

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING NOVEMBER 18, 2011

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### Search & Seizure

*Wilder v. State S10G1897 (11/7/11)*

Appellant was convicted on two counts each of child molestation and sexual exploitation of a child and one count each of aggravated child molestation and statutory rape based on sexual acts committed on several occasions with a 15-year-old girl. Appellant challenged the trial court's denial of his motion to sup-

press incriminating evidence found in a locked briefcase that was owned by appellant but was seized from a third party's premises without a warrant and subsequently searched pursuant to a valid warrant. The Court of Appeals held the motion to suppress had been properly denied pursuant to the "independent source" exception to the exclusionary rule finding that the contents of the briefcase were seized pursuant to a valid search warrant based upon information wholly independent from law enforcement's illegal use a third party (the victim's mother) to obtain the briefcase.

Upon affirming that appellant did in fact have standing to challenge the seizure of his briefcase, the Supreme Court confronted the issue of whether the search of appellant's briefcase constituted a violation of his Fourth Amendment rights. Appellant contended that because the subsequent search was made possible only by the initial warrantless seizure, and because the warrantless seizure was unlawful, the evidence obtained in the search of his briefcase should have been suppressed. The Supreme Court distinguished this particular scenario with other "independent source doctrine" cases in that the search of appellant's briefcase was a single search immediately preceded by an unlawful seizure whereas incriminating evidence obtained totally independent of an illegal seizure or search was admissible under the independent source doctrine. The Court reversed judgment and remanded for further proceedings.

*Boykins v. State, S11G0643 (11/7/2011)*

Appellant was convicted of cocaine possession that resulted from the search of appellant's vehicle incident to his arrest. Appellant contended the search was illegal and that the

trial court erred in denying his motion to suppress the drug evidence.

The only witness to testify for the State was the arresting officer. The record showed that appellant was in custody of a second officer prior to the search. The arresting officer testified he searched the wingspan within the appellant's vehicle and discovered the drugs. The State provided the court no other information from which it could make a determination that the center console remained within appellant's reach. The Court held that based solely on this evidence, the State failed to show the physical location of the appellant at the time of the search and notwithstanding alternative evidence to effectuate the search, the State failed to meet its burden in proving the search incident to arrest exception to the warrant requirement.

## **Jury Instructions**

*Williams v. State S11A0727 (11/7/11)*

The State appealed from the grant of a motion for new trial. Williams was convicted of felony murder and four other charges in connection with the death of an innocent bystander. The felony murder count charged Williams with causing the victim's death during the commission of the felony of theft by receiving stolen property. The other counts included (1) first degree vehicular homicide based on hit and run; (2) first degree vehicular homicide based on reckless driving; (3) theft by receiving stolen property; and (4) hit and run.

On motion for new trial, Williams argued that by failing to instruct on inherent dangerousness, the jury instructions effectively took over the jury's role as fact-finder with respect to the element of the felony upon which the felony murder charge was predicated and thus constituted an error by the trial court in properly charging the jury. A different superior court judge than the one who heard the case granted the motion. The judge determined that the inadequate instruction regarding the requisite dangerousness of the predicate felony constituted plain error, mandating a new trial.

The issues raised by the State were (1) circumstances under which an appellate court may review alleged jury instruction errors to which no objection was raised at trial; and (2) assuming such review was appropriate in this case, whether the trial court correctly held

that the omission in the jury charge constituted plain error. Under OCGA § 17-8-58 (b), appellate review for plain error is required whenever an appealing party properly asserts an error in jury instructions. Plain error is that which is so clearly erroneous as to result in a likelihood of a grave miscarriage of justice or which seriously affects the fairness, integrity or public reputation of a judicial proceeding. In its findings, the Court explained that a trial court's refusal to give an "inherent dangerousness" instruction, even when it was requested, did not constitute error. The Court reasoned that the omission of the instruction did not affect the outcome of the proceedings because the jury did in fact make such a finding when it found Williams guilty of vehicular homicide by reckless driving—a crime which is dangerous per se. Therefore, the Court reversed the grant of the new trial because the jury did in fact make the requisite factual finding of dangerousness as to the predicate felony.

## **Jury Charges; Plain Error Rule**

*State v. Kelly S11A0734 (11/7/11)*

The Supreme Court granted the State's interlocutory appeal challenging the grant of a new trial to defendant that was the result of a finding of error in the jury charge.

The trial court convicted the defendant of felony murder as a result of the victim's death while defendant was in commission of a felony. Despite any objections to the jury charge at trial, the defendant's motion for a new trial rested upon the argument that the jury instructions failed to instruct the jury to consider whether the predicate offense in support of the felony murder charge was an offense that created a foreseeable risk of harm. OCGA § 17-8-58 provides an exception to the objection requirement when any party fails to object to any part of the jury instruction. Where a party fails to object to a jury charge, review may still be had under a plain error standard.

Here, the Court held the trial court erred in the determination that the omission in the jury charge did in fact constitute plain error. To determine if an omission of a jury charge did constitute plain error, the court must look at whether or not the error clearly affected the proceedings as to substantially alter the outcome of the trial. In so holding, the Court stated that even without the benefit of the

instruction, the jury still found the requisite factual findings of dangerousness as to the predicate felony of the felony murder charge by finding the defendant liable in the charge of vehicle homicide—a separate charge yet sufficient to meet the requirements in a finding of a felony murder charge. The Court reversed and remanded the case for further proceedings.

## **Murder; Aggravated Assault; Effective Assistance of Counsel**

*Ardis v. State S11A1526 (11/7/11)*

Appellant was convicted of felony murder and aggravated assault in the shooting of a drug dealer that resulted in the death of an innocent bystander. He argued that the trial court erred in denying his motion for severance.

It is upon the discretion of the trial court to determine the appropriateness of a severance. The Court stated that in determining whether to grant a motion to sever, a trial court should consider: (1) whether the number of defendants will confuse the jury as to the evidence and the law applicable to each defendant; (2) whether, despite cautionary instructions from the court, there is a danger that evidence admissible against one defendant will be improperly considered against another defendant; and (3) whether the defenses of the defendants are antagonistic to each other or to each other's rights of due process. It is incumbent upon the defendant who seeks a severance to show clearly that he will be prejudiced by a joint trial, and in the absence of such a showing, the trial court's denial of a severance motion will not be disturbed.

Here, the Court held that appellant failed to establish that the denial of his motion for severance would prejudice him at trial. First, there was no showing that the jury would have been confused by the number of defendants or the law applicable to each. Second, despite a *Bruton* violation at trial, the error was harmless and there was no danger that evidence admissible against one defendant was improperly considered against appellant in light of the overwhelming evidence against appellant consisting of eyewitness testimony and a confession. Finally, despite the small differences in the defenses of each defendant, the Court stated that an assertion of antagonistic defense alone is not sufficient to grant a motion of severance. The Court affirmed judgment.

## Guilty Plea; Boykin Rights

*Brown v. State, S11A0949 (11/7/11)*

A divided Supreme Court upheld the denial of appellant's petition of habeas corpus. Appellant raised the issue that he was not fully informed of his rights before signing a waiver of rights form and entering a guilty plea. The record showed the trial court and the appellant's trial counsel failed to fully inform appellant of his *Boykin* rights during the plea hearing. However, the Court held the mere signing and initialing of the waiver form, which included all the *Boykin* rights, was sufficient to establish the presumption that appellant was fully informed of his rights prior to waiving them. Appellant argued that the waiver of rights form did not stand as affirmative evidence that the trial court or the trial counsel conferred with appellant on all three of his *Boykin* rights. The Court disagreed, relying on trial court transcripts that reflected appellant's acknowledgement that he fully understood the waiver form. Furthermore, the record showed that trial counsel went over the form with the appellant and informed him of his Constitutional rights. The Court found these facts to be sufficient to conclude the trial court and the trial counsel did in fact meet the standard as to informing the defendant of his *Boykin* rights.

Appellant also argued that the wording of the waiver form failed to inform him of his rights. Specifically, appellant contended that the form failed to refer to his right to remain silent at trial. The Court found this argument without merit. Nothing in *Boykin* requires the use of any precisely-defined language or "magic words" during a guilty plea proceeding. Here, the form conveyed one's privilege against self-incrimination in a reasonable, intelligible fashion. Therefore, the habeas court properly denied appellant's petition.

## Habeas Corpus; Venue

*Wilkes v. Terry S11A1410 (11/7/11)*

A divided Supreme Court affirmed the habeas court's denial of Wilkes' motion to transfer his habeas petition, as well as the denial of the petition itself, holding that a habeas court is not required to transfer a properly filed habeas petition to another county's superior court when the petitioner is transferred to that county for detention.

Appellant argued that *Preer v. Johnson*, 279 Ga. 90 (2005), required that the habeas court transfer a case to the jurisdiction to which a prisoner is moved. But the Court interpreted the standard established by *Preer* to mean that superior courts, at their discretion, simply have the authority to transfer a habeas petition based on petitioner's location of detention, not that the courts are required to transfer the petition.

Petitioner's only argument was that transfer of the petition was mandated because his county of detention had changed. Petitioner failed to provide any compelling evidence as to why a denial of transfer would aggravate the habeas hearing or that a transfer of venue would provide for a more appropriate proceeding.

Justice Melton wrote a strong dissent aimed specifically at the Court's interpretation of *Preer*.

## Murder; Evidence

*Rogers v. State S11A0659 (11/7/11)*

Appellant was convicted of murder, aggravated assault and burglary. Appellant and an accomplice broke into the victim's apartment seeking drugs and money. The victim confronted appellant, which resulted in a struggle that left the victim with a fatal gunshot wound to the neck. After robbing the victim's wife, appellant fled the scene and ultimately sought medical attention for a gunshot wound to his wrist as a result of the burglary. Due to his wound, appellant was considered a victim of a crime, which required a police officer to conduct an interview at the hospital. During the interview, appellant provided a false name and maintained that his wound was from being shot while walking down the street. The police failed to corroborate appellant's story and eventually found his DNA to be a match to blood evidence from the crime scene.

Appellant contended his statements to the police officer were not admissible as evidence, arguing that the statements were not voluntarily given because he was in pain and had suffered injuries that required him to be flown to another hospital for treatment. The Court held that the mere fact appellant was in pain, taking medication and hospitalized did not render his statements involuntary. The officer testified that appellant seemed to be awake and lucid and did not seem to be under the influence of any drugs or medication at the

time the statements were made. Thus, the trial court did not abuse its discretion in admitting the statements.

Appellant further argued that other statements made were inadmissible under the attorney-client privilege rule. The evidence showed that while awaiting trial, appellant's girlfriend initiated a three-way conversation between appellant and an attorney on the jail house phone system in which appellant informed the attorney that the evidence against him included blood found at the crime scene. The Court ruled against appellant and explained that the statute pertaining to the attorney-client privilege is a narrowly construed statute that does not enforce itself upon certain instances, including conversations that involve third parties. There was no evidence of any device used to obtain the recording other than the jail recording system, which appellant was put on notice of multiple times prior to the conversation. Furthermore, OCGA §16-11-62 (2) (A) contains an exception to the surveillance prohibition by allowing the recording of all activities of incarcerated persons who have been charged or convicted of a crime.

## Speedy Trial; Barker v. Wingo

*Williams v. State S11A0727 (11/7/11)*

The Supreme Court affirmed the trial court's denial of appellant's motion to dismiss all charges. Appellant argued for dismissal of all charges based upon an alleged violation of his constitutional right to a speedy trial. Under *Barker v. Wingo*, a claim alleging a violation of the constitutional right to a speedy trial is analyzed under a four prong test: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) prejudice to the defendant.

The Court found the 48-month delay presumptively prejudicial and weighed this against the State. The reason for the delay was weighed benignly against the State, finding much of the delay due to an overloaded docket and the ongoing investigations of other potential crimes involving appellant. The untimely assertion by appellant to his right to a speedy trial was weighed heavily against appellant.

Finally, appellant argued the delay of his trial was prejudicial. Specifically, appellant stated his defense was impaired because he could not locate witnesses. The Court noted

that it views this prong as most important in this analysis. However, the Court determined the sufficiency of the testimony to be provided by appellant's anticipated witnesses amounted to that of hearsay evidence and would effectively fail to be admitted into evidence. Accordingly, the Court did not find an abuse of the trial court's discretion and affirmed the denial of appellant's motion to discharge and acquit.

### **Judicial Comments; Motion for Mistrial**

*Vandall v. State S11A0810 (11/7/11)*

Appellant was convicted of murder of a 13-month-old that bled to death internally from a broken back while in appellant's sole care. Appellant argued that: (1) the court interfered with his right to a thorough cross-examination by repeatedly interrupting and cutting short his counsel's questioning of a witness, and (2) that the court erred in denying his motion for a mistrial.

Appellant argued that the trial court interrupted his counsel's cross-examination of the State's lead investigator by repeatedly interfering with the questioning, which appellant argued prejudiced him and left the jury with the impression that the court was frustrated with the proceedings. The Court held that the trial court's interjections did not deprive appellant of the opportunity to fully and fairly present his case to the jury. First, appellant failed to point to any instance where he was denied the right to ask a question. Second, the trial judge did not, at any time, intimate an opinion on the evidence by his comments or questioning. Finally, in the instructions to the jury, the trial judge stated that he had interjected himself at various times during the questioning of the witness, but that the jury should not consider anything the court said or did as evidence or let the court's actions affect their view of the evidence.

Appellant further argued that the trial court erred in not granting a mistrial after the prosecutor violated a pre-trial order. During the examination of the appellant's mother, the prosecutor violated a pre-trial order that prohibited questioning regarding the appellant's outstanding warrants. The trial court denied appellant's motion for a mistrial despite acknowledging the improper questioning. In so doing, the trial court issued a curative instruction to the jury. The Court held that in light

of the curative instruction to the jury, the trial court did not abuse its discretion in denying the motion for a mistrial. Judgment was affirmed.

### **Due Process**

*Nations v. State S11A0848 (11/7/11)*

Appellant was convicted of malice murder and aggravated battery. Appellant contended he was denied due process as a result of the prosecution withholding exculpatory evidence. The evidence showed that after appellant was convicted, a person named Teague contacted the sheriff and district attorney's office. Teague claimed that he had an audiotape which purportedly had a witness from appellant's trial admitting to giving perjured testimony. An assistant district attorney listened to the tape and determined that it did not substantiate the Teague's assertion. Teague died a short time later. Three months after his death, the tape was turned over to the defense.

Appellant argued that his conviction should be overturned because it was obtained through the use of perjured testimony. OCGA § 17-1-43 mandates the setting aside of a verdict or judgment obtained or entered as a result of perjury when the judgment could not have been obtained without the perjured evidence and the perjurer has been duly convicted thereof. The Court found there was no showing that any perjury actually occurred or that the witness was ever charged with or convicted of perjury. Moreover, even assuming arguendo that the witness perjured himself, it could not be said that the guilty verdicts and consequent judgments could not have been obtained without such evidence inasmuch as there was testimony from other witnesses at the crime scene portraying appellant's unjustified shooting of the victim.

Furthermore, the Court found, there was no basis for appellant's claim of a due process violation. This was not a situation in which the prosecution knew or should have known about a witness's untruthful testimony prior to trial or circumstances that resulted in the corruption of the essential truth-seeking function of the trial process.

Nevertheless, appellant argued, this was "akin" to a *Brady* violation because he was deprived of the chance to fully explore the issue of the witness's "perjured" testimony as he was not given any notice of it prior to Teague's death and not until the witness was diagnosed

with Alzheimer's disease and had lost the ability to recall his discussion with Teague. But, the Court held, the evidence did not warrant a finding that the witness committed perjury by virtue of his testimony at trial. Moreover, even assuming that the audiotape was arguably exculpatory, in order to demonstrate a *Brady* violation, a defendant must show, among other things, that the prosecution suppressed the favorable evidence and that had it been disclosed to the defense, there exists the reasonable probability that the outcome of the trial would have been different. Here, appellant failed to show that the State, either purposefully or through oversight or neglect suppressed the audiotape, much less that any earlier notice of the existence of the audiotape would have actually benefitted appellant or that any alleged delay deprived him of a fair trial. The Court further stated that even if the evidence was found to be exculpatory, to demonstrate a *Brady* violation had occurred, the appellant must show that the evidence would have otherwise provided a reasonable probability that the outcome of the trial would have been different. The Court found appellant presented no evidence of this and affirmed his conviction.

### **Kidnapping; Jury Charges**

*Sipplen v. State A11A1965 (11/1/11)*

Appellant appealed his conviction of kidnapping and possession of a firearm during the commission of a felony. Appellant was convicted of these charges stemming from the robbery of a Pepsi-Cola truck. Appellant argued that the trial court erred in giving the jury proper instruction with regard to the kidnapping charge. Appellant contended the court must apply the rule set out in *Garza v. State*, 284 Ga. 696, which provided a four part test to determine if the asportation element of kidnapping was met: (1) the duration of the movement; (2) whether the movement occurred during the commission of a separate offense; (3) whether such movement was an inherent part of that separate offense; and (4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense.

The Court stated that the intent of the *Garza* test is to determine whether the movement in question was undertaken to isolate the victim from protection or rescue or if it was merely an insignificant circumstance attendant

to another crime. Appellant argued the movement of the victim in the case was irrelevant because the appellant was attempting to rob the truck, and the driver just happened to be inside of the truck. The record revealed that the driver was forced to drive six miles away, down a secluded dirt road. The appellant had placed the victim in an isolated situation that substantially limited the victim's chances for protection or rescue. The Court held that these facts were overwhelmingly supportive of the State's burden to prove asportation set out in the *Garza* standard.

In deciding that the acts did meet the *Garza* test, the Court then addressed appellant's argument of improper instruction to the jury and whether the instructions amounted to that of an error by the trial court. Appellant argued that the charge to the jury regarding the asportation element of the offense of kidnapping allowed the jury to consider evidence of only the slightest movement rather than evidence of the *Garza* factors. The Court applied the "highly probable test": Whether it was highly probable that the error did not contribute to the judgment. Because the Court determined that the evidence did sufficiently meet the *Garza* test, appellant failed to demonstrate the error contributed to the judgment, and thus, appellant provided no grounds for reversal.

## **Probation Revocation**

*Thompson v. State A11A1808 (11/1/11)*

The Court granted appellant's application for discretionary review of the superior court's order revoking his probation. Appellant argued that his probated sentence had already run when the State petitioned to revoke it. In April of 2001, appellant was convicted of VGCSA and sentenced to seven years, six of which were to be served on probation. In October of 2002, the trial court issued a warrant for appellant's arrest for violating certain conditions of his probation, including the condition that he report to his probation supervisor. The warrant instructed the sheriff or another law enforcement official to obtain appellant and hold him until a February court date. A sheriff's deputy signed the following statement of "non est inventus" on the back of the warrant: "The undersigned officer hereby certifies that a thorough and diligent search for the probationer listed in this warrant has been made at but not limited to places of abode,

known places of frequencies, and others and that His/Her whereabouts are unknown and cannot be located." In March of 2003, the trial court entered an order tolling the running of appellant's probated sentence.

In December of 2010, appellant was arrested for committing several offenses, and the State petitioned to revoke his probation. Appellant argued that his probated sentence should not have been tolled because the statutory requirements for tolling had not been met. Therefore, his probation sentence would have run in 2008. The Court noted that the version of OCGA § 42-8-36 (2002) in effect in 2003 controlled its analysis. OCGA § 42-8-36 (a) (2) allowed the tolling of a probated sentence if the probation supervisor submitted an affidavit to the court stating that a probationer had fled and could not be found, effective on the date the affidavit was submitted. In this case, however, the probation officer's signed statement that appellant could not be located was unsworn, thereby nullifying it as an affidavit failing to meet the requirement of the statute. Nevertheless, OCGA § 42-8-36 (a) (1) provided for an automatic tolling of a probated sentence if a probationer failed to report to a supervisor or a return of "non est inventus" or other return of a warrant. Appellant contended this section did not apply because there was no record that the signed "non est inventus" had been returned to the superior court. However, due to unexplained circumstances, a record of the signed warrant did end up in the appellate record. The appellant failed to provide evidence to the Court that the warrant in question was not in the trial court's files. Based on that evidence, the Court found that the trial court did not err in holding that appellant's probated sentence was tolled by the return of a warrant showing "non est inventus" and, thus, in revoking appellant's probation.

## **Merger**

*Davis v. State A11A1269 (11/1/11)*

Appellant was convicted of burglary, aggravated assault, and attempt to commit armed robbery, and possession of a firearm during the commission of a felony. Appellant contended the trial court erred by refusing to merge his aggravated assault conviction with his attempted armed robbery conviction because "there was never a break in the action to end one offense and begin another." The 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 that the other does not. The Court held that both crimes were complete when appellant pointed the gun at the victim while simultaneously entering the apartment, and there was no separate aggravated assault before the armed robbery began. Therefore, the trial court erred in not merging the two crimes.

## **Jury Charges; Accomplice Testimony**

*Dickerson v. State A11A1251 (11/1/11)*

Appellant was convicted of trafficking cocaine, and he received a life sentence without parole. Appellant timely filed a motion for new trial and filed a motion to modify his sentence. The trial court granted the motion to modify the sentence in 2010 and re-sentenced him to 40 years to serve 20, but the trial court denied his motion for new trial. At trial, appellant's accomplice provided corroborating testimony against appellant that stood as the crux of the State's case against appellant. Appellant argued that the trial court erred by not charging the jury sua sponte that the accomplice's testimony "should be viewed with suspicion and caution."

The Court disagreed. The State's requirement is one of corroboration and where there is corroboration, the law does not require an additional instruction to the jury that the testimony of the accomplice must be received with skepticism. The Court stated that although it is not error to give such an instruction upon request, "we decline to hold that the failure to so charge where the corroboration requirement has been satisfied is error requiring a new trial."

## **Burglary; Effective Assistance of Counsel; Jury Charges**

*Mitchell v. State A11A0901, A11A0902 (10/28/11)*

Appellant and his accomplice were tried together and convicted of burglary, misdemeanor obstruction of an officer, and theft by taking. Because both he and his accomplice were represented by the same attorney, appellant argued that there was a conflict of interest that amounted to ineffective assistance of counsel. Where, as here, a defendant raises no

objection at trial, he must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. Where the contention is only the possibility of conflict, this is insufficient to impugn a criminal conviction. Here, the Court found, trial counsel testified that she did not feel there was a conflict between her two clients. Furthermore, she apprised them both prior to trial, individually, at least three times, that if they felt a conflict existed, they needed to inform her. Neither did. Counsel testified that she had received no statements from either defendant that could have been used against the other. Therefore, the Court determined, counsel did not slight the defense of one defendant for another, and no ineffective assistance was shown.

Nevertheless, appellants contended that the trial court had a duty to inquire prior to trial into any possible conflict of interest when one attorney represents two defendants.

The Court stated that a trial court certainly bears a duty to inquire into a potential conflict of interest whenever the trial court is aware of circumstances creating more than a vague, unspecified possibility of conflict. However, a trial court's failure to inquire into the circumstances of a potential conflict does not relieve a prisoner of his or her duty to show on appeal that a conflict existed that adversely affected his or her counsel's performance. Here, appellants failed to show evidence that any conflict adversely affected counsel's performance.

## **Cross Examination; Severance**

*Jefferson v. State A11A1295 (11/3/2011)*

Appellants Jefferson and Edwards were tried jointly and convicted of armed robbery, aggravated assault, false imprisonment and firearms offenses. Appellants and a third man forced their way into a home, bound the three victims with duct tape, beat one of the victims with a pistol, and took money, a video game console, and a television. Appellants contended that the trial court erred by allowing the State to introduce expert opinion testimony, based on the theory of fracture match analysis, that a piece of duct tape found at the scene of the crime came from the roll of duct

tape found in Edwards' car. They assert that the State did not demonstrate that fracture match analysis has reached a verifiable state of scientific certainty as required by *Harper v. State*, 249 Ga. 519 (1982).

Before scientific evidence can be properly admitted, the proponent of the evidence must lay a proper foundation for its admission. The proponent must show that: (1) the general scientific principles and techniques involved are valid and capable of producing reliable results, and (2) the person performing the test substantially performed the scientific procedures in an acceptable manner. Here, the Court found, the State failed to demonstrate that the fracture match analysis evidence was founded on valid scientific principles. Evidence based on a scientific principle or technique is admissible only if the science underlying the evidence is a phenomenon that may be verified with such certainty that it is competent evidence in a court of law. The State was required to either demonstrate to the court that the procedure or technique in question has reached a scientific stage of verifiable certainty, or that the procedure "rests upon the laws of nature." The trial court may make this determination from evidence presented to it at trial by the parties; in this regard expert testimony may be of value. Alternatively, the trial court may base its determination on exhibits, treatises or the rationale of cases in other jurisdictions. The significant point is that the trial court makes this determination based on the available evidence rather than by simply calculating the consensus in the scientific community. Once a procedure has been recognized in a substantial number of courts, a trial judge may judicially notice, without receiving evidence, that the procedure has been established with verifiable certainty or that it rests upon the laws of nature.

Here, the trial court did not take judicial notice that fracture match analysis had reached a scientific stage of verifiable certainty, and there was very little evidence available to it regarding the issue. No evidence of exhibits or treatises was presented to or cited by the court. Likewise, no rationale of cases from either Georgia or other jurisdictions was presented to or cited by the court to show that fracture match analysis satisfied the *Harper* test. The State did not identify at trial any cases in which claims for fracture match analysis were admitted. The cases identified by the State on

appeal did not analyze whether fracture match analysis has reached a scientific stage of verifiable certainty; and, the Court stated, it "found no Georgia appellate cases admitting such testimony under *Harper*." Instead, the State expert's testimony was the only foundation evidence for fracture match analysis under the *Harper* test.

But, while the expert witness's testimony addressed how the fracture match analysis was performed, it did not address the core of the *Harper* test —whether fracture match analysis has reached a scientific stage of verifiable certainty such that the evidence thereof constituted competent evidence. Further, although the State's expert had a Bachelor of Science degree in chemistry and had received training in conducting fracture match analysis, she was not qualified as an expert on the scientific theory underlying the analysis. The State presented no expert witness who opined that the underlying scientific theory has reached a scientific stage of verifiable certainty. Thus, the trial court erred in ruling that the expert testimony of a state's witness satisfied the requirements of *Harper v. State*.

Nevertheless, the Court determined, the trial court's error in ruling that the *Harper* test had been satisfied did not require reversal. Unlike the expert witness's "overreaching testimony on voir dire," her testimony before the jury did not focus on the scientific principles underlying fracture match analysis or its ability to identify unique tears. Instead, the witness testified primarily about her acts of observing and comparing the physical properties of two pieces of duct tape through a stereo microscope. This testimony helped the jury with information the average juror does not have. Citing *Belton v. State*, 270 Ga. 671 (1999), the Court found that most of the testimony given before the jury by the witness here was not subject to *Harper* and was admissible as concerning the observation and comparison of physical objects, notwithstanding the trial court's erroneous *Harper* ruling. Although the expert witness did give some testimony before the jury that should have been excluded under *Harper*, the information was not a necessary foundation for evidence of the physical comparison performed by the witness, such as her observation that the longer fibers on the end of the duct tape allegedly used to bind one of the victims matched the shorter fibers on the end of the roll of tape found in the car. Moreover,

defense counsel elected to expose on cross-examination the expert witness's overreaching regarding the uniqueness of fractures. Defense counsel elicited a repetition before the jury of her claim on voir dire that fracture match analysis is as accurate as a DNA test. Under these circumstances, the Court found it highly probable that the trial court's admission of the brief portion of testimony that should have been excluded under *Harper* did not contribute to the judgment.

Appellant Jefferson further contended the trial court erred by restricting his cross-examination of a police officer. The record showed that during cross examination, his counsel requested that the police officer "come down and examine his arm and tell us what he sees in the way of tattoos." The court sustained the State's objection to the request because that would effectively deprive the State of the ability to cross examine the defendant. Overreaching cross-examination may not be used as a vehicle to enable a party to present non-testimonial evidence without being subject to oath, or to subvert the ability of the opposing party to cross-examine the party proponent such non-testimonial evidence. Within carefully protected legal parameters, the scope of cross-examination lies within the sound discretion of the trial court. Here, the Court found, what Jefferson sought was not related to a legitimate purpose of cross-examination, but to introduce evidence without the burden of cross-examination. Thus, the trial court did not abuse its discretion in restricting his cross-examination.

### **Right to Counsel; Jury Charges**

*Calmes v. State A11A1245, A11A2203 (11/3/11)*

Appellants Calmes and Allen were jointly tried and convicted of armed robbery, aggravated assault and firearms offenses. In August of 2008, the victims attempted to sell the appellants stereo equipment. Instead, appellants robbed the victims of the equipment at gunpoint.

Appellant Calmes argued the trial court erred by refusing to instruct the jury of his defense of coercion. OCGA § 16-3-26 provides that "[a] person is not guilty of a crime, except murder, if the act upon which the supposed criminal liability is based is performed under such coercion that the person reasonably be-

lieves that performing the act is the only way to prevent his imminent death or great bodily injury." The Court explained that this defense would not apply given the facts of the case. Appellant Calmes had an opportunity to leave the scene and terminate his involvement in the crime. The coercion appellant Calmes relied on happened before the crimes occurred and preceded an opportunity for Calmes to leave, which he did not. Thus, the Court found no error in the trial court's refusal to give the requested instruction.

Appellant Calmes further argued the trial court erred by replacing a juror who was disqualified after the jury originally reached a guilty verdict. Appellant contended that the alternate who replaced the disqualified juror had been tainted by the original guilty verdict, and the trial court instead should have granted a mistrial. The record showed that the jury initially returned a verdict finding Calmes and Allen to be guilty. But when polled, one of the jurors said that she needed more time, so the trial court directed the jury to continue deliberations. After an overnight recess, the trial court discovered that one of the jurors—not the juror who had said she needed more time—had independently visited Allen's neighborhood during a break in the trial, although she did not find his house. Allen and Calmes moved for a mistrial. The trial court denied the motion for mistrial, excused the juror who had driven by Allen's neighborhood, and replaced her with an alternate juror. The trial court then instructed the jurors to begin their deliberations anew.

The decision to grant or deny a motion for mistrial rests within the trial court's discretion, and an appellate court will not disturb a trial court's ruling absent a manifest abuse—one that threatens the defendant's right to a fair trial—of that discretion. Here, the Court noted, Calmes could not have been harmed by the alternate juror's discovering immediately before entering the jury room what she surely would have discovered soon after entering the jury room. Moreover, his claim that the reading of the verdict tainted the jury was purely speculative. Thus, the trial court did not err in denying the motion for a mistrial.

### **Rape Shield**

*Turner v. State A11A1106 (11/1/11)*

The Court affirmed appellant's conviction for the rape of a 16-year-old, holding that

the trial court did not abuse its discretion in excluding appellant's testimony regarding the victim's statements to him that she had sex in the past with her boyfriend and with older men. Appellant argued that the trial court should have allowed him to testify to certain statements the victim made to him. Appellant argued that these statements were essential to his sole defense that the victim consented to having sexual intercourse with him.

The trial court ruled that the statements were barred by the rape shield statute. The statute protects the victim in rape cases by excluding evidence that might reflect on the character of the witness without contributing materially to the issue of the guilt or innocence of the accused. The only exception to this statute are instances where evidence reveals past sexual behavior of the victim that directly involves the accused and that participation supports an inference that the accused could have reasonably believed that the victim had consented to the conduct at issue. The Court found the statements concerning the victim's past experience were not related to the accused and did not fit within the exception of the statute. Therefore, the trial court did not abuse its discretion in excluding the testimony proffered.

### **Rape Shield; Jury Charges**

*Birdsong v. State A11A2000 (11/1/11)*

Appellant was convicted of aggravated assault, simple battery and firearms offenses. The record indicated that the victim went to appellant's house to retrieve their son's video game system in October of 2006. According to the victim, after she entered the house, appellant demanded that she move back in with him, but she responded that she was not returning and was planning on getting a divorce. The victim testified that appellant then slapped her in the face and stated that she was going to come home "or else." She said that when she asked appellant what he meant by "or else," he began grabbing and clawing at her neck and face and dragged her up the stairs, down the hall, and into the master bedroom on the upper level of the house. The victim further testified that once in the bedroom, appellant threw her on the bed and began choking her; retrieved a shotgun and poked her in the chest and stomach with it while threatening to kill her; cracked one of her teeth by striking her

in the mouth with the shotgun; and forced her to have sexual intercourse with him.

During the first trial, defense counsel inquired into the victim's sexual activities after the crime took place. The trial court immediately declared a mistrial per the violation of Georgia's rape shield statute, which prevents the questioning of an alleged rape victim's sexual history. A second trial ensued. During the second trial, defense counsel again allegedly violated the Rape Shield Statute through the introduction of defense witnesses regarding the victim's alleged promiscuity.

After the defense rested in the second trial, the prosecutor argued that as in the first trial, defense counsel had violated the Rape Shield Statute by eliciting testimony about the victim's sexual activities with other men. The prosecutor stated that he was not requesting a mistrial because of the stress that would be engendered in the victim and her children by conducting a third trial. He further argued that a curative instruction given immediately after the offending testimony would have only served to accentuate the impermissible testimony to the jury and make the situation worse. Instead, the prosecutor argued that the trial court ought to give a curative instruction as part of its charge to the jury at the close of the case. The prosecutor stated that it was his "hope . . . that a thorough and curative instruction given during a larger body of instructional law at the close of the case [would] help the jury understand that this kind of business is irrelevant and shouldn't enter into their deliberations at all."

Appellant argued the trial court erred by including the curative instruction relating to the victim's sexual history in its charge to the jury at the close of the case. Specifically, he argued that the prosecutor's request for the instruction was untimely, given that no objection was made immediately after the improper testimony was elicited. Further, appellant argued, that even if the prosecutor did not waive his objection to the testimony, a curative instruction would have only been proper if given immediately after the offending testimony was elicited rather than as part of the closing jury charge.

The trial court has broad discretion in fashioning a remedy to alleviate a problem created by the utterance of inadmissible evidence. As an initial matter, a trial court has the inherent authority to instruct the jury to

disregard inadmissible testimony, even if there was no timely objection to the testimony. A trial court does not err by giving a curative instruction in its closing jury charge rather than contemporaneous with the introduction of the improper testimony, even when there was no request for such an instruction at the time the testimony was elicited. After hearing the prosecutor's concern that the giving of a curative instruction in isolation would only emphasize the error, the Court of Appeals found that the trial court acted within its broad discretion in determining that the most subtle way of dealing with the improper testimony was to give a curative instruction embedded within the closing jury charge. Moreover, even assuming the giving of the instruction was error, it was highly probable that the charge did not contribute to the verdict since he was acquitted of the rape charge.