

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING OCTOBER 29, 2010

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## THIS WEEK:

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- **Double Jeopardy; Blockburger**
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- **Severance**
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### **Habeas Corpus; OCGA 9-14-48 (e)**

*Flint v. State, S10A1093 (10/18/10)*

The Court granted appellant's appeal in order to consider the propriety of the habeas court's conclusion that, under OCGA § 9-14-48 (e), the State had proven that it was prejudiced in its ability to respond to petitioner's petition for writ of habeas corpus due to petitioner's delay in filing it. The record showed that appellant pleaded guilty to one felony and one misdemeanor count of VGCSA in 1988. Twenty years later, he filed this habeas petition alleging eight grounds for relief, which the trial court dismissed.

The Court found that § 9-14-48 (e) OCGA § 9-14-48 (e) authorizes the discretionary dismissal of a petition for writ of habeas corpus in a non-capital case under certain circumstances. First, the State must show that the habeas petitioner's delay in filing the petition has prejudiced its ability to respond.

If such a showing is made, the burden shifts to the petitioner to prove by a preponderance of the evidence that he or she did not know of the grounds for the petition, and could not have known of them through the exercise of reasonable diligence, prior to the events that prejudiced the State. The Court found that each and every ground raised by appellant directly involved or potentially implicated actions by the plea court, the defense attorney, and the assistant district attorney involved in the case. However, the defense attorney died a month prior to the filing of the petition; the ADA could not provide specifics about the case and was able to make statements about only general practices and procedures in criminal cases, which could not address, much less resolve, appellant's complaints; and both the judge and the court reporter involved in the pleas were octogenarians and no longer available or able to provide any relevant information. Moreover, the record of the plea was mostly handwritten and to a large extent indecipherable. Thus, the trial court properly found that the State had met its burden.

The Court also found that appellant failed to prove by a preponderance of the evidence that, prior to the events prejudicing the State's response, he did not know of the grounds for his habeas petition, and could not have known of them through the exercise of reasonable diligence. Appellant's complaint on habeas was that he was misled, in some form or fashion, regarding the pleas and their punitive consequences. But, the Court found, the record contained signed "declarations" expressly "under the penalty of perjury" by appellant and his mother regarding their knowledge, prior to and at the time of the pleas, of circumstances allegedly giving rise to his habeas claims, including his immediate dissatisfaction with his received

punishment. Thus, the record supported an alternate conclusion that appellant's delay in asserting his challenge on habeas was because his guilty pleas to the state drug charges had no collateral consequences until such time as they were to be used for the enhancement of his federal sentencing in 1993.

## **Double Jeopardy; Blockburger**

*Garrett v. State, A10A1294 (10/13/10)*

Appellant appealed the denial of his motion for plea in bar on grounds of double jeopardy in connection with a charge of serious injury by vehicle (OCGA § 40-6-394). The record showed that on August 10, 2008, appellant drove under the influence of alcohol (OCGA § 40-6-391 (a) (5)), had an open container of alcohol (OCGA § 40-6-255) and failed to yield the right of way (OCGA § 40-6-71), resulting in an automobile collision. He pled guilty to these state violations in municipal court on September 26, 2008, and he was sentenced to twenty-four months on probation, two days to serve, and \$1,046 in fines, surcharges and other costs. Police and prosecutors were unaware at the time of this plea that the collision had resulted in a serious injury to anyone. Later, when police were notified that the victim had been seriously harmed in the wreck, the case was referred to the District Attorney who then indicted appellant on the charge of serious injury by vehicle. The indictment alleged that appellant caused bodily harm to the victim "through a violation of OCGA § 40-6-391, Driving Under the Influence of Alcohol."

The Double Jeopardy Clause of the Fifth Amendment protects against multiple punishments for the same offense. The test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger v. United States*, 284 U.S. 299, 304 (1932): "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." The *Blockburger* test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial. Thus, if each statute

requires proof of an additional fact which the other does not, the offenses are not the same under the *Blockburger* test.

Here, the Court found, proof that appellant was guilty of DUI under OCGA § 40-6-391 is a required element for convicting him of serious injury by vehicle under OCGA § 40-6-394. And while proof of serious injury by vehicle also requires proof of an additional element, i. e., bodily harm, the DUI charge included no element that was not also contained in the crime of serious injury by vehicle. Accordingly, the *Blockburger* test was not met, and the subsequent indictment for serious injury by vehicle violated the federal Double Jeopardy Clause.

## **Statements**

*Fife v. State, A10A1263 (10/13/10)*

Appellant was convicted of child molestation. He contended that the trial court erred by admitting as evidence his statement to police. The evidence showed that in 2004, appellant was 17 years old when he was questioned by the police. This questioning first occurred at his home and in the presence of his parents. Appellant was read his Miranda rights and stated that he understood them and signed a waiver form. The investigating officers knew that appellant had "mental issues" but did not know the specifics. Appellant made no incriminating statements at the time. A few hours later, appellant's father brought appellant down to the station at the request of the police. Appellant was questioned outside of his parents' presence and this time made incriminating statements. Although the evidence was in dispute whether appellant was promised a benefit or threatened, the trial court found that he gave his statement freely and voluntarily without any hope of benefit or fear of injury. The evidence also showed that based on his statements to the police, appellant was evaluated and subsequently found to be incompetent to stand trial and committed. In 2008, he was found to be competent, and subsequently tried and convicted.

The Court found that a preponderance of the evidence supported the trial court's findings. The fact that appellant was initially found incompetent to stand trial did not demand the conclusion that he lacked the mental capacity to knowingly and voluntarily waive his rights. This holds true even if a defendant is initially

found incompetent to stand trial. The true analysis is whether, under the totality of the circumstances, the statement was free and voluntary. Since the trial court's decision was not clearly erroneous, appellant's conviction was affirmed.

*State v. Floyd, A10A0854 (10/13/10)*

Appellant was charged with rape and other related offenses. The State appealed from the trial court's suppression of Floyd's statements to the police. The record showed that the trial court heard the testimony of the Tyus, the interrogating officer, and Floyd. Additionally, the trial court reviewed the videotape of the interrogation.

The Court affirmed. It held that the trial court's ruling reflected the trial court's conclusion that the State failed to carry its burden of proving that Floyd's statement was freely and voluntarily given. Although Tyus indicated that he wanted to inform Floyd of his rights and had a "Waiver of Counsel" form, he read the *Miranda* rights very quickly and then directed Floyd to sign the form so he could talk to the detective and "get this thing cleared up." Tyus made no effort to ascertain whether Floyd understood his rights, nor did he ever testify that he believed Floyd understood them. When Tyus handed Floyd the form, Floyd asked whether the paper represented the charges against him. Tyus responded that the document merely said Floyd was a suspect and that he needed to sign it so he could talk to Tyus in order to clear things up. At no time did the conversation cease, allowing Floyd a clear opportunity to read the form, and it is unclear from the video whether Floyd ever read it. Thus, the Court found, the trial court could have accepted Floyd's testimony from the hearing that he did not understand his rights or any waiver of those rights, and could have concluded that Floyd signed the paper handed him at Tyus's direction because he believed he had to in order to clear things up.

Therefore, when the evidence is construed in favor of the trial court's ruling at least some evidence existed to support the finding that Floyd's signature on the waiver form did not indicate that he understood his rights and wished to waive them. Moreover, it was not clear error for the trial court to believe Floyd's testimony. Accordingly, the Court affirmed the granting of Floyd's motion to suppress.

## DUI; Closing Arguments

*Jaffray v. State, A10A1256 (10/14/10)*

Appellant was convicted of DUI (less safe) and endangering a child by driving under the influence of alcohol. He contended that the trial court erred by permitting the State to argue in its closing statement to the jury that his BAC was over the legal limit at the time of his arrest because it was not supported by the evidence and was irrelevant. The record showed that during his closing argument, the prosecutor reminded the jury that appellant 1) admitted consuming alcohol at a hockey game in Atlanta; 2) was stopped approximately 40 or 50 miles away from the game; and 3) then registered a BAC of between 0.075 and 0.085 at 12:30, an hour after he was stopped by police. Thus, the prosecutor argued, appellant's BAC exceeded the legal limit. Appellant objected, contending that the State's argument was improper and irrelevant because he was not charged with DUI per se. The trial court permitted the prosecutor to "go forward" with his argument, after repeating his instruction to the jurors that "nothing the attorneys say is evidence."

The Court held that evidence of a driver's numerical BAC has been held to be probative of a DUI less safe charge. Here, appellant did not object when the State introduced testimony regarding his BAC as determined by the Intoxilyzer 5000, nor did he object to the admission of the printout of the results. In fact, during cross-examination, defense counsel repeatedly asked the officer to confirm that a person with a BAC of 0.08 within three hours of driving was "over the legal limit." The trial court was not asked to make a determination regarding any potential prejudice to appellant resulting from admission of his BAC level and by failing to object to the admission of this evidence, appellant waived his right to object to the prosecutor's closing arguments. Moreover, the evidence supported a deduction that appellant's BAC was over the legal limit.

## Severance

*Anderson v. State, A10A1199 (10/13/10)*

Appellant was found guilty of one count of aggravated assault, one count of possession of a firearm during the commission of a felony, and two counts of possession of firearm by a convicted felon. His co-defendant, Glass, was

found guilty of single counts of felony murder, aggravated assault, and possession of a firearm during the commission of a felony. Appellant and his co-defendant were indicted separately and tried in a joint trial on a new indictment.

Appellant argued that the trial court erred in granting the State's motion to join defendants. The Court disagreed. The evidence showed that late one evening, appellant exchanged words with co-defendant Glass and others as he departed a pool room, returning shortly thereafter with a gun which he fired at Glass but missed as he ran. Glass, in turn, returned to the tavern early the next morning and fired into a crowd intending to hit appellant. Instead he killed an innocent bystander.

It is within the discretion of the trial court to try defendants jointly or separately when two or more defendants are indicted for a capital felony in which the State does not seek the death penalty. In order to avoid joinder and obtain a severance, the defendant must do more than raise the possibility that a separate trial would give him a better chance of acquittal. The test is "whether the number of defendants will create confusion during the trial; whether the strength of the evidence against one defendant will engulf the others with a 'spillover' effect; and whether the defendants' claims are antagonistic to each other's rights."

Appellant's burden was to establish prejudice sufficient to demonstrate a denial of due process. But the Court found, he failed to do so. First, appellant conceded that no issue of confusion resulting from a joint trial presented itself here. Second, appellant and his co-defendant were not indicted for mutually committed offenses. Thus, no fair potential for spillover effect was demonstrated. Finally, appellant's defense was not antagonistic to Glass' rights. Appellant's defense was simply that he did not shoot at Glass and did not have a gun.

## Merger; "Required Evidence" Test

*Garrett v. State, A10A1074 (10/13/10)*

Appellant was convicted of several crimes in connection with an altercation with peace officers while he was incarcerated. He argued that both Count 3 (aggravated assault) and Count 6 (obstruction of an officer) should be merged into Count 4 (aggravated assault

upon a peace officer) because they were all proven with the same facts. Whether the separate convictions should be merged requires analysis under the "required evidence" test of *Blockburger v. United States*, 284 U.S. 299 (1932). Under such an analysis, the test to be applied to determine whether there are two offenses or only one, is whether each statutory provision requires proof of a fact which the other does not.

The Court noted that in Count 3, appellant was charged with aggravated assault for assaulting the officer "with an object which was likely to result in serious bodily injury to said person, to wit: the hands, arms and body of the accused choking said person." In Count 4, he was charged with the exact same aggravated assault —assaulting the "with an object which was likely to result in serious bodily injury to said person, to wit: The hands, arms and body of the accused choking said person," but this time with the added allegation that he did so "knowing said person was a peace officer and correctional officer engaged in the performance of his official duties."

Aggravated assault is defined in OCGA § 16-5-21 (a). Aggravated assault on a peace officer is found in OCGA § 16-5-21 (c). It is a separate and distinct crime from aggravated assault, but the only difference is that knowledge of the fact that the victim was a police officer is an essential element of the crime. Here, the physical act as charged, as well as the victim, were the same for both counts. The only required proof that differed in Count 4 was the proof that appellant knew he was assaulting a police officer. Thus the conviction on Count 3 was "established by proof of the same or less than all the facts" that were required to establish the conviction on Count 4. Accordingly, the two crimes merged for sentencing.

However, the Court found, in Count 6, appellant was charged with obstruction of an officer in that he did "knowingly and willfully obstruct, resist and oppose [the officer], a law enforcement officer and correctional officer . . . by offering and doing violence to the person of said officer. . ." The evidence showed that appellant first choked the officer then separately hit him with handcuffs. Merger is not required where the two crimes are based on more than one separate act or transaction and if one crime is complete before the other takes place, the two crimes do not merge. Thus the Court held, the trial judge was authorized

to conclude that the choking and the beating with the handcuffs were separate completed crimes and therefore, there was no merger.

*Herrera v. State, A10A1381 (10/13/10)*

Appellant was convicted of armed robbery and aggravated assault with intent to rob. The evidence showed that the victim was walking across his apartment complex at night when a man later identified as appellant called out from behind and told him to stop. When he started to turn, appellant shot the victim in the leg, immobilizing him. Appellant's co-defendant then came out of the bushes holding a knife, told the victim not to move, put his hand inside the victim's pockets, and took cash and other valuables from him.

Appellant argued that the trial court erred in not merging his conviction for aggravated assault with intent to rob into his conviction for armed robbery. A defendant may not be convicted of more than one crime if one crime is included in the other. In making this determination the courts apply the "required evidence" test: "[T]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Relying on *Lucky v. State*, 286 Ga. 478, 482 (2010), the Court held that there is no element of aggravated assault with intent to rob that is not contained in armed robbery.

The State argued that the crimes were separate because the aggravated assault was completed before the armed robbery. However, the Court found that the robbery that was intended by appellant when he shot the victim in the leg was completed at the same place and approximately the same time as the shooting. Applying *Lucky*, the assault forming the basis of the aggravated assault with intent to rob was contained within the use of an offensive weapon element of armed robbery, and so the aggravated assault was established by proof of the same or less than all the facts required to establish the commission of the armed robbery. Accordingly, appellant's conviction and sentence for aggravated assault was vacated and remanded for resentencing with directions to merge the aggravated assault count into the armed robbery count.

## Forfeitures

*State v. Huff, A10A0941 (10/13/10)*

The State appealed from a judgment for the claimant in this drug forfeiture action pursuant to OCGA § 16-13-49. Prior to trial, the State moved to dismiss claimant's answer because it was not verified as required under OCGA § 16-13-49 (o) (3). The trial court denied the State's motion to dismiss because the State had similarly failed to submit a proper verification. The case then went to trial and the trial court found for the claimant.

The Court reversed the judgment. First, the officer's verification contained the qualification that the facts within the complaint were "true and correct to the best of my belief." The trial court found that the inclusion of the qualifying language rendered the verification defective. However, the Court held, an averment by an agent of the State that the allegations within a forfeiture complaint are true and correct to the best of his knowledge and belief is a proper verification.

The Court also held that "the trial court was without authority to deny the State's motion to dismiss the answer." The Court noted that the answer was unverified at the time of trial despite the fact that the trial court had notified the claimant of the defect and ordered him to correct it. The forfeiture statute's hearing requirement is founded on the filing of a legally sufficient answer. Claimant's legally insufficient answer was not an answer for purposes of the forfeiture statute, and the trial court therefore abused its discretion in denying the State's motion to dismiss the answer and in proceeding with the hearing.

## Search & Seizure

*Hall v. State, A10A2064 (10/14/10)*

Appellant was convicted of possession of marijuana. He contended that the trial court erred in denying his motion to suppress. The evidence showed that appellant was the passenger of a vehicle that was stopped for following too closely. The vehicle was rented and the person who rented the vehicle was not the driver and not in the vehicle. The officer asked for the driver's license and while he was waiting on the computer check to be returned, he asked the driver for permission to search. The driver agreed and the officer located a

box containing marijuana in the cargo area behind the back seat. At this point, appellant attempted, unsuccessfully, to flee.

Appellant contended that the officer prolonged the traffic stop beyond the time reasonably required to issue the driver a citation for following too closely and therefore, the driver's consent to search was not valid. The Court held that the Fourth Amendment is not violated when, during the course of a valid traffic stop, an officer questions the driver or occupants of a vehicle and requests consent to conduct a search. The dispositive factor "is not the nature or subject of the officer's questioning, but whether that questioning [takes] place during [an] otherwise lawful detention," such as, in this case, for committing a traffic violation in the officer's presence. In order to pass constitutional muster, the duration of a traffic stop cannot be unreasonably prolonged beyond the time required to fulfill the purpose of the stop. A reasonable time to conduct a traffic stop includes the time necessary to verify the driver's license, insurance, and registration, to complete any paperwork connected with the citation or a written warning, and to run a computer check for any outstanding arrest warrants for the driver or the passengers.

Here, the Court stated, it was undisputed that the officer requested and obtained the driver's consent to search before the officer received the verification on the driver's license. Thus, the questioning and request for consent to search occurred before the purpose of the traffic stop was fulfilled. Also, the time that elapsed between the beginning of the traffic stop and the time the officer requested the consent to search, about eight minutes, was not inherently unreasonable.

Appellant further argued that he objected to the search of the vehicle and therefore, even if the driver's consent to search was valid, the officer lacked authority to search the car. The Court disagreed. It was undisputed that appellant was not an owner or lessor of the vehicle. Furthermore, it is well settled that the driver has immediate control of the car and, therefore, authority to consent to a search. Moreover, the circumstances did not suggest that appellant had an exclusive interest in the box that would limit the scope of the driver's general consent. Accordingly, the trial court did not err in denying the motion to suppress.

## Right to Counsel; Judicial Comments

*Bates v. State*, A10A1036 (10/13/10)

Appellant was convicted of felony shoplifting. He contended that the trial court erred in denying his request for different appointed counsel and forcing him to proceed *pro se*. The evidence showed that when the case was called for trial, appellant moved for a continuance and asked the court to appoint a different lawyer to represent him, asserting first that his appointed counsel had a conflict because another lawyer from her office had briefly represented Sarah Kelley, the woman with whom he had been arrested. Appellant's counsel stated that the office had been unaware of the connection between the two and that in an abundance of caution, the other attorney withdrew from representing Kelley and had had not contact with her. Appellant had also filed a bar complaint against his appointed attorney because of this, but it was dismissed and the defense attorney stated that she bore appellant no ill will and could continue to represent him. The trial court denied the continuance and requested defense counsel remain as "stand-by" counsel. Again appellant objected, arguing the inadequacies of defense counsel. The trial court excused appointed counsel from attending the trial and attempted to ascertain whether appellant understood his right to counsel and the perils of representing himself. Appellant repeatedly declined to answer the trial court's questions because he wanted a lawyer, and the trial court repeatedly explained that it could not appoint a different lawyer to represent him absent a sufficient legal reason. Eventually, appellant represented himself at trial.

The Court found no error. Quoting *Jefferson v. State*, 209 Ga. App. 859, 861 (1) ((1993), the Court held, "[t]he trial court found the attorney's ability, loyalty and advocacy to be more than adequate, and tried mightily to dissuade the appellant from his folly. The appellant insisted. He was warned of the consequences. We find a knowing, intelligent waiver of counsel. Intelligent waiver and foolishness are not mutually exclusive."

Appellant also contended that the trial court improperly commented on the evidence by telling him to move on with his cross-examination because "the jury is not idiots." The Court held that while OCGA § 17-8-57 pro-

hibits judges in criminal cases from expressing or intimating their opinion on what has or has not been proven, and mandates reversal for any violation of the Code section, no such violation occurred here. The trial court's comment came after multiple attempts by the court and the State to instruct appellant on how to impeach a witness with prior testimony, after which appellant repeatedly attempted to state the facts as he saw them instead of asking questions of the witness. While, the court's statement was "inartful and a sign that the judge was frustrated with [appellant's] failure to properly conduct his cross-examination," it was not an opinion as to what had been proven or whether appellant was guilty. Thus, the comments were not directed toward a material issue or relevant evidence in the case, and the trial court did not violate OCGA § 17-8-57.

## Hearsay; Right of Confrontation

*Silverio v. State*, A10A1528 (Oct. 13, 2010)

Appellant was convicted of numerous counts of armed robbery, aggravated assault and other crimes arising out of a string of home invasions. The evidence showed that he was the founder of a gang that perpetrated these crimes. Appellant argued that the trial court erred in refusing to admit, under OCGA § 24-3-10, the prior testimony exception to the hearsay rule, statements made by a co-indictee, Castro-Delacruz, during his plea hearing. Castro-Delacruz stated during his plea colloquy that appellant was not present at certain robberies. Castro-Delacruz also stated, however, that appellant and other gang members provided him the locations to rob and that appellant received jewelry and money from the various robberies. After the prosecutor questioned Castro-Delacruz, the trial court found that a factual basis existed for the plea and that it was entered freely and voluntarily. The trial court ordered, as a condition of Castro-Delacruz's probation, that he testify truthfully against his co-defendants if summoned as a witness at any trial.

At trial, appellant called Castro-Delacruz in his defense, but he refused to answer any questions, even after being threatened with contempt. Appellant then unsuccessfully moved to introduce the plea transcript into evidence, arguing that it was necessary, exculpatory, and admissible under OCGA

§ 24-3-10. The Court held that a trial court may admit the testimony of a witness given at a prior proceeding provided the proponent is able to show that: (1) the declarant is unavailable as a witness at trial; (2) the testimony was given under oath at a hearing or other proceeding; and (3) the parties and issues are substantially similar. Appellant satisfied the first two conditions. Castro-Delacruz's refusal to testify at trial rendered him unavailable within the meaning of OCGA § 24-3-10, and his testimony at the guilty plea hearing was given under oath. However, appellant failed to establish a substantial similarity of issues between his trial and Castro-Delacruz's plea hearing such as would ensure that the State had an opportunity for meaningful cross-examination at the plea hearing. The purpose of a plea colloquy is to protect the defendant from an unintelligent or involuntary plea. To that end, the State questioned Castro-Delacruz at his plea hearing to establish the factual basis for his plea and to show that he was entering it freely and voluntarily. As the purpose of the hearing was to protect Castro-Delacruz, it could not be said that the State was afforded an opportunity for meaningful cross-examination. Therefore, the trial court did not abuse its discretion in excluding Castro-Delacruz's plea transcript.

Appellant also argued that the trial court violated his right of confrontation by denying his motion for mistrial made after the prosecutor asked Carrera-Camargo, another co-indictee, on direct examination whether he had been threatened by appellant. The evidence showed that initially, Carrera-Camargo answered the State's questions regarding his involvement in the home invasions, his guilty plea, and his sentence. When the prosecutor began to ask questions about co-indictees, however, Carrera-Camargo refused to answer any further questions, stating finally, "I am not going to testify either way, and not in favor of either side." The State then asked Carrera-Camargo whether appellant had ever threatened him; whether he ever told anyone that appellant had threatened him; and whether appellant had ever threatened him specifically about testifying. Appellant objected to the questions as prejudicial, nonprobative, and inflammatory. The trial court overruled the objection. After the defense rested, appellant moved for a mistrial, arguing that his right to confront Carrera-Camargo had been violated. The trial

court denied the motion but instructed the jury, pursuant to appellant's request, that the evidence "does not include . . . the questions asked by the lawyers."

The Court held that this case is distinguishable from *Horne v. State*, 281 Ga. 799 (2007), in which the defendant's co-indictee, who had given a pretrial statement detailing his and the defendant's involvement in an armed robbery and identifying the defendant as the shooter, refused to utter any response to 117 questions posed by the State that fully laid out the contents of his statement for the jury. The defendant's inability in *Horne* to cross-examine his co-indictee deprived him of his right of confrontation under the Sixth Amendment. Here, however, the procedure permitted by the trial court did not place the content of Carrera-Camargo's statement before the jury. Rather, the questions derived from another co-indictee's statement to the trial court that during the trial, appellant had threatened him and Carrera-Camargo not to talk or their families would pay for it. Moreover, the Court held, even if the three questions posed by the prosecutor could be construed as violating appellant's right of confrontation, any such violation was rendered harmless by properly admitted evidence that appellant had threatened to kill other co-indictees' families if they talked about him.