged the jury on enticing a child for indecent purposes; that penetration, however slight, sufficed to satisfy the penetration requirement of rape and aggravated sexual battery; that the age of consent is 16; and that it is a crime to have physical sexual contact with a child aged 15 or younger. The trial court then charged that: "The State is not required to show that the alleged victim did not consent to the sexual act when the alleged victim is a child 15 years of age or younger."

The Court noted that to show plain error, appellant had to [1] point to an error that was not affirmatively waived, [2] the error must have been clear and not open to reasonable dispute, [3] the error must have affected substantial rights, and [4] the error must have seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

The Court stated that there was no indication that appellant affirmatively waived error in this context. Further, because aggravated sexual battery, like sexual battery, does not require that the prohibited conduct be sexual in nature, the State is not exempt from proving lack of consent at trial merely because the victim is under the age of sixteen when establishing a violation of the aggravated sexual battery statute. Thus, the Court found, the trial court's instruction on underage consent was clearly erroneous when coupled with the charge on aggravated sexual battery.

Nevertheless, the Court determined, although appellant met the first two prongs of the plain error test, he failed to meet the latter two. Relieving the State of its burden of proving an element of a crime may, in some instances, be harmful error affecting the outcome of a proceeding. But in the plain error context, appellant had the burden of making an affirmative showing that the error probably did affect the outcome below.

Appellant argued on appeal that A. D. was a "drug user" who had previously given him her used underwear and that she "possibly" had sex with him in exchange for money. This, he contended, meant a rational juror could have concluded that the State failed to prove consent. The Court disagreed.

Here, the Court found, there was no allegation or contention that appellant's conduct was benign or non-sexual in nature, and the evidence of his actions was substantial. Further, given the amount of alcohol and drugs A. D. consumed, appellant's own testimony that he knew she had drunk a dozen or more shots of gin, A. D.'s testimony that she felt uncomfortable, violated, and that appellant's actions were "not right," and her testimony about being confused and passing out, it was hard to fathom any context in which a child so impaired by alcohol and drugs would have the capacity to consent to such conduct by an adult. Thus, given the evidence presented, it was highly unlikely that the instruction at issue affected appellant's substantial rights or that it affected the jury's decision to return a verdict of guilty for the charge of aggravated sexual battery. Accordingly, the Court concluded, there was no plain error.

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