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In the Supreme Court of Georgia

Decided: August 14, 2017

S17A1103. BREWNER v. THE STATE.

GRANT, Justice.

Appellant Brian Joseph Brewner was convicted of murder and numerous other crimes in connection with an August 2014 home invasion in which victim Adam Schrier was shot and killed and two other victims were injured. Brewner now appeals, asserting that he was denied his constitutional right to be present at certain stages of the proceedings; that the trial court erred in admitting certain evidence; that his trial counsel provided constitutionally ineffective assistance; and that the evidence was insufficient to support his convictions. Finding no error, we affirm.¹

¹ In November 2014, Brewner was indicted in Gwinnett County, together with four other indictees, on charges of malice murder, felony murder, aggravated assault, burglary, first-degree home invasion, conspiracy to commit robbery, armed robbery, false imprisonment, first-degree child cruelty, and possession of a firearm by a first offender probationer. Brewner was re-indicted for the same offenses in August 2015. At the conclusion of an eight-day jury trial in October 2015, Brewner was convicted on all of the 18 counts in which he was named. He was sentenced to life imprisonment without the possibility of parole, plus a total of 50 consecutive years to serve. Brewner filed a motion for new trial on October 22, 2015, which he amended on October 29, 2015 and May 16, 2016. Following a hearing on June 8, 2016, the motion for new trial was denied. Brewner filed a timely notice of appeal

I.

Viewed in the light most favorable to the jury's verdicts, the evidence shows that in the early morning hours of August 6, 2014, a group of men forcibly entered Adam Schrier's home. Schrier's girlfriend, Jami Smith, had arisen around 5:30 a.m. and gone to the basement-level garage to smoke a cigarette. Hearing strange noises on the main floor, Smith went back up the stairs and was confronted by a man who hit her in the head with a gun and demanded to know where "the money" was. When Smith responded that she did not know, he shot her in the leg and dragged her upstairs to the main floor. Another man with a gun confronted Smith's daughter Madison on the second floor of the home and dragged her downstairs. Mother and daughter were forced to lie on the living room floor, where Schrier, who had also been shot, was also lying. The men again asked where the money was; one stated that he had been told that there was \$40,000 in the home. Smith told the men she had money in her purse upstairs, which the men took. The assailants bound Smith and Madison's arms and legs with duct tape, and one fired a gun; the bullet traversed Smith's shoulder and struck Madison's arm. The men then left, and

on October 20, 2016, which he amended on January 17, 2017. This appeal was docketed to this Court's April 2017 term and was orally argued on June 26, 2017.

Smith was able to unbind Madison's legs so that Madison could retrieve a phone for Smith to call 911. Police and paramedics responded, but Schrier died at the scene of a gunshot wound to the chest.

The State presented evidence showing that the home invasion arose from a complicated web of drug-related transactions. In mid-July 2014, law enforcement conducted a drug bust at the apartment of Becky Banner, who was involved in a methamphetamine trafficking operation supplied by a Mexican drug cartel. While the bust was in progress, Becky's son Bryan drove up to his mother's apartment, realized what was happening, and drove to Becky's other residence. Parked outside this house was a Chevy Blazer in which Becky was storing five kilos of methamphetamine—Becky's "last drop"—which Bryan retrieved. Bryan then got his friend, victim Schrier, to hide the drugs for him in a storage unit near Schrier's home. Within a week, Bryan had sold most of the drugs.

Jamie Staples, who was also connected with the drug operation, knew that Bryan had taken the drugs from the Chevy Blazer, but believed that they were being stored at Schrier's home. Staples testified at trial that, during the week prior to the crimes, he met with Appellant Brewner several times to discuss recovering the drugs, and any money from the sale of the drugs, from

Schrier's home. Staples had been acquainted with Brewner since 2010 and often purchased drugs from him. In 2013, to recover a debt owed by Staples, Brewner had dispatched a crew of men to invade Staples' home, where Staples was bound, beaten, and robbed of \$5,500 and 3 ounces of meth. Brewner later apologized to Staples over the incident.

At the time he and Staples were devising the Schrier home invasion, Brewner was staying at a La Quinta hotel with his girlfriend, Charlice Roberts. Roberts testified that Staples visited their hotel room several times during the week before the crimes and that Staples and Brewner were discussing a plot to recover drugs and money from Schrier's home. Roberts also testified that during the night before the early-morning crimes, co-indictees Devon Jenkins and Pierrer Scott visited Brewner. Roberts testified that Jenkins expressed excitement at the prospect of making money and was carrying a gun.

Neighbors of Schrier reported seeing a white Dodge truck parked outside Schrier's home with its engine running that morning around the time of the crimes. One of these witnesses, whose suspicions were aroused, recorded the Tennessee tag number of the vehicle, and investigators later determined that on the afternoon following the crimes a truck with that tag number had been parked outside the Congress hotel, which was adjacent to the La Quinta hotel.

Video surveillance footage from the Congress hotel at 6:35 a.m. on the morning of the crimes showed a white Dodge Ram truck pulling in followed by a white Toyota Camry with tinted windows; three males exited the truck and got into the Camry, which drove away. Testimony established that Roberts owned a white Toyota Camry with tinted windows, which Brewner often drove and had access to at the time of the crimes. A vehicle matching this description was observed making a sudden U-turn on Schrier's street around the time of the crimes. Roberts told police that a female in Tennessee had rented the white truck for Brewner, and investigators matched the truck's tag number to a vehicle that had gone missing in mid-July from a Chattanooga rental car company.

A few weeks after the crimes, Staples was arrested on drug trafficking charges, and in subsequent police interviews he implicated Brewner in the crimes. With assistance from Staples, Police Detective Bobby Johnson located Brewner in a vehicle in a motel parking lot. When the detective approached him on foot, Brewner drove the vehicle at the officer and then fled. Roberts, who was left behind in the parking lot, submitted to police questioning and confirmed Brewner's knowledge of the robbery plot, though she claimed he had disavowed any participation in it. Ultimately, at the urging of Roberts,

Brewner telephoned Detective Johnson to discuss the crimes; these conversations were recorded. Though Brewner consistently denied being present for the crimes at Schrier's home, he admitted introducing Staples to Jenkins to help Staples recover the five kilos of meth, and he also admitted to previously robbing Staples over a drug debt.

The evidence described above was clearly sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that Brewner was guilty of the crimes of which he was convicted. *Jackson v. Virginia*, 443 U. S. 307 (99 SCt 2781, 61 LE2d 560) (1979). Though Brewner may not have been present for the home invasion, there was ample evidence of his knowledge of and participation in the planning of the crimes, and his contact with and assistance to the perpetrators before and after the crimes occurred. See OCGA § 16-2-20 (one may be culpable for commission of a crime if he "[i]ntentionally aids or abets in the commission of the crime" or "[i]ntentionally advises, encourages, hires, counsels, or procures another to commit the crime").

II.

Brewner contends that he was denied his right under the Georgia Constitution to be present at certain "critical stages" of his trial proceedings. "Embodied within the constitutional right to the courts is a criminal

defendant's right to be present and see and hear all the proceedings which are had against him on the trial before the Court." *Ward v. State*, 288 Ga. 641, 645 (4) (706 SE2d 430) (2011) (internal citations and punctuation omitted). Violations of this due process right are presumed prejudicial, and, absent a waiver by the defendant, require a new trial. *Sammons v. State*, 279 Ga. 386, 387 (2) (612 SE2d 785) (2005). Here, however, there was no violation of Brewner's right to be present.

"The right to be present attaches 'at any stage of a criminal proceeding that is critical to its outcome if the defendant's presence would contribute to the fairness of the procedure.'" *Huff v. State*, 274 Ga. 110, 111 (2) (549 SE2d 370) (2001) (punctuation omitted). Thus, a "critical stage" of a criminal proceeding is defined as "one in which the defendant's rights may be lost, defenses waived, privileges claimed or waived, or one in which the outcome of the case is substantially affected in some other way." *Fortson v. State*, 272 Ga. 457, 458 (1) (532 SE2d 102) (2000) (punctuation omitted); accord *Campbell v. State*, 292 Ga. 766, 770 (4) (740 SE2d 115) (2013) (right to be present exists where "a fair and just hearing would be thwarted by the defendant's absence"). Proceedings during which the jury is selected or modified, for example, are a critical stage at which the right to be present

attaches. *Sammons*, 279 Ga. at 387; *Hanifa v. State*, 269 Ga. 797 (6) (505 SE2d 731) (1998). On the other hand, pre-trial hearings and bench conferences pertaining to purely legal issues, such as the admissibility of evidence or jury instructions, ordinarily do not implicate the right to be present. See, e.g., *Campbell*, 292 Ga. at 770 (pre-trial discussion of motions regarding the scope of cross-examination and suppression of the defendant's statement were not critical stages at which right to be present attached); *Huff*, 274 Ga. at 111-112 (jury charge conference and in-chambers discussion of legal matters were not critical stages).

Brewner contends that he was denied his constitutional right to be present when the trial court ruled on the State's motion to admit evidence pursuant to OCGA § 24-4-404 (b) and when the court, in his absence, excused a prospective juror due to a family emergency. Neither contention is correct.

Regarding the 404 (b) ruling, the record reflects that the trial court held a pre-trial motions hearing approximately one month before trial at which several motions were argued, including the State's motion to admit 404 (b) evidence. In this motion, the State sought leave to introduce testimony regarding (1) Brewner's involvement in past drug dealings and (2) his participation in the 2013 home invasion and robbery of Staples. At the

conclusion of the hearing, the trial court reserved ruling on the motion and directed the State to provide, as an aid in the court's decision-making, the recordings of Detective Johnson's phone conversations with Brewner and his interview with Staples. The trial court never did issue any express ruling on the 404 (b) motion, either by written order or in open court. Instead, the court implicitly granted the motion by allowing both types of evidence to be offered during the trial.

Brewner now contends that, because he was not present when the trial court announced its ruling on the 404 (b) motion, he was denied his constitutional right to be present. As an initial matter, it could be argued that Brewner was in fact present when the trial court "announced" its decision, as he was present at all times during trial when the evidence in question was being introduced. But even if this were not so, Brewner's claim would fail for the simple reason that a trial court's announcement of a legal ruling on a motion is not a "critical stage" of the proceedings at which the right to be present attaches. Brewner has cited no authority, and we are aware of none, holding that a defendant is constitutionally entitled to be present at the time a court issues a ruling. Were it otherwise, trial courts would be compelled to announce all rulings in open court in the defendant's presence, meaning that they would

be forbidden from ever issuing rulings by written order. That is plainly not the case. Accordingly, there was no denial of any right to be present in connection with the admission of the 404 (b) evidence.

Regarding the juror dismissal, the record reflects that, during jury selection on the first day of trial, the trial court dismissed a prospective juror during the lunch break after receiving a note from the juror requesting excusal due to a family emergency. Immediately following the lunch break, the trial court noted in open court, where Brewner himself as well as the prosecutor and Brewner's counsel were present, that it had made a "command decision" to excuse the juror because of the emergency. The court asked both defense counsel and the prosecutor whether there was "anything we need to talk about with regard to [the juror]," and both responded in the negative. Brewner did not express any disagreement with his counsel's assent to the trial court's decision, either contemporaneously with the trial court's statement or at any other time during the trial proceedings.

It is true that Brewner had the right to be present during the trial court's exchange with the prospective juror. See *Sammons*, 279 Ga. at 387; *Hanifa*, 269 Ga. at 807; but see *Waldrip v. State*, 266 Ga. 874, 879 (2) (471 SE2d 857) (1996) (finding no error where communications were unrelated to the case and

were not prejudicial to the defendant). Even so, “the right to be present belongs to the defendant, and he is free to relinquish it if he so chooses.” *Burney v. State*, 299 Ga. 813, 820 (3) (b) (792 SE2d 354) (2016). The mechanics of relinquishment are plain:

The right to be present is waived if the defendant personally waives it in court; if counsel waives it at the defendant’s express direction; if counsel waives it in open court while the defendant is present; or if counsel waives it and the defendant subsequently acquiesces in the waiver.

Id.; accord *Pennie v. State*, 271 Ga. 419 (2) (520 SE2d 448) (1999). Here, Brewner’s counsel affirmed in open court while Brewner was present that he had no objection to the juror’s dismissal, or to the trial court’s manner of handling the situation. And Brewner never voiced any disagreement during the ensuing eight-day trial with either the trial court’s decision or his counsel’s conduct. Brewner thus waived any right to be present and cannot now assert error in this regard. See *Fuller v. State*, 277 Ga. 505 (2) (591 SE2d 782) (2004) (defendant waived right to be present by failing to object after being informed of trial court’s communications with jury outside his presence); *Hanifa*, 269 Ga. at 807-808 (defendant waived right to be present by failing to object after being informed of trial judge’s meeting with the jury outside presence of defendant and counsel).

III.

Brewner next contends that the trial court erred in admitting the other acts evidence relating to his prior drug dealings and the 2013 home invasion targeting Staples. As an initial matter, it is undisputed that Brewner did not assert any objection when this evidence was first introduced at trial.² Accordingly, as Brewner concedes, our review of the trial court's admission of this evidence is limited to a plain error review. See OCGA § 24-1-103 (d); *Jones v. State*, 299 Ga. 40, 42 (2) (785 SE2d 886) (2016). The bar for plain error is a high one:

First, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the trial court proceedings. Fourth and finally, if the above three prongs are satisfied, the appellate court has the *discretion* to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

² At one point, in the course of moving for a mistrial when Staples referred during his testimony to Brewner's having been in jail, defense counsel did interpose an objection to "this whole line of questioning about these drug transactions." This objection, however, came after Staples had already testified, without objection, that he had met Brewner in 2010, used drugs with him at that time, and then began purchasing drugs from Brewner to resell and to support his own habit.

State v. Kelly, 290 Ga. 29, 33 (2) (a) (718 SE2d 232) (2011) (punctuation omitted, emphasis in original). Under the circumstances here, there was no error, much less any clear or obvious error, and therefore Brewner's other acts claims fail.

Under OCGA § 24-4-404 (b),

evidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Of course, even if offered for a proper purpose under OCGA § 24-4-404 (b), evidence may nonetheless be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." OCGA § 24-4-403; *State v. Jones*, 297 Ga. 156, 158 (1) (773 SE2d 170) (2015). Because these provisions of our new Evidence Code were borrowed from the Federal Rules of Evidence, our interpretation of these provisions is guided by the decisions of the federal appellate courts, especially the United States Supreme Court and the Eleventh Circuit. *Davis v. State*, 299 Ga. 180, 185 (2) (a) (2) (787 SE2d 221) (2016).

Thus, in construing OCGA § 24-4-404 (b) in conjunction with OCGA § 24-4-403, this Court has adopted the three-part test utilized in the Eleventh Circuit under the analogous Rules 403 and 404 (b) of the Federal Rules of Evidence. *Hood v. State*, 299 Ga. 95, 101 (4) (786 SE2d 648) (2016). This test assesses whether (1) the evidence is relevant to an issue in the case other than the defendant's character; (2) the probative value of the evidence is not substantially outweighed by the likelihood of its undue prejudice; and (3) there is sufficient proof for a jury to find by a preponderance of the evidence that the defendant in fact committed the other act. *Id*; *Olds v. State*, 299 Ga. 65, 69-70 (2) (786 SE2d 633) (2016). We review a trial court's ruling on the admission of 404 (b) evidence for abuse of discretion. *Jones*, 297 Ga. at 159.

The evidence of Brewner's involvement in the Staples home invasion was relevant to prove his intent to participate in the scheme to invade Schrier's home in search of drugs and money. See *Olds*, 299 Ga. at 71-72 (a defendant's not-guilty plea makes intent an issue for purposes of 404 (b)). More specifically, it was relevant to rebut Brewner's assertion that he merely introduced Staples to the other participants, with no intent to further orchestrate and actively assist in the enterprise. Because Brewner's defense was premised on his alleged disavowal of the robbery scheme, which Brewner sought to

establish by highlighting Roberts' testimony regarding his intent to distance himself from the scheme, his prior involvement in a similar plot the year before the crimes here is highly probative of his intent to participate in the overall criminal scheme. Accordingly, the significant probative value of this evidence in undercutting the defense Brewner himself interposed was not substantially outweighed by the likelihood of undue prejudice from its admission. Finally, there is little dispute that Brewner did in fact mastermind the 2013 crime, as Staples' testimony on this subject was unchallenged, and Brewner himself admitted doing the acts in his interview with Detective Johnson.

As for the evidence regarding Brewner's involvement in the drug trade, this evidence was clearly relevant to establish context for his relationship with Staples and to the others involved in the crimes. Because this evidence was integral to the narrative surrounding the crimes, its probative value was not substantially outweighed by the risk of undue prejudice. See generally *Old Chief v. United States*, 519 U. S. 172, 183 (117 SCt 644, 136 LE2d 574) (1997) (recognizing, in weighing the probative value versus prejudice of evidence offered under Rule 404 (b), "the offering party's need for evidentiary richness

and narrative integrity in presenting a case”).³ Again, this evidence was undisputed, so the jury was authorized to find by a preponderance of the evidence that Brewner did engage in such drug dealing. Accordingly, the trial court did not abuse its discretion in admitting the evidence under 404 (b).

To the extent Brewner asserts error in the trial court’s failure to make on-the-record findings with regard to the three prongs of the 404 (b) test, he is incorrect. Again, because Brewner failed to object at trial on this basis, we review this issue only for plain error. While our case law pre-dating the effective date of the new Evidence Code held that trial courts must make on-the-record findings that the requirements for admissibility had been satisfied, see, e.g., *Moore v. State*, 290 Ga. 805, 809 (2) (725 SE2d 290) (2012), the Eleventh Circuit has imposed no such requirement under Rule 404 (b). See *United States v. Schatz*, 545 Fed. Appx 934, 936 (11th Cir. 2013) (because there

³ In fact, to the extent this evidence simply helps to present a complete picture of the various parties’ relationships and the context within which the crimes were planned and perpetrated, this evidence might even be viewed as “intrinsic” evidence not subject to the 404 (b) requirements. See Paul S. Milich, Georgia Rules of Evidence § 11:3, at 243-251 (2016-17 ed.); *Brooks v. State*, 298 Ga. 722, 726, n.11 (2) (783 SE2d 895) (2016) (evidence is “intrinsic” if it is (1) an uncharged offense arising from the same transaction or series of transactions as the charged offense; (2) necessary to “complete the story of the crime”; or (3) “inextricably intertwined with the evidence regarding the charged offense”).

is no U.S. Supreme Court or Eleventh Circuit precedent specifically requiring on-the-record findings prior to the admission of evidence under Rule 404 (b), defendant could not establish plain error in district court's failure to do so); *United States v. Braithwaite*, 709 F2d 1450, 1455-56 (11th Cir. 1983) (no error in district court's failure to make on-the-record finding under 404 (b)); see also *United States v. Veltrmann*, 6 F3d 1483, 1499 (11th Cir. 1993) (where record did not indicate the district court conducted the proper review under Rule 404 (b), the appeals court conducted the analysis itself). Accordingly, there was no plain error in the trial court's failure to make on the record findings in support of admission of the 404 (b) evidence. *Schatz*, 545 Fed. Appx at 936.

IV.

Brewner contends that his trial counsel rendered constitutionally ineffective assistance in two respects, but neither argument succeeds. To establish ineffective assistance of counsel, a defendant must show that his counsel's performance was professionally deficient and that such deficient performance resulted in prejudice to the defendant. *Strickland v. Washington*, 466 U. S. 668, 695 (104 SCt 2052, 80 LE2d 674) (1984); *Wesley v. State*, 286 Ga. 355, 356 (3) (689 SE2d 280) (2010). To prove deficient performance, one must show that his attorney "performed at trial in an objectively unreasonable

way considering all the circumstances and in the light of prevailing professional norms.” *Romer v. State*, 293 Ga. 339, 344 (3) (745 SE2d 637) (2013); see also *Strickland*, 466 U. S. at 687-688. To prove prejudice, one must establish a reasonable probability that, in the absence of counsel’s deficient performance, the result of the trial would have been different. *Strickland*, 466 U. S. at 695. If the defendant fails to establish either the “deficient performance” or the “prejudice” prong of the *Strickland* test, this Court is not required to examine the other. *Green v. State*, 291 Ga. 579 (2) (731 SE2d 359) (2012).

Brewner’s first argument is that his counsel rendered ineffective assistance by failing to request a limiting instruction contemporaneous with the admission of the 404 (b) evidence. But the trial court gave a comprehensive limiting instruction at the conclusion of the evidence regarding the limited purposes for which the jury could consider the 404 (b) evidence. The giving of the instruction at the conclusion of the evidence mitigated any risk that the jury would ultimately consider the evidence for an improper purpose. See *United States v. Lamons*, 532 F3d 1251, 1266-67 (11th Cir. 2008) (no error where limiting instruction regarding 404 (b) evidence given at the close of evidence). See also *Smith v. State*, 270 Ga. 68, 70 (3) (508 SE2d 145) (1998)

(counsel's failure to request a limiting instruction contemporaneously with the admission of prior bad act evidence did not constitute ineffective assistance where trial court gave limiting instruction at close of evidence). Brewner therefore cannot establish prejudice from trial counsel's failure to request the instruction at an earlier point in the trial.

Brewner also asserts ineffective assistance in counsel's failure to object to the admission of the audio recordings of Brewner's phone calls to Detective Johnson based on lack of voice authentication. Under OCGA § 24-9-901, authentication of evidence may be achieved through any of a variety of means affording "evidence sufficient to support a finding that the matter in question is what its proponent claims." It is true, as Brewner notes, that the State did not present any evidence that Detective Johnson or any other person who was familiar with Brewner's voice recognized that voice on the recordings. But the record does reflect, among other things, that in these conversations, the speaker provided verifiable information that only Brewner would possess, such as the location of his truck and contents of his backpack. Trial counsel, moreover, testified at the new trial hearing that he believed the voice on the recording was Brewner's, and thus any objection based on lack of authentication could have been overcome by readily available evidence. We agree with counsel's

assessment, and thus Brewner can show neither deficient performance nor prejudice.

V.

In his final enumeration, Brewner contends that the trial court erred in admitting as prior inconsistent statements the video recordings of Roberts' interview with Detective Johnson. Under OCGA § 24-6-613 (b), extrinsic evidence of a witness' prior inconsistent statement may be admitted so long as "the witness is first afforded an opportunity to explain or deny the prior inconsistent statement and the opposite party is afforded an opportunity to interrogate the witness on the prior inconsistent statement or the interests of justice otherwise require." See also OCGA § 24-8-801 (d) (1) (A) (prior inconsistent statements meeting requirements of OCGA § 24-6-613 (b) are not hearsay if the declarant testifies at trial and is subject to cross-examination).

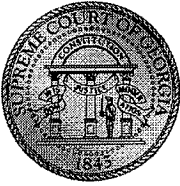
The recordings were admitted, over objection by the defense, after Roberts testified at length regarding the relationships among Brewner, Staples, the other co-indictees, and various witnesses; her observations regarding the interactions among these individuals in the days leading up to the crimes and immediately thereafter; and her understanding about the plot to recover the missing drugs and/or money from Schrier's home. Roberts steadfastly

maintained at trial that Brewner's involvement in the robbery plot was limited to merely introducing Staples to Jenkins and that she had convinced him to eschew further participation in the scheme. At various points during Roberts' direct testimony, she was asked about discrepancies between her testimony and her prior recorded statement to Detective Johnson. For example, Roberts claimed not to recall telling Detective Johnson that Brewner had initially wanted to be an active participant in the robbery, and she attempted to reconcile her trial testimony that Brewner had gotten rid of all his guns by the time of the crimes with her prior statement to Detective Johnson that Brewner always carried a gun. When given the opportunity to explain why her trial testimony might have differed from her statements to police, Roberts testified that at the time of her police interview she was extremely tired and under the influence of drugs.

The failure of a witness to remember making a statement may provide the foundation for offering extrinsic evidence to prove that the statement was made. See *Hood*, 299 Ga. at 99; *McNair v. State*, 330 Ga. App. 478 (1) (767 SE2d 290) (2014) (evidence of witness's past statements to police, including recording of police statement, were properly admitted where witness claimed he could not recall speaking with police). Here, the foundation was laid for

admission of Roberts' prior statements to Detective Johnson when Roberts gave testimony inconsistent with those statements, was confronted with them, and disclaimed them. There was no error in the trial court's admission and publication of the recorded statements at trial.

Judgment affirmed. All the Justices concur.



SUPREME COURT OF GEORGIA
Case No. S17A1103

Atlanta, September 13, 2017

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

BRIAN JOSEPH BREWNER v. THE STATE

**Upon consideration of the Motion for Reconsideration filed in this case, it is
ordered that it be hereby denied.**

All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the
minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court
hereto affixed the day and year last above written.


Clerk

FILED IN OFFICE
CLERK SUPERIOR COURT
GWINNETT COUNTY, GA

2015 OCT -2 AM 8:52

RICHARD ALEXANDER, CLERK

IN THE SUPERIOR COURT FOR THE COUNTY OF GWINNETT
STATE OF GEORGIA

STATE OF GEORGIA

VS.

FILE NO. 15-B-3143-8

BRIAN JOSEPH BREWNER

Transcript of motions given before The Honorable

R. Timothy Hamil, September 9, 2015, at Lawrenceville, Georgia
at 2:00 p.m.

APPEARANCES OF COUNSEL:

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ORIGINAL

1 MR. LUSH: Yes, Your Honor, we're here on case number
2 14-B-4593 which has been readopted -- or reindicted as
3 15-B-3143, State versus Brian Brewner. Of course, the
4 Court has previously heard a motion in this case with
5 regards to the State's motion to disqualify Mr. Drake as
6 Mr. Brewner's attorney which has been dealt with. This
7 case was recently reindicted and is actually on the
8 arraignment calendar this week to fix a mistake with a
9 name in the indictment. But otherwise, the indictment's
10 exactly the same except for fixing a couple counts with
11 respect to a victim's name.

12 Under the old indictment I had filed three other --
13 well, two other motions and I guess one was notice that
14 does not require any motion. The first of those in terms
15 of the notice was notice of the State's intention to admit
16 child hearsay statements that has to do with statements
17 made by victim Madison Smith regarding what happened on
18 August 6th, 2014 in regards to the home invasion and
19 shooting. She was one of the victims. The statute
20 requires the State to provide notice in advance of trial.
21 But essentially that's it.

22 So I don't believe Mr. Drake has any issue,

23 MR. DRAKE: I have no opposition to that motion,
24 Judge.

25 MR. LUSH: Another motion that the State has filed --

1 and I talked to Mr. Drake about this just prior to court
2 today, and I think it will not require any testimony -- is
3 the State's motion to admit hearsay evidence under the
4 Residual Hearsay Rule, Rule 807.

5 Specifically, the State is seeking to admit
6 statements by -- made by the deceased victim in this case,
7 Adam Schreir; and specifically, statements that he made to
8 Ashley Sprague and Bryan Banner. Both -- well,
9 Mr. Banner's actually in custody and has been brought over
10 from the jail -- was brought over from the jail to testify
11 regards these statements today for the motion. And
12 Ms. Sprague is actually over in the D.A.'s office.

13 I talked to Mr. Drake before court today and, as
14 outlined in the motion and, of course, provided in far
15 greater detail in discovery, these regard statements
16 Mr. Schreir made in terms of his involvement with Bryan
17 Banner and these stolen narcotics that Mr. Banner was
18 responsible for that ultimately the State's theory is was
19 what led to the home invasion and the shooting in this
20 case.

21 They would also have to do with other, I guess,
22 criminal activities that Mr. Schreir was involved in.
23 Neither -- Mr. Schreir did not know Mr. Brewner. He does
24 not know -- or at least as far as I know, there's never
25 been any evidence presented that he knew Mr. Brewner. He

1 did not know any of Mr. Brewner's co-defendants in this
2 case. So nothing that would be offered in terms of the
3 hearsay statements would directly implicate Mr. Brewner.
4 And I believe Mr. Drake has no opposition to these hearsay
5 statements coming in at trial.

6 MR. DRAKE: That is correct, Your Honor.

7 THE COURT: Okay.

8 MR. LUSH: So Mr. Banner can go back just so you're
9 aware. The only motion that is left, then, which is going
10 to require argument, no testimony, is the State's motion
11 to admit 404(b) evidence. And as I outlined in the
12 motion -- and actually, and there's kind of two parts to
13 some of this evidence in the State's argument. It has to
14 do with Mr. Brewner's criminal background in terms of his
15 involvement in drug dealing and a specific incident
16 involving a prior strong arm robbery that the State
17 believes would be pertinent in this case.

18 Just by way of background, as I stated, what
19 ultimately led to this home invasion of Mr. Schreir's
20 residence were some missing five kilos, approximately, of
21 methamphetamine and a large amount of cash that Mr. Banner
22 had actually stolen, procured, from his mother in Dekalb
23 County when she had gotten arrested.

24 Mr. -- one of the witnesses in this case, Jamie
25 Staples, was a business associate, shall we say, of Bryan

1 Banner's mother and they all knew one another.

2 Mr. Staples had a responsibility for the stash house from
3 which these drugs were stolen, specifically from his
4 vehicle at the house.

5 Now, it's a matter of dispute in terms of if the idea
6 for this home invasion ultimately came from Jamie Staples
7 in terms of him ordering it or procuring Mr. Banner, who
8 is a friend of his or associate of his, or if it was an
9 idea that was put out there that Mr. Banner took and run
10 with.

11 In any event, the State would expect the evidence at
12 trial's going to show is that Mr. Banner then was the one
13 who got his co-defendants to do this home invasion robbery
14 that ultimately ended up in the shooting of Mr. Schreir
15 resulting in his death and the shooting of his girlfriend,
16 Jamie Staples, and her daughter, Madison Smith.

17 The evidence is going to show in this case that
18 regardless of Mr. Staples' responsibility in this case is
19 that he is admittedly a drug dealer and that he had an
20 association with the defendant, Mr. Brewner, through that.
21 There is going to be evidence from multiple witnesses that
22 would say Mr. Brewner is involved in drug dealing. I
23 think it's fair to say that with the exception of law
24 enforcement and people from the Crime Lab in this case,
25 that every other witness, any other person connected in

1 this case has a criminal record of some kind or at least
2 is involved in the drug world either as a user or dealer
3 or both.

4 And as I said, the victim is no exception.
5 Obviously, these people didn't know each other through a
6 PTA meeting. But that Mr. Brewner was involved in drug
7 dealing, that that's how he -- the State would argue why
8 when this idea was presented to him of ripping off
9 Mr. Schreir and Mr. Banner of the -- of this five kilo of
10 methamphetamine that -- I mean, that's what he does in
11 terms of -- I mean, he deals drugs. It's an intrinsic
12 part of the story.

13 Furthermore, I expect there to be evidence both from
14 a statement that the defendant made to police himself and
15 testimony from Jamie Staples is that months prior
16 Mr. Staples apparently owed money to Brian Brewner. As a
17 result of that, there was a home invasion that was not
18 reported to police but that both of them reference where
19 his group of black men -- and the co-defendants in this
20 case are black -- broke into his home, beat him,
21 threatened him, and stole money and I believe some amount
22 of drugs at the behest of Mr. Brewner.

23 Mr. Staples, I guess, is a forgiving person because
24 as time -- over the next course of the next few months
25 because he was, in a sense, responsible for these stolen

1 drugs that Mr. Banner and Mr. Schreir were responsible
2 for, he went to Mr. Brewner and again either suggested or
3 partnered with him to help him recover the drugs. And
4 there was some discussion about getting the same guys to
5 do that as the ones that had robbed him. Interesting
6 person to go to in order for assistance with that but
7 there are statements by the defendant, Mr. Brewner, and
8 Mr. Staples indicating that that was, in fact, the case.
9 And then ultimately, you know, Mr. Brewner put together
10 this crew that broke into the victim's home.

11 So both the drug dealing on the part of Mr. Brewner
12 and the specific robbery that involved Jamie Staples,
13 first of all, I would say actually even falls outside Rule
14 404(b). And I have various cases in support of this
15 motion, the first of which -- and I have copies for the
16 Court and Mr. Drake -- is United States of America versus
17 Daniel Garcia-Barzaga, Freddie Crespo, and Jorge Torres.
18 So that's Garcia-Barzaga, that's B-a-r-z-a-g-a; Freddie
19 Crespo, C-r-e-s-p-o; and Jorge with a J, Luis Torres,
20 T-o-r-r-e-s. That is Eleventh Circuit case 361 Federal
21 Appx. 109, that's a 2010 case.

22 And of course, under the new evidence rules there's
23 not a whole lot of case law at this point on Rule 404(b)
24 evidence. But in that particular case the convictions
25 stem from multiple drug charges, conspiracy to deal drugs,

1 conspiracy to rob by use of force. Basically it was a
2 conspiracy not unlike this to rob drug dealers of their
3 drugs. In that case evidence was presented in court that
4 had to do with the defendant's prior drug dealing
5 activities. I think that's what it was. Sorry, prior
6 robberies that the defendant's co-conspirators had
7 committed together.

8 And of course, the Court is familiar with Rule
9 404(b), but also in addition to, as the courts have stated
10 in Federal case law, is that evidence -- only extrinsic
11 evidence is subject to the requirements of Federal rules
12 of evidence 404(b). Evidence not part of the crime
13 charged but pertaining to the chain of events explaining
14 the context, motive, and set-up of the crime is properly
15 admitted if linked in time and circumstances with the
16 charged crime or forms an integral and natural part of the
17 account of the crime where it's necessary to complete the
18 story of the crime for the jury.

19 Such evidence is not extrinsic under Rule 404(b) and
20 thus falls outside the scope of the Rule. We have held
21 that evidence of a defendant's previous drug smuggling
22 activities was intrinsic to the charged crime where this
23 evidence one, explained why another drug smuggler was
24 willing to assist the defendants in the crime with little
25 or no advance notice; and two, rebutted the defendant's

1 defense that he had merely accompanied another individual
2 who was engaged in drug smuggling. And of course, even if
3 it falls outside Rule 404(b) it still has to meet the
4 requirements of Rule 403 which is that the probative value
5 must be substantially outweighed by the prejudicial
6 effect.

7 Here the Court ruled the District Court did not abuse
8 its discretion in admitting evidence of the defendant's
9 previous robberies because this evidence was intrinsic to
10 the charged offenses. First, this evidence provided an
11 explanation for why these particular defendants joined
12 together and agreed to rely on each other to commit an
13 armed narcotics robbery. In addition, this evidence
14 was -- also explained details such as why Torres offered
15 to share his proceeds of the offense with Garcia, how
16 Garcia and Gallego could identify Torres's gun, and why
17 the defendants had police paraphernalia, et cetera -- and
18 that gets into the specifics of the case.

19 So as a preliminary matter I would say that this
20 evidence that the State is seeking to admit falls outside
21 of 404(b). You can't tell the story of how the defendant
22 put together this crew, robbing crew, to procure these
23 drugs and cash in question without knowing that A, that
24 this defendant was heavily involved in drug dealing; and
25 that B, he had done the exact same thing involving one of

1 the witnesses in this case, Mr. Staples, in the months
2 prior to this actual crime.

3 As I said, this isn't just through the testimony of
4 Jamie Staples. This is through the defendant's own
5 statement. You know, the defendant -- and I don't know if
6 this has come up in any prior hearings or motions -- but
7 the evidence is going to show that Mr. Brewner during --
8 when he knew that police were looking for him in respect
9 to this crime and had actually fled from police at one
10 point, called up Detective Bobby Johnson on his own and
11 basically threw everybody under the bus.

12 He tried to minimize his role, obviously did not
13 fully comprehend the meaning of party to a crime, but that
14 this is -- he's basically pointing a finger at Jamie
15 Staples, that Jamie Staples wanted these drugs back, that
16 they had discussed about, you know, that the same people
17 who had robbed Jamie Staples previously might be the ones
18 to commit this crime. Again, you can't tell this story
19 without knowing the defendant's involvement with all of
20 the parties involved, both his co-defendants and these
21 other witnesses.

22 The State's second argument though, would be that
23 even if the Court found this was an intrinsic part of the
24 evidence in case is that it is admissible under Rule
25 404(b). In support of that first case I have is Bradshaw

1 versus the State, that's 296 Georgia 650. That's a 2015
2 case. There the defendant was charged with malice murder
3 and other crimes. And part of the evidence that was
4 admitted was evidence of a prior murder he had been
5 charged with but hadn't been tried yet on in Ohio.

6 There the evidence was admitted to both show intent.
7 And since the defendant as in Bradshaw as in this case is
8 making an intent an issue with his not guilty plea, intent
9 is relevant. It was also admitted to show motive. The
10 reason it was admitted in terms of a factual basis was
11 that in both cases both crimes involved the defendant
12 being involved in drug dealing, that he had a customer or
13 someone that he was unhappy with in terms of the drug deal
14 and then shot the person as a result. So it was
15 admissible both for intent and motive.

16 In evaluating 404(b) evidence, the Court is to follow
17 the three-part test enunciated by the Eleventh Circuit
18 Court of Appeals that is that one, the evidence must be
19 relevant to an issue other than the defendant's character;
20 two, the probative value must not be substantially
21 outweighed by its undue prejudice; and three, the
22 government must offer evidence proof so that -- sufficient
23 proof so that the jury could find that the defendant
24 committed the act.

25 Here the reasons that the State is seeking to admit

1 this evidence is to show motive, opportunity, intent,
2 preparation, and plan. First of all, in terms of the drug
3 dealing activities, I mean, that all goes straight to
4 motive intent. The defendant is a drug dealer. This
5 involved the theft of drugs to be resold by either himself
6 or others. That's clear-cut.

7 And then in terms of this prior robbery involving
8 Mr. Staples, first of all, the defendant admits to these
9 activities one way or another, and there's going to be
10 other evidence or other witnesses to testify as to it. So
11 there's no question about his having committed these other
12 crimes.

13 And again, it's just highly relevant to the issue --
14 for the reasons that the State is seeking to admit it.
15 And in terms of the balancing test the Court must engage
16 in, I mean, without all of that there -- I mean, in terms
17 of the defendant's background, he is not involved in this
18 crime. So of course it's prejudicial. All strong
19 evidence, good evidence, is prejudicial. The only
20 question is whether or not its prejudice is substantially
21 outweighed.

22 And I would say that one of the reasons that it's not
23 is the defendant contacted Detective Johnson himself and
24 tried to put out this story that he was on the edges of
25 this case, that he's had his problems, that he's done

1 these things, but he's not involved in this. I mean, he's
2 in a sense offering it up kind of as a quasi defense that
3 yeah, I'm a bad guy but I'm not bad this time.

4 A couple other cases that the State has. The first
5 one is U.S. versus Thompson -- Johnson; that is 348
6 Federal Appx. 468. That's a 2009 case. In that case --
7 and that was a drug case and firearms case -- 404(b)
8 evidence was admitted of the defendant's prior drug
9 convictions or drug dealings. There it was admitted
10 because, as the Court said, the convictions were probative
11 of Johnson's knowledge of the drug trade which showed his
12 motive to possess a gun.

13 Again, these people didn't meet at a PTA meeting.
14 Mr. Brewner is heavily involved in the drug world. That's
15 how he knows all these people. And it is highly relevant
16 as to his intent and motive.

17 And then finally, the last case I have is U.S. versus
18 Torres Homes. That is 171 Federal Appx. 753. That's a
19 2006 case. There the defendant and his co-defendants were
20 charged in a bank robbery and evidence was admitted of a
21 prior uncharged bank robbery under 404(b). There the --
22 again, it was admitted because it goes to the whole issue
23 of conspiracy. And one of the charges in this case is
24 conspiracy to commit robbery.

25 One of the elements of conspiracy that the

1 prosecution must establish beyond a reasonable doubt is an
2 intention to further the purposes of the conspiracy. And
3 this all goes to intent. Again, intent is an issue in
4 this case because by virtue of the defendant pleading not
5 guilty, he has made it an issue.

6 So again, this prior robbery that the defendant was
7 involved in, his drug dealing activities are all relevant
8 to the issue of intent. And so I think, you know, between
9 the Georgia Supreme Court case, the Eleventh Circuit case,
10 it gives all of us guidance that this evidence both as to
11 the defendant's drug dealing activities and also this
12 prior robbery are highly relevant as 404(b) evidence in
13 this case if the Court doesn't agree with the State's
14 argument that it's intrinsic evidence to the case and
15 falls outside 404(b). Thank you.

16 THE COURT: Mr. Drake?

17 MR. DRAKE: Thank you, Judge. Judge, I disagree with
18 learned counsel Mr. Lush in that you can tell the story of
19 this case quite easily, as my client did over a series of
20 voluntary phone calls that he had with Detective Bobby
21 Johnson in this case where he outlined exactly what
22 happened. In this case he tells Investigator Johnson
23 that, you know, look, Staples came to me. He wanted to
24 rob this guy because he thought that this guy had five
25 kilos of methamphetamine and a bunch of money that

1 Mr. Banner, his good buddy, had stolen from his own mother
2 who was a drug dealer and who was at the time in custody
3 in DeKalb County for trafficking, and that Brian said that
4 he wasn't interested but he'd pass that information along
5 to some people that he knew, those being the co-defendants
6 in this case.

7 And so absent any drug dealing information, absent
8 any allegations of committing a home invasion robbery, you
9 can tell that story just as Brian did in the case.

10 With that, I think that puts us squarely within
11 404(b), Judge. And here we have the statement of
12 Mr. Staples who is also charged, who says that it was
13 Brian who orchestrated this plan to come into his home and
14 rob him but we're dealing with different people and
15 different issues.

16 In this case the allegation is that Mr. Staples owed
17 Brian significant amounts of money from a debt that was
18 unpaid. We have different players involved in that the
19 folks that are involved in going to the home of
20 Mr. Schreir, killing him, shooting the girlfriend and the
21 child, those folks were not involved in the prior alleged
22 home invasion because the record will show that those
23 folks were in prison at the time. And so we're dealing
24 with a whole different set of players.

25 Mr. Brewner in his statements refers to Mr. Staples

1 being beaten but not anything about a robbery or a home
2 invasion. And so I think that puts us right back into,
3 you know, that any probative value that it would have
4 whatsoever -- I don't think it has any -- is substantially
5 outweighed by its undue prejudice upon Mr. Brewner. And
6 so that's the basis for our objection, Judge.

7 MR. LUSH: The only thing that I can add, Your Honor,
8 is if the Court -- I don't know if Mr. Drake has any
9 objection -- I know the Court's heard Ms. Sprague's
10 recording but I can tender into evidence Mr. Brewner's
11 statements along with Mr. Staples. I know that there's a
12 lot said and there's multiple multiple statements,
13 especially in the case of Mr. Brewner, to kind of
14 summarize it all because I know it sounds like there's
15 some conflict about what's being said. But I would seek
16 to offer -- I don't have them with me right now -- but
17 offer those into evidence for the Court's consideration.

18 THE COURT: Well, for purposes of discussion,
19 Mr. Lush, if I was inclined to see things your way, does
20 this call for some sort of a limiting instruction?

21 MR. LUSH: I think it would, Your Honor, that clearly
22 the defendant is not on trial for this prior robbery or
23 any of his drug dealing activity. So I think, yeah, that
24 it would be a pattern instruction about character evidence
25 and other acts would be appropriate.

1 THE COURT: So you think a pattern instruction would
2 be enough?

3 MR. LUSH: Well, I know we tried to craft that once
4 in a prior trial because it's -- I prefer the old pattern
5 instruction to the new one. So I think we could craft it
6 in a specific way that is more specific to the facts in
7 this case. Yeah, so.

8 THE COURT: What specifically are you seeking to
9 introduce here?

10 MR. LUSH: What I'm specifically -- first is to the
11 drug activities -- is there's no specific incident of,
12 like on such and such date this defendant sold drugs to
13 this person. But it's just the general knowledge,
14 information that, first of all, that's how -- that all
15 these parties know each other; specifically Mr. Staples
16 and Mr. Brewner, that that is the -- as I said, he doesn't
17 randomly call someone to say hey, want to help me recover
18 these drugs? This is a drug associate of his that he is
19 just -- that's how they know each other. They're drug
20 dealers.

21 And that more specifically as to the robbery, it's
22 that Mr. Staples sought out Mr. Brewner because he himself
23 had been robbed before because of money he owed to
24 Mr. Brewner that did not sever their criminal relationship
25 and that Mr. Staples specifically sought his assistance in

1 one form or another of having a group like the one, maybe
2 the ones that the guys that you got to do me, to do the
3 same thing in terms of getting these drugs from
4 Mr. Schreir and Mr. Banner.

5 Like I said, none of this is by accident that --
6 especially in terms of the relationship between
7 Mr. Staples and Mr. Brewner. That's their connection.
8 That's why Mr. Staples sought him out. You know,
9 Mr. Brewner admits to this, that that's their relationship
10 and how this all got -- how it all got started.

11 THE COURT: And you offered to me some interview
12 material. Was that from Mr. Staples?

13 MR. LUSH: No, I have not. I should have done that
14 prior to today and I apologize because all you've heard so
15 far in terms of actual interviews is Ms. Sprague. But
16 there are some interviews if it's of assistance to the
17 Court -- and I think could be -- is that I would ask to
18 submit that for the Court to --

19 THE COURT: And what interviews -- because you're
20 right. I've heard Ms. Sprague's interview and we, of
21 course, have had hearings regarding her situation. But
22 what --

23 MR. LUSH: These would be interviews by the
24 defendant, Mr. Brewner, and interviews that were conducted
25 of Mr. Staples. Because as I said, that's the linchpin in

1 terms of these missing -- because as the Court has heard,
2 the victim --

3 THE COURT: well, I kind of feel like I need to hear
4 that kind of stuff.

5 MR. LUSH: Okay.

6 THE COURT: I mean, we all agree it's a very
7 sensitive area. So why don't you get with Mr. Drake and
8 let him know what you intend to submit to me. And if
9 there's a problem, y'all let me know and we can gear the
10 hearing back up.

11 MR. DRAKE: Yeah, Judge, I have no objection to the
12 Court hearing the series of phone calls, interviews, if
13 you will, that Mr. Brewner made to Investigator Johnson.
14 I think they're about three hours in length by the time
15 it's all said and done. And then Mr. Staples' interview
16 as well, Judge. I think that would aid the Court and try
17 to help frame the issue.

18 THE COURT: Okay. well, let's get that to me.

19 MR. LUSH: Okay. I'll get that to the Court today.

20 THE COURT: Anything else?

21 MR. LUSH: Not as to this case, Your Honor.

22 MR. DRAKE: And Judge, just while we're here,
23 Mr. Lush and I had talked about in regard to the series of
24 phone calls, statements that Mr. Brewner made that there
25 is going to have to be some redaction. Obviously a lot of

1 that's going to depend on the Court's ruling here today
2 that we're going to see if we can reach a consent
3 agreement on. And if need be, we'd have to present some
4 issues to the Court. But he talks about prior convictions
5 and going to prison and things like that. So I think it's
6 going to be pretty clear once the Court rules on this
7 issue what we need to cut and what we can keep in.

8 THE COURT: Very good. I'll wait to hear from y'all.
9 Thank y'all.

10 MR. DRAKE: Thank you, Judge.

11 MR. LUSH: That's it.

12 (whereupon, the hearing was concluded.)
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C E R T I F I C A T E

STATE OF GEORGIA:

GWINNETT COUNTY:

I do hereby certify that the foregoing pages 1 through 20 are a true, complete and correct transcript of the proceedings taken down by me in the case aforesaid.

This certification is expressly withdrawn and denied upon the disassembly or photocopying of the foregoing transcript, or any part thereof, including exhibits, unless said disassembly or photocopying is done by the undersigned Official Court Reporter and original signature and seal is attached thereto.

This the 29th day of September, 2015.

MARY M. GRUBB

MARY M. GRUBB, COR.

