Hello Folks and welcome back to the Good Judge-Ment podcast. I am Wade Padgett.

*And I am Tain Kell. Occasionally we try to mix up the format of our episodes just to give our listeners some variety and Wade had an idea that we hope you will enjoy.*

That’s right – occasionally our appellate courts issue opinions that seem to be filled with topics that judges need to know. They come from the same set of facts but there are multiple issues that deserve consideration.

*I think the truth of the matter is that Wade’s son, Matt Padgett, noted that sometimes our episodes are so “in the weeds” on the details of a principle of law that it can be a difficult listen. And Matt is a lawyer in Augusta so we listened to his idea.*

We will not follow this format very often but we wanted to give it a try and get some feedback from our listeners.

*So make sure we hear from you via e-mail at* *goodjudgepod@gmail.com* *and let us know if you like this format. Enough of that, tell the folks what we are discussing today, Wade.*

Today, we are going to do a deep dive in a case decided by the Georgia Supreme Court on March 1, 2021 – the case of *Finney v. State*, \_\_ Ga. \_\_, 855 S.E.2d 578 (2021). Let’s get started.

The decision begins with this sentence: Appellant Benjamin Finney, who was a drug dealer in Macon…. Probably a bad sign if you are the appellant.

Couple of points we want to make before we begin. Some of the cases we discuss here must be retried so we are going to intentionally skip over some facts, names, dates and other details to prevent any issues with the retrials. These names, facts, etc. are all in the appellate decision so we are not revealing any secrets. We just want to minimize any impact our podcast may have on the retrial.

Second point that we have stressed many times before but which we need to specifically address here. The judges who heard these cases are awesome judges. Frequently, the case decided on appeal only has a passing similarity with the case that was actually tried. So there is no occasion when we are attempting to criticize the judges, lawyers, witnesses or anyone else when we cover these cases.

**FACTS:** Defendant convicted of felony murder and 2 firearms offenses based upon the fatal shooting of Gwendolyn Cole, “the mother of one of Appellant’s rivals.”

Before the shooting, Finney and his girlfriend were the victims of a home invasion committed by two or three people. The intruders stole $30,000 in cash, 300 pounds of marijuana and two kilos of cocaine. The opinion includes a finding that the stolen drugs were worth more than $300,000.

Girlfriend testified that because of the home invasion, she purchased 2 Glock pistols and a Bushmaster AR-15 rifle for protection. Finney was a convicted felon so the girlfriend purchased the weapons (\*wink, wink). Another friend of Finney’s testified at about the same time, Finney gave him the money to purchase two additional AR-15 rifles. Two nights after the friend purchased the additional rifles, someone shot up the home of a close associate of Finney’s with AR-15’s. Some of the shell casings matched one of the guns that Finney’s friend had purchased for him and the other shell casings came from another AR-15 that was never recovered and which was used in murder of Ms. Cole. The friend confronted Finney about the shooting and Finney indicated that the same person who had robbed him must have shot up the associate’s home. But later, someone testified that Finney made a statement that suggested it was actually him who had shot up the associate’s home because Finney believed the associate was involved in the home invasion.

The opinion outlined several other altercations that Finney initiated or was involved with as part of his attempt to determine who had robbed him and exact his own brand of retribution. After one of those other altercations, Ms. Cole became aware that her son was involved in a beef with Finney. She tried to intervene but was unsuccessful. Later that night, someone knocked on Ms. Cole’s door at 10:00 p.m. and she spoke to the man through the door. The man asked if her son was home and she told the man (through the closed door) that her son was not home. Then the person (people) at the door started shooting through the door, striking Ms. Cole. Several neighbors saw 2 or 3 men (depending upon the account) either shooting or fleeing the scene. Collectively, the witnesses were able to provide a description of the clothing two men were wearing. Ms. Cole died at the hospital the next day.

 At Ms. Cole’s home, a total of **72** .223 shell casings were recovered. 51 of those casings were fired from the Bushmaster AR-15 that Finney’s girlfriend had purchased and the remaining 21 shell casings were fired by the same AR-15 that had been used to shoot up the associate’s house we discussed above. However, that particular second rifle was never recovered.

On the night that Ms. Cole was shot, Finney, his girlfriend and her children all stayed at a hotel under the watch of a friend of Finney’s. Over the next few days, Finney, his girlfriend and her kids stayed at different hotels and at a campground.

Once the investigation began, officers contacted Finney’s friend who had purchased the two AR-15’s for Finney. They eventually got in touch with Finney and he turned over one of the rifles but said the other one had been stolen and was “in the streets.” Later, Finney was stopped in his vehicle and officers located cocaine and two Glock pistols. Police obtained a search warrant a few days later for the girlfriend’s home where police located owner’s manuals for two Bushmaster rifles and two additional Glock pistols. Finney was prosecuted for the drugs and guns that were discovered during the traffic stop but that prosecution occurred in ***federal*** court. Finney did 70 months in a federal facility in Arkansas.

While Finney was in prison, the AR-15 that Finney’s girlfriend had purchased (and which was used in the murder of Ms. Cole) was found in a bag in the woods in Macon. That same rifle had been used in an incident subsequent to Ms. Cole’s murder where another house in Macon was shot up and another man was killed. The perpetrator of that separate crime was convicted of that murder and there was no evidence that the second man had any connection with Finney. However, the Crime Lab was able to connect 51 shell casings from Ms. Cole’s home to that particular AR-15.

While Finney was in custody, he allegedly confessed to a cellmate. It was not a complete confession but the comments clearly implicated Finney in Ms. Cole’s murder. That was not the only jailhouse conversation that was involved in this case. Another man known as Marlon had been identified by Finney of being involved in the shooting of Ms. Cole. Marlon did some federal time in West Virginia and two of his cellmates came forward to tell officers that Marlon had confessed his involvement with Finney in the murder of Ms. Cole during the time they were incarcerated together in West Virginia. Marlon never identified Finney by name but did say that the other person involved was doing federal time in Forrest City, Arkansas. That just happens to be the same town where Finney was doing his federal time.

Neither Marlon or Finney testified at Finney’s trial and that is a fact that will become important.

The appeal addressed three issues that we want to discuss here.

1. Inadmissible hearsay (Confrontation Clause also) from Marlon’s former cellmates in West Virginia;
2. Jury charge issues relating to corroboration requirement of an accomplice;
3. 404(b) incidents (prior shootings/altercations.

Let’s start with the cellmate confessions

Important note – these were NOT cellmates of the ***defendant***. Instead, the witnesses were former cellmates of an alleged **co-conspirator**, Marlon.

If a former cellmate has provided officers information about a statement **the defendant** allegedly made while in custody, couple of bells should go off for all involved: 1) Confrontation Clause (i.e. the former cellmate has to testify as to what the defendant said in the jail cell); 2) Hearsay (probably not hearsay under §24-8-801(d)(2) because it is the party’s own statement).

Where the witness is the former cellmate of an accomplice, there are all sorts of bells that need to be going off. 1) Confrontation Clause; 2) Hearsay; 3) Accomplice Corroboration requirement (which we will deal with in a few minutes).

**CONFRONTATION CLAUSE AND HEARSAY**

Confrontation Clause and Hearsay – these issues are frequently intertwined and it is important to separate them out. (Both practically and for appellate purposes)

I will admit that we are probably going to discuss them in conjunction with one another during this episode but please understand that they are two separate and distinct hurdles and merely finding that a statement is not hearsay does not clear all of hurdles (and vice-versa).

*Crawford v. Washington*, 541 U.S. 36 (2004) is ***the*** case on the Confrontation Clause. To be clear, only ***testimonial*** statements are excluded by the confrontation clause. “[T]he United States Supreme Court held that the admission of out-of-court statements that are testimonial in nature violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination.” *Pitts v. State*, 280 Ga. 288 (2006).

“A statement is testimonial if its ‘primary purpose ... was to establish evidence that could be used in a future prosecution.’” *Lord v. State*, 304 Ga. 532, 537-538 (2018).

This issue frequently arises during argument as to whether 911 calls should be admitted. If the caller is merely calling for help in an emergency situation, there is no *Crawford* problem because that is not a “testimonial” statement. However, if the call gets into statements made to further the prosecution of the defendant, that call may not be admissible because the purpose of the statement was to aid law enforcement in the prosecution of the offender. Usually, it is easy to make this determination relating to 911 calls – if the caller is describing the ongoing emergency, it is not testimonial. However, if any of the caller’s statements are “backward looking” (i.e. explaining what led up to the current emergency), they are probably testimonial.

In *Finney*, defendant alleges a Confrontation Clause problem because Marlon’s former cellmates (not the ***defendant’s*** former cellmates but former cellmates of a person who is not on trial) were testifying about what Marlon told them while they were all incarcerated in West Virginia. Get this straight – cellmates testify about what Marlon told them that Marlon and Finney did together.

If the alleged speaker (a/k/a “the declarant” in hearsay law parlance) does not testify, that person’s statement made during his/her incarceration is being admitted without the defendant having the right to cross-examine the accomplice.

If the statement truly qualified as a co-conspirator statement, there is no Confrontation Clause issue. Why? Because a statement made in furtherance of a conspiracy can never be found to be “testimonial.” Let’s break this all down a bit.

**CO-CONSPIRATOR STATEMENT IS NOT HEARSAY**

First, the statement of Marlon to the cellmates would be hearsay (out-of-court statement offered to prove the truth of the matter asserted) UNLESS the statement is: a) not determined to be hearsay because of the statutory definitions; or b) the statement falls within an exception.

O.C.G.A. § 24-8-801(d) specifically provides what statements are simply not to be considered as hearsay. §24-8-801(d)(2)(E) says that a co-conspirator statement is not hearsay and defines a co-conspirator statement as: “A statement by a coconspirator of a party during the course and in furtherance of the conspiracy, including a statement made during the concealment phase of a conspiracy. A conspiracy need not be charged in order to make a statement admissible under this subparagraph.”

Those statements are ***not hearsay*** by definition. They DO NOT need as exception to the hearsay rule because they are NOT HEARSAY.

To qualify as a co-conspirator statement, the statement must be made “in furtherance of the conspiracy.” So if a co-defendant is speaking with someone that he wants to help aid in the conspiracy, get rid of evidence, etc., that statement is not hearsay when the person the co-conspirator was talking to comes to court and testifies.

HOWEVER, if the statement made by the co-conspirator is bragging or merely “spilling the beans” to someone without any true attempt to actually further the conspiracy, that statement does not qualify as a co-conspirator statement.

Essentially, the hearsay rules say that your own statements are not hearsay and you are liable for them at your trial. Similarly, you, Mr. Defendant on trial, are also “stuck” with any statements made by those you chose to conspire with. Under an agency theory, a defendant is “stuck” with statements made by his/her agent. But in criminal cases, we do not usually discuss agents and principals – instead we discuss co-conspirators and accomplices.

Some of you may be arguing with us through your device, saying that, “Marlon was in prison. How could the conspiracy be on-going.” Remember that Georgia’s rule differ slightly from the FRE – and this was a hotly contested point when Georgia’s rules were passed. A conspiracy continues “through the concealment phase” under Georgia law (which was Ga. law before the 2016 Evidence Code was passed). “For purposes of the hearsay exception, a conspiracy is deemed to endure so long as the parties thereto attempt to conceal either the crime itself or the identity of the perpetrators.” *Lord v. State*, 304 Ga. 532, 538 (2018), citing *Franklin v. State*, 298 Ga. 636, 639 (2016).

The Court in *Finney* acknowledged the issue of “concealment phase” by deciding, “[a]t the time of Marlon’s statements, he and Appellant had not yet been charged with crimes related to [Ms.] Cole’s murder, and it may be that their alleged conspiracy to commit those crimes was still in its concealment phase.”

But where the *Finney* court found problems was with the analysis of whether Marlon’s statement actually ***furthered*** the conspiracy.

“there is no indication that Marlon was sharing details of those completed crimes to advance the interests of that conspiracy when he spoke to two federal prison inmates in West Virginia who had no other apparent connection to Marlon, Appellant, their criminal scheme, or even the state of Georgia. Instead, Marlon’s statements worked against the concealment of the conspiracy: they ‘merely “spill[ed] the beans,” disclose[d] the scheme, [and] inform[ed] the listener[s] of the declarant’s activities.’” See *State v. Lane*, 308 Ga. 10, 20 (2020) (“[A] retrospective statement regarding matters that have already occurred, not intended to foster involvement in the conspiracy, is not a statement in furtherance of the conspiracy”).

That does not mean that a backward-looking statements that are bragging about criminal activity could ***never*** qualify as a co-conspirator statement. Compare *Kemp v. State*, 303 Ga. 385, 395 (2018) (holding that the trial court was authorized to conclude that statements the appellant made to a fellow gang member in the local jail were made in furtherance of a conspiracy to engage in ongoing criminal gang activity, because they “could be interpreted as fostering cohesiveness with another gang member or as providing information to a fellow co-conspirator (of the criminal street gang)”).

So the Ga. Supreme Court held that even though the trial court found that Marlon’s statements furthered the conspiracy, there was no evidence to support that conclusion. Therefore, the trial court erred in admitting the statement as a co-conspirator statement. (There was a timely objection made)

Second issue: **CORROBORATION OF AN ACCOMPLICE**

We all are aware that testimony of a single witness is generally sufficient to establish a fact. O.C.G.A. § 24-14-8. However, please note the phrase “generally sufficient”

In felony cases, the testimony of an accomplice must be corroborated. This corroboration requirement is true even if the accomplice does not testify at trial.

And this is a plain error issue on appeal (i.e. even if there is no objection at trial, it can be reversed on appeal – just as what happened in *Finney*).

Prosecutors in my area have recently fallen in love with this “single witness” charge and request it in every case. But if there is any hint that a witness who testifies at trial was an accomplice, you absolutely must give the “corroboration” add on.

“[S]ufficient corroborating evidence may be circumstantial, it may be slight, and it need not of itself be sufficient to warrant a conviction of the crime charged. It must, however, be independent of the accomplice testimony and must directly connect the defendant with the crime, or lead to the inference that he is guilty. Slight evidence from an extraneous source identifying the accused as a participant in the criminal act is sufficient corroboration of the accomplice to support a verdict. (Citations and punctuation omitted). *Threatt v. State,* 293 Ga. 549, 551(1), 748 S.E.2d 400 (2013). Evidence of the accused's conduct before and after the crime was committed may give rise to an inference that he participated in the crime.” *Stanbury v. State*, 299 Ga. 125, 128 (2016).

Examples of sufficient corroboration:

text messages between defendant and accomplice after the crime that clearly were related to the crime *Montanez v. State*, \_\_ Ga. \_\_, 2021 WL 2518684 (June 21, 2021).

recorded phone calls between defendant and accomplice after crime *Edwards v. State*, 299 Ga. 20, 23 (2016).

cell phone records showing that defendant’s cell phone communicated with accomplice’s cell phone at time of the crime, even without the substance of the conversations *Crawford v. State*, 294 Ga. 898, 901-902 (2014).

Examples of insufficient corroboration:

*Taylor v. State,* 297 Ga. 132, 135 (2) (2015) (reversing murder conviction where accomplice's testimony regarding defendant's participation in the crimes was corroborated only by testimony that defendant was seen with other accomplices on the evening after the murder)*;*

*Gilmore v. State,* 315 Ga. App. 85, 87-92 (1), 726 S.E.2d 584 (2012) (reversing conviction where the only evidence against the defendant other than the testimony of the accomplice showed that the defendant had been with the accomplice the night the crimes were committed and that the defendant had a prior encounter with one of the victims)

In *Finney*, the accomplice’s statement should not have been admitted. But it was. Then the trial judge gave the standard “one witness sufficient” charge without adding the “accomplice corroboration” add-on portion of the charge. The Supreme Court held that was plain error and never reached the issue of whether there was sufficient corroboration of Marlon’s statement. (There was ample corroboration but they never reached that point because of the plain error).

**404(b) ISSUES**

We have had FOP Judge Robert McBurney on the podcast to discuss 404(b) issues and you may want to listen to those episodes for a more detailed description of 404(b).

Remember that when dealing with evidence of other crimes or acts under 404(b), the offering party must show:

(1) that the evidence is relevant to an issue in the case other than the defendant’s character; (2) that the probative value of the evidence is not substantially outweighed by its undue prejudice; and (3) that there is sufficient proof for a jury to find by a preponderance of the evidence that the defendant committed the other act.

*Strong v. State*, 309 Ga. 295, 300 (2020).

In *Finney*, the State was allowed to present evidence of three prior shootings that they alleged proved motive. However, the Supreme Court noted that while they argued motive, there was no evidence that the people shot at during those prior incidents had anything to do with the home invasion for which Finney was allegedly seeking revenge. There was actually some question as to whether Finney had any part in at least one of the other shooting incidents. In another of the prior shootings, it was undisputed that Finney was actually the target/victim of another competitor.

The Court held that the evidence presented did not support a “motive exception” under 404(b). Instead, all that the incidents actually showed was a fancy way of alleging “propensity” – they only showed that the defendant dealt with conflict via violence. Evidence of other acts that really only shows that the defendant likes to “control things” or “responds to conflict with violence” is a classic propensity argument and should not be allowed. See *Kirby v. State*, 304 Ga. 472, 487 (2018) (holding that the State’s argument that the other acts showed the defendant’s ‘inclination’ to use violence to obtain money and sex ... is a classic improper propensity argument, ... identifying [the defendant’s] motive to act in far too generic a fashion) under 404(b).

There is no doubt that the home invasion committed against Finney started a mini-war in Macon. However, in some of the incidents, Finney would be best described as the victim instead of the instigator. The Court held that the evidence of the other shootings that seemed to culminate with Ms. Cole’s murder should not have been introduced under 404(b).

**FOOTNOTE ISSUE**

We realize this episode is getting long but occasionally our friends on the appellate courts provide some juicy tidbits in footnotes and endnotes and there is one in *Finney* that deserves a couple of comments.

You know that we charge the jury that the State must prove their case beyond a reasonable doubt but not to a mathematical certainty. Well, occasionally lawyers attempt to address that issue of “mathematical certainty” when they really should just leave it alone. That happened in *Finney*.

In the final footnote of the 40 page opinion, the Justices noted that they were not even going to address the several claims of ineffective assistance of counsel because they were not likely to recur on appeal. But they made a special note about a line from the prosecutors closing argument.

The prosecutor allegedly made a statement to the effect that to meet the beyond a reasonable doubt standard, the State does not have to prove the defendant guilty “51 versus 49.” The Justices noted that such an argument is “obviously wrong” and cited their decision in *Debelbot v. State*, 308 Ga. 165, 167 (2020) as precedent for that obvious error.

Pretty clear to me that any reference to percentages or any similar language in a closing argument could give rise to a plain error reversal on appeal.

Thank you for listening to the Good Judge-Ment Podcast. We hope you enjoyed this deep dive into the *Finney v. State* decision. It really was chock full of legal issues that trial judges seem to face on a regular basis.

*We hope that you like the occasional change in how we format our episodes. We do not intend to always center our episodes on a single appellate decision but we like doing that occasionally just to break things up a bit.*

My son, Matt, is a great young lawyer and I could not be more proud of him. But when your son thinks enough to reach out and give his opinion on how we can make the podcast even more inclusive and helpful to lawyers, I wanted to make sure that we listened. So, shout out to Matt for the constructive criticism.

*Send us an e-mail at* *goodjudgepod@gmail.com* *and let us know what you think about this episode (and any of our other episodes). We really want your help with episode topics so please let us know your thoughts.*

You can visit our website, goodjudgepod.com, for the episode notes from this and all other episodes.

*Again, thanks for listening to the Good Judge-Ment Podcast. And remember…*