

## THIS WEEK:

- **In-Life Photographs; Plain Error**
- **Sentencing; Recidivism**
- **Rule 404 (b); Jury Charges**

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### In-Life Photographs; Plain Error

*Harris v. State, S23A0141 (4/18/23)*

Appellant was convicted of felony murder and other offenses. He contended that the trial court plainly erred in admitting an in-life photograph of the victim. The Court disagreed.

The record showed that at trial, the State called the victim's mother to present a single in-life photograph of the victim. After the victim's mother confirmed that the photograph, which depicted the victim alone against a neutral background, clearly and accurately reflected how the victim looked in the weeks before his death, the State asked to enter the photograph as an exhibit. Appellant's counsel then stated, "No objection, Your Honor." In ruling on this issue in appellant's motion for new trial, the trial court determined that appellant's trial counsel affirmatively waived any objection to the admission of the photograph.

Appellant argued that despite his trial counsel's failure to object, the trial court committed plain error in admitting the photograph because it likely stoked the jury's emotions through the victim's mother. But, the Court stated, even assuming, without deciding, that appellant did not affirmatively waive the claim of error through his counsel's statement that she had no objection to the admission of the in-life photograph, any error did not affect appellant's substantial rights. The victim's mother's testimony was very brief, and the photograph was fairly benign, depicting the victim alone on a neutral background. Moreover, there was no indication that the victim's mother became emotional during her testimony, and the evidence against appellant was strong. Thus, the Court determined, appellant could not show that the admission of the victim's in-life photograph probably affected the outcome of his trial. Accordingly, the Court concluded, appellant failed to show plain error.

### Sentencing; Recidivism

*Williams v. State, S23A0314 (4/18/23)*

Appellant was convicted of malice murder. He argued that that the trial court erred in sentencing him to life in prison without the possibility of parole. He contended that although OCGA § 16-5-1 (e) (1) gave the court discretion to consider sentencing him to life with the possibility of parole, the court failed to exercise that discretion because it incorrectly concluded that he was a recidivist who was ineligible for parole under OCGA § 17-10-7. Appellant further argued that OCGA § 17-10-7 is inapplicable because he was not previously convicted of a serious violent felony, as required under section 17-10-7 (b) (2), and because section 17-10-7 (c) does not apply to murder convictions.

The Court found that prior to trial, the State filed a notice of intent to seek recidivist punishment of appellant based on his 2013 convictions for possession of cocaine and various traffic offenses, 2016 conviction for possession of a firearm

by a convicted felon, and 2019 convictions for aggravated assault and burglary. At the sentencing hearing, the State argued that the court was required to impose a sentence of life in prison without the possibility of parole because of appellant's prior convictions, and defense counsel did not object. The trial court then orally pronounced it was sentencing appellant "[to] serve the balance of [his] natural life in prison without the possibility of parole," without further explanation. Subsequently, the trial court entered its final written sentence, which did not reflect that appellant was sentenced as a recidivist.

The Court stated that a trial court has discretion to impose a sentence of life without parole for murder regardless of whether the defendant is a recidivist. And here, the record did not show that the trial court's sentence was anything other than an exercise of that discretion. Although there was some discussion of recidivism at the sentencing hearing, neither the trial court's oral sentence nor its final sentencing order indicated that appellant was sentenced as a recidivist. Accordingly, the Court concluded, because appellant did not show that the trial court failed to exercise its discretion in imposing a life-without-parole sentence for his malice murder conviction, appellant failed to show that the sentence was improper.

### **Rule 404 (b); Jury Charges**

*Priester v. State, S23A0109 (4/18/23)*

Appellant was convicted of malice murder and other offenses. The record showed that at trial, the State introduced Rule 404 (b) evidence that the day before the murder, appellant committed armed robbery during a drug deal and shot the victims' car. Over appellant's objection, the trial court determined that the evidence was admissible under Rule 404 (b) to show opportunity, intent, knowledge, and absence of mistake or accident.

Appellant contended that the trial court erred in admitting the Rule 404 (b) evidence. The State conceded that the trial court erred by admitting the Rule 404 (b) evidence for the purposes of intent, knowledge, and lack of mistake or accident. However, the State contended, the evidence was admissible for the purpose of proving opportunity under Rule 404 (b).

Assuming without deciding that the trial court erred in admitting this evidence, the Court found that the error was harmless. Here, the Court determined, the evidence against appellant was strong. Additionally, the defense theory that someone else shot the victim was undermined at trial through the investigating officer's testimony. Furthermore, the trial court twice instructed the jury that it could only consider the other-act evidence for the limited Rule 404 (b) purposes and that it could not conclude from the evidence that appellant had a propensity to commit crimes, and the court reminded the jury that appellant was on trial only for the charges listed in the indictment. Thus, because the Court presumes that jurors follow the trial court's instructions, any harm caused by the Rule 404 (b) evidence was mitigated by the trial court's instructions limiting the jury's consideration of the evidence. Moreover, although the trial court instructed the jury that it could consider the other-act evidence for the purposes of intent, knowledge, and absence of mistake or accident, which the State conceded were not permissible purposes, the instructions, as a whole, reduced the likelihood that any error in admitting the armed-robbery and shooting evidence contributed to the verdict, as they did, at least, tell the jury what it could not do, namely, that the jury could not consider the evidence as proof of appellant's propensity to commit crimes. Therefore, the Court concluded, given the strength of the evidence against appellant and the trial court's limiting instructions, it was highly probable that the admission of the armed-robbery and shooting evidence did not contribute to the verdict.

Nevertheless, appellant argued, the trial court plainly erred by instructing the jury that it could consider the armed-robbery and shooting as Rule 404 (b) evidence for the limited purposes of opportunity, intent, knowledge, and absence of mistake or accident, because the evidence itself was improper.

*Prosecuting Attorneys' Council of Georgia*  
**CaseLaw** UPDATE

**WEEK ENDING MAY 19, 2023**

**Issue 20-23**

The Court again noted that the State conceded that the admission of the armed-robbery and shooting evidence for the purposes of intent, knowledge, and absence of mistake or accident was erroneous. However, the Court found, even assuming that the trial court clearly erred by instructing the jury that the Rule 404 (b) evidence could be considered for those purposes and for the purpose of opportunity, he failed to satisfy the third prong of plain error review: that the challenged instructions likely affected the outcome of his trial.

The Court stated that when determining whether a jury instruction likely affected the outcome of the trial, it considers the jury instruction as a whole, rather than looking at the challenged instruction in isolation. Here, the trial court instructed the jury that it could not use the other-act evidence to make an inference about appellant's character or as evidence that appellant had a propensity to commit crimes. Moreover, the trial court reiterated to the jury that appellant was "on trial for the offenses charged in this bill of indictment only and not for any other acts, even though such acts may incidentally be criminal"; that the State carried the burden "to prove every material allegation of the indictment and every essential element of the crimes charged beyond a reasonable doubt," which included the elements of intent and identity; and that the jury could not convict appellant "of any crime unless and until each element of the crime as charged is proven beyond a reasonable doubt." And, it is assumed that the jury followed the trial court's instructions not to use the other-act evidence to make improper inferences about appellant's character or propensity to commit crimes. Further, although the trial court instructed the jury that it could consider the other-act evidence for the purposes of intent, knowledge, and absence of mistake or accident, such instructions did not likely affect the outcome of appellant's trial, even if the jury considered the evidence for such impermissible purposes, given the strength of the evidence of appellant's guilt. Therefore, the Court held, based on the trial court's instructions as a whole and the strong evidence of appellant's guilt, it could not say that the challenged instructional error likely affected the outcome of his trial.