

**IN THE COURT OF APPEALS
STATE OF GEORGIA**

STATE OF GEORGIA,)	
)	
Appellant,)	
)	
v.)	CASE NO. A22A1509
)	
JERRION MCKINNEY,)	
)	
APPELLEE.)	
)	

APPELLEE’S BRIEF

COMES NOW, Jerrion McKinney, Defendant-Appellee in the above-styled case and submits his Appellee’s Brief in opposition to the State’s efforts to reverse the decision of the trial court in this case.

The State’s argument essentially is that it believes the State Legislature granted prosecutors nearly unfettered power to introduce evidence of almost any crime as a gang-related charge. The State’s argument rejects the concept that our judiciary has any ability to review laws or interpret them in a fashion consistent with our State and Federal Constitutions. Instead, the State asks this Court to serve simply as a rubber-stamp for any legislation passed and signed into law. As such, the State’s argument would eviscerate the power of our independent judiciary and flies in the face of our nation’s tradition of separation of powers. This is not hyperbole, but

logical and inexorable conclusion of the State's position in this case. This Court should firmly reject the State's position and affirm the decision of the trial court. In support of this argument, Mr. McKinney shows the Court as follows:

ARGUMENT AND CITATION OF AUTHORITY

I. STATEMENT OF JURISDICTION

Mr. McKinney joins with the State in asserting that jurisdiction is proper with this Court pursuant to O.C.G.A. § 5-7-1(a)(4) and Article VI, Section V, Paragraph III of the Georgia Constitution of 1983.

II. STANDARD OF REVIEW

The State seeks the reversal of the trial court's decision of exclude evidence of Mr. McKinney's alleged gang activity. When reviewing the admission of evidence by a trial court, this Court reviews the decision for an abuse of discretion. "The admission of evidence is committed to **the sound discretion** of the trial court, and the trial court's discretion whether to admit or exclude evidence will not be disturbed on appeal absent an abuse of discretion." *Anglin v. State*, 302 Ga. 333, 335 (2017) (citing *Young v. State*, 297 Ga. 737, 739 (2015)). Although the State urges this Court to reverse the trial court's Order, there is simply no evidence of any abuse of discretion that would justify a reversal based on the stringent standard of review.

III. THE STATE'S FACTUAL SUMMATION IS CONCLUSORY AND IMPROPER AT THIS STAGE OF LITIGATION

Pursuant to Court of Appeal Rule 25(b)(1): "The brief of the appellee shall...point out any material inaccuracy or incompleteness of the appellant's statement of facts deemed necessary." Consistent with Rule 25, Mr. McKinney objects to the conclusory nature of the State's recitation of facts. Specifically, Mr. McKinney objects to subsections I(A) and (B) of Appellant's Brief (See Appellant's Brief, pp. 4-6).

Mr. McKinney bases his objection on the fundamental truth that he has not been convicted of any of the charges alleged in the State's Indictment. At this stage, Mr. McKinney remains innocent until proven guilty by a jury in Fulton County Superior Court. This fundamental Constitutional right cannot be sidestepped by the State's improper summation of facts before the Court. As such, much of the State's summation should be disregarded as either premature or improper.

Mr. McKinney is confident that this Court need not sanction or otherwise strike portions of the State's Brief. Instead, Mr. McKinney simply notes that the State's recitation is better suited for a post-trial appeal rather than the interlocutory proceedings before the Court.

As an alternative, Mr. McKinney submits the following is an accurate factual and procedural history of this case to date:

- On or about July 4, 2020, protests surrounding the shooting death of Rayshard Brooks by Atlanta Police Department Officer Garrett Rolfe occurred at the intersection of 135 Pryor Road and 99 University Avenue in Atlanta, Georgia. The Court may take judicial notice of this fact due to the extensive media coverage of events.

- The State alleges that Mr. McKinney was present at the protests at the time when Mr. McKinney's co-defendant Julian Conley shot and killed eight-year-old Secoria Turner. Mr. McKinney was later arrested in conjunction with the events at the protest, but is not charged with murder.

- On August 13, 2021, Mr. McKinney and his co-defendant were indicted. Mr. McKinney was only indicted on eleven (11) of the thirty-seven (37) counts issued by the Grand Jury. The Indictment alleges Mr. McKinney committed multiple acts of criminal street gang activity, aggravated assault, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon.

- On December 20, 2021, the State filed its Notice of Intent to Introduce Evidence of Prior Criminal Gang Activity pursuant to O.C.G.A. §§ 24-4-418 and 16-5-1, *et seq.*

- On February 11, 2022, the trial court heard oral arguments in relation to the State's Notice. The matter was taken down by a court reporter and the transcript of the same speaks for itself. Following the hearing, the trial court permitted the parties to submit written briefs for review. The State submitted its brief on February 18th and Mr. McKinney responded on February 28th.

- On March 15, 2022, the trial court issued its Order permitting the State to introduce evidence of one prior gang act against Mr. McKinney as related to a 2017 robbery from Florissant, Missouri. The trial court denied the State's efforts to introduce evidence of two other alleged incidents of gang activity from 2015 and 2016 respectively. The trial court permitted the State to introduce all evidence of alleged gang acts against co-defendant Conley. On March 17th, the State timely filed its notice of appeal, which was eventually docketed on May 24th. This briefing follows.

IV. THE TRIAL COURT'S ANALYSIS DID NOT CONSTITUTE JUDICIAL OVERREACH

The State expends substantial paper and ink arguing that the trial court's Order violated separation of powers, the plain text of the statute, the legislative intent of the Georgia legislature, and constitutes judicial overreach. The State asserts, without analysis, that the eight previous cases referencing O.C.G.A. § 24-4-418 do not discuss a "nexus" requirement. However, the State also ignores the fact that

ultimately the question before this Court is ultimately one of first impression. *Dunn v. State*, 312 Ga. 471 (2021). To argue, without evidence or authority, that the trial court's decision constitutes overreach is a patent overstatement. Instead, this Court should focus its analysis on whether and how O.C.G.A. § 24-4-18 should be interpreted in conjunction with other statutes under the Georgia Gang Act.

V. THE PLAIN TEXT OF O.C.G.A. § 24-4-418 REQUIRES IT BE READ IN HARMONY WITH O.C.G.A. §§ 16-15-3 AND 16-15-4

The State insists that if a statute does not expressly and unambiguously set forth a method of analysis, then it cannot be applied. This analysis would lead to repeated absurd results if applied broadly to Georgia law. Instead, when one statute references another, the analysis of the referenced statute's case law should be relevant to analysis of the subject statute.

In the present case, O.C.G.A. § 24-4-418 permits introduction of evidence of other criminal gang activity as defined by O.C.G.A. § 16-15-3. However, the language of § 16-15-3 is a list of definitions for crimes that constitute predicates under O.C.G.A. § 16-15-4(a) and (b). The State would simply want the Court to adopt the position that evidence of the commission of any crime listed in § 16-15-3 is admissible in a gang act prosecution. The State employs circular reasoning to support this conclusion, insisting there is not any notion of a "nexus" requirement in the statute because there is no reference to a "nexus" requirement in the statute, as such there can be no "nexus" requirement in the statute.

Contrary to this analysis, the trial court's analysis is persuasive. The trial court acknowledged both that there is no case law on point addressing the application of O.C.G.A. § 24-4-418 and that cases relied upon by the Mr. McKinney "do not speak to the issue of whether the State must prove a nexus between the prior acts and an intent to further gang activity for the prior acts to be admissible." (R. 254).

The trial court ultimately endorsed the Georgia Supreme Court's analysis set forth in *Rodriguez v. State*, 284 Ga. 803 (2009). In *Rodriguez*, the Supreme Court addressed the necessity of reading sections of the Georgia Street Gang Terrorism and Prevention Act in conjunction. The Supreme Court's analysis focused on the interpretation of O.C.G.A. §§ 16-15-3 and 16-15-4 in harmony with each other. "'The various provisions of a statute `should be viewed in harmony and in a manner which will not produce an unreasonable or absurd result. (Cits.)' [Cit.]" Lindsey v. State, 277 Ga. 772, 774(1) (2004)." *Rodriguez*, 284 Ga. at 805.

The Supreme Court held that O.C.G.A. § 16-15-4 must be read in conjunction with the definitions of "criminal gang activity" and "criminal street gang" in O.C.G.A. § 16-15-3. Accordingly, "Criminal gang activity" is defined as "the commission, attempted commission, conspiracy to commit, or solicitation, coercion, or intimidation of another person to commit any of [certain enumerated] offenses on or after July 1, 2006. . . ." O.C.G.A. § 16-15-3(1).

Likewise, a “criminal street gang” means any organization, association, or group of three or more persons associated in fact, whether formal or informal, which engages in criminal gang activity as defined in paragraph (1) of § 16-15-3. “The existence of such organization, association, or group of individuals associated in fact may be established by evidence of a common name or common identifying signs, symbols, tattoos, graffiti, or attire or other distinguishing characteristics. Such term shall not include three or more persons, associated in fact, whether formal or informal, who are not engaged in criminal gang activity.” *Rodriguez*, 284 Ga. At 805.

In *Rodriguez*, the Supreme Court held that “[t]he necessary and required element...is that there must be some nexus between the act and an intent to further street gang activity.” *Rodriguez*, 284 Ga. at 807.

That nexus is provided by use of the preposition “through” in O.C.G.A. § 16-15-4(a). Furthermore, the last portion of the statute, beginning with that preposition, indicates that the means of participation in or management of criminal street gang activity is not merely the unlawful procurement of an enumerated offense, but rather consists of the actual commission of an enumerated offense by the defendant himself. Therefore, under its most natural reading, OCGA § 16-15-4(a) requires gang participation by the defendant which is active by any measure.

Ibid.

The Georgia Supreme Court’s interpretation of OCGA §§ 16-15-3 and 16-15-4(a) was held to be most consistent with the State’s quoted language of the legislative statement of intent “to seek the eradication of criminal activity by street gangs by

focusing upon patterns of criminal gang activity and upon the organized nature of street gangs. . . ." O.C.G.A. § 16-15-2(c). *Rodriguez*, 284 Ga. at 807.

Based on the foregoing, the trial court correctly reasoned O.C.G.A. §§ 16-15-3 and 16-15-4 must be read in conjunction with one another, even when applied to a separate statute and that the analysis, consistent with *Rodriguez* must focus on the nexus between the prior act and the intent to further gang activity in order to support admissibility.

VI. EVIDENCE OF MR. MCKINNEY'S PRIOR OFFENSES SHOULD BE EXCLUDED

Turning to the actual evidence at issue, for the purposes of this appeal the allegations against Mr. McKinney should be excluded.¹ The State seeks to introduce three incidents from the State of Missouri. The first, from May 5, 2015, involved Mr. McKinney, as a juvenile, bringing a weapon to school with him and allegedly pointing it at another student. Following an investigation, the alleged victim and his family did not wish to prosecute the case and stated that Mr. McKinney had no intent to harm him. Accordingly, the case was referred to municipal court for an unlawful weapons charge. At no point was there any allegation that the incident was connected to any gang activity.

¹ Mr. McKinney abides by the trial court's ruling in this case. Although he does and shall object to the admission of all evidence under O.C.G.A. § 24-4-418, he does not believe the record in this case is sufficiently developed to properly raise all objections to the trial court's admission of the 2017 robbery. Accordingly, Mr. McKinney does not raise this issue here but elects to preserve his objection for any post-trial litigation that may occur.

Likewise, on February 13, 2016, Mr. McKinney negligently discharged a firearm, resulting in his shooting himself in the foot. Once again, law enforcement investigators in Missouri made no finding of gang activity in connection with Mr. McKinney shooting himself. Indeed, it would be instructive for the State to proffer how shooting oneself in the foot is part of gang activity. How does self-injury further the aims of the street gang, or make the injured individuals better gang members? Mr. McKinney submits that asking these questions underscores the absurdity of the State's argument. In recognizing the absurdity of the State's position in this case, the Court should instead interpret the statutes harmoniously and uphold the trial court's ruling.

CONCLUSION

The State's voluminous argument is simple and reductionist. It can be summarized in one sentence: We believe the legislature meant for the State to have nearly unchecked power, and the trial court cannot stand against us. This analysis does not present an actual abuse of discretion by the trial court. The State has not shown an analogous case from Georgia or any other jurisdiction showing a finding that a judge abused her discretion under similar circumstances. Absent the showing of such abuse, the trial court's ruling must stand.

Furthermore, the State's analysis is not supported by principles of statutory interpretation. Statutes must be read in harmony to avoid absurd results. The

State's interpretation of O.C.G.A. § 24-4-418 as a grant of nearly unlimited power to prosecutors would lead to just such an absurdity. Not every crime that may be committed by a purported gang member is evidence of gang activity. The State's interpretation would eliminate that simple truth. Based on the foregoing, the lack of abuse by the trial court and the absurdity of the State's reasoning, the judgment of the trial court should be affirmed.

Respectfully submitted this 29th day of July, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing pleading by electronically filing the same with the Court's e-filing system and also mailing a copy of the same via U.S. Mail to the following parties of record:

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This 29th day of July, 2022.

/s/ Michael S. Katz
MICHAEL S. KATZ

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RULE 24 CERTIFICATION

I hereby certify that the foregoing Appellee's Brief is in compliance with Court of Appeals Rule 24. The submission does not exceed the word count limit imposed by Rule 24.

/s/ Michael S. Katz
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