

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 4, 2016

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THIS WEEK:

- **Right to be Present; Juror Notes**
- **Page Limits on Briefs: Constitutionality**
- **Sufficiency of the Evidence; Ineffective Assistance of Counsel**
- **Prior Convictions; Former O.C.G.A. § 24-9-84.1**
- **Foundation Questions; Re-opening of Evidence**
- **Entrapment; Informant Testimony**
- **Informant's Statements; Relevancy of Testimony**

Right to be Present; Juror Notes

Burney v. State, S16A1042(10/17/16)

Appellant was convicted of malice murder and a firearm offense. He contended that his constitutional right to be present was violated regarding the handling of five juror notes. The record showed that after the jury was selected, but before they were released for the evening, five jurors sent notes to the court. Two jurors asked what time court would end each day; two jurors sought to be excused from service for hardship; and one juror noted a family law enforcement connection that the juror said had slipped his mind when he was individually questioned about such connections earlier in the day.

Appellant contended that the trial court violated his right to be present by failing to read the notes aloud in open court or show him the notes. The Court stated that two of the notes, which asked what time the jury would be let go each day, related solely to a logistical issue of the sort that does not implicate the

right to be present. However, the other three notes involved the composition of the jury that tried appellant (and his co-defendant), so appellant had the right to have the notes read aloud in open court or shown to him so that he could read them for himself. But, that did not happen in this case.

Nevertheless, the Court noted, the right to be present is waived if the defendant personally waives it in court; if counsel waives it at the defendant's express direction; if counsel waives it in open court while the defendant is present; or if counsel waives it and the defendant subsequently acquiesces in the waiver. Acquiescence, which is a tacit consent to acts or conditions, may occur when counsel makes no objection and a defendant remains silent after he or she is made aware of the proceedings occurring in his or her absence.

Here, the Court found, it was clear that appellant did not personally waive in court his right to see or hear the juror notes and that his counsel, who knew what the notes said, did not waive appellant's right at his express direction or in his presence. It was also clear, however, that appellant and his counsel did not object to the trial court's handling of the notes or ask that they be read aloud in open court or given to appellant so that he could read them himself. The question, therefore, was whether appellant had sufficient information concerning the notes and the nature of their contents to fairly construe his silence in this regard as acquiescence. The Court concluded that he did.

Thus, the Court found, at the end of the first day of his trial, appellant knew that there were notes that he had not seen, which had been discussed at a bench conference that he could see occur but from which he was excluded. Appellant also knew that he could

view the notes if he wanted to, as the trial court asked in open court, “Do y’all want to then look at the notes?” Appellant was not excluded from this invitation. Moreover, as soon as court began the next morning, appellant (along with the other trial participants) was reminded by the trial court of the notes that he had not seen or read and was advised that they came from the jury and of their general subject matter. The court clearly indicated that there were five notes from the jury and that the notes had to do with “scheduling issues” and “disclosures” that might affect jurors’ willingness or ability to serve, in particular “scheduling issues and then one disclosure that didn’t come up in voir dire yesterday.” The court directly asked if “[a]nybody want[ed] to say anything else about [the issue]” and if the defense had any other suggested method of dealing with the notes. Counsel for appellant’s co-defendant highlighted the concern that the issues the jurors raised in the notes had come to light at the “13th hour,” after the jury had been selected. And when the jury was brought in, the court told them that “[w]ith regard to some additional disclosures that jurors made, let me assure you that *the parties and their attorneys* are aware of those matters.” (Emphasis added.)

Yet, the Court noted, appellant did not ask to see the notes or ever complain at trial to his attorney or the court about not seeing them. Only after the jury — several members of which he knew had sent the notes — found him guilty did appellant raise a complaint. Under these circumstances, the Court held that appellant acquiesced in the court’s handling of the juror notes. Accordingly, appellant was not entitled to a new trial on this ground.

Page Limits on Briefs: Constitutionality

Daker v. State, S16A1372, S16A1373, S16A1393 (10/17/16)

Appellant was found guilty of malice murder, felony murder, aggravated assault, aggravated battery and criminal attempt to commit aggravated stalking against three different victims. He appealed, pro se. In one of his appeals, he contended that the Supreme Court’s Rule 20, which imposes a 50-page limit on an appellant’s brief in a non-death penalty appeal of a criminal case, is unconstitutional. The Court disagreed.

The Court stated that the requirements as to the form of appellate briefs were created not to provide an obstacle, but to aid parties in presenting their arguments in a manner most likely to be fully and efficiently comprehended by this Court. And, to function with any sort of efficiency, a court must control the cases before it. Page limits, therefore, benefit both the parties who file briefs and the courts which must consider them. Moreover, the Court found, federal courts have routinely dismissed due process challenges based on page limits. Likewise, the page limits imposed on appellant are the same limits imposed on all criminal appellants who bring an action to the Court, and there is no equal protection violation in which similar classes are treated similarly. Therefore, the Court concluded, appellant’s contentions that Rule 20 is unconstitutional had no merit.

Sufficiency of the Evidence; Ineffective Assistance of Counsel

Cisneros v. State, S16G0443 (10/17/16)

Appellant was convicted of six counts of armed robbery, eight counts of burglary, two counts of criminal attempt to commit armed robbery, two counts of aggravated sexual battery, and one count of sexual battery, all relating to a series of home invasions. The Court granted certiorari on a number of issues. The first concerned the sufficiency of the evidence to support appellant’s convictions for armed robbery and burglary relating to home invasions on Glenwhite Drive and Sandune Drive. The only witness against appellant for those crimes was an accomplice, Gonzalo Ortega. The Court of Appeals held that Ortega’s testimony was sufficiently corroborated by evidence at trial showing that appellant was a participant in home invasions on Davenport Park Lane, Skyview Lane, and Shadowood Road. Appellant was convicted of crimes related to those home invasions and did not challenge the sufficiency of the evidence for those convictions on appeal. The Court of Appeals held that all five home invasions had a “markedly similar modus operandi” and held that this modus operandi was sufficient by itself to corroborate Ortega’s testimony. Appellant contended the Court of Appeals erred by holding that the modus operandi evidence was, by itself, sufficient to corroborate Ortega’s testimony regarding the

Glenwhite Drive and Sandune Drive home invasions. The Court disagreed.

Here, the Court noted, the victims at each of these locations testified that in the early morning hours a group of armed, Spanish speaking men wearing dark clothing and face-covering masks entered their homes and pointed guns at their heads. The assailants told the victims not to look at them and demanded money, indicating they knew the victims were in possession of a large amount of cash. They ordered the victims to lie face down and tied them with their hands behind their backs. In each case, the assailants first kept the victims separate from each other but subsequently placed them together, under guard, while the gunmen spent several hours ransacking the home, taking primarily money and jewelry but also a vehicle belonging to one of the victims. Moreover, all the home invasions occurred over the course of only three weeks and were committed within the same county. Thus, the Court concluded, the modus operandi evidence in this case was sufficient to corroborate Ortega’s testimony identifying appellant as a participant in the Glenwhite Drive and Sandune Drive crimes. Accordingly, there was sufficient evidence to support the jury’s verdicts related to the Glenwhite Drive and Sandune Drive crimes, and the Court of Appeals did not err by affirming these convictions.

The second issue was whether the Court of Appeals erred when it determined that the evidence presented at trial was sufficient to sustain appellant’s conviction as a party to the crime of sexual battery, a crime which occurred during the Skyview Lane home invasion. Although the State’s theory was that appellant was guilty of this charge as a party to the crime, appellant argued the evidence was insufficient to support the jury’s verdict because there was no evidence showing he knew a sexual battery would occur or that he intentionally aided and abetted any part of that crime.

Here, the Court found, evidence was presented establishing that appellant, together with several co-indictees, planned and executed the armed robbery and burglary at Skyview Lane, that appellant acted as a driver and lookout while the others directly participated in those crimes, and that one co-conspirator committed a sexual battery while in the victims’ home. The evidence showed appellant and three other gunmen then drove the victim of the sexual

battery at gunpoint to her sister's house. There, they committed another burglary and armed robbery and participated in the burning of a victim for the purpose of coercing him to tell them where he kept his money. The gunmen, including appellant, then divided the proceeds from both robberies. The Court agreed with the Court of Appeals that from this evidence, as well as evidence of appellant's participation in and knowledge of the other crimes, including those for which he was convicted at trial, the jury was authorized to find that appellant knew his co-conspirators intended to commit a brutal home invasion at the Skyview Lane residence where they likely would use threats, intimidation, and physical coercion. The jury also would have been authorized to find that appellant was aware of the possibility that a co-conspirator might commit a sexual battery, which, by definition, does not require sexual contact with a victim's intimate body parts, but only non-consensual, intentional physical contact with a victim's intimate body parts. This possibility was especially foreseeable at the Skyview Lane robbery given that appellant had participated in previous robberies where the group had beaten and shot victims to force compliance with their demand for cash and other valuables. Thus, the evidence was sufficient to authorize the jury to find appellant guilty of sexual battery as a party to the crime.

In so holding, the Court rejected appellant's contention that the *Rosemond v. United States*, ___U.S.____ (134 S.Ct. 1240, 188 L.E.2d 248) (2014), required the State to prove not merely that the commission of a sexual battery was reasonably foreseeable but that he had advance knowledge that a co-conspirator would commit this offense. The Court stated that because *Rosemond* arose under federal law, it does not control, and *Rosemond* did not address issues of due process as contended by appellant.

The last issue was whether the Court of Appeals erred by concluding that trial counsel was not ineffective for failing to object during trial to the courtroom interpreter's interpretation and failing to insist on a hearing to assess the accuracy of the interpretation. Appellant contended counsel's performance was deficient on both of the asserted grounds and that he was prejudiced by counsel's deficient performance. The record showed that the trial court appointed two interpreters to serve at trial. One, Ms. Murillo-Brucek, sat

at the defense table to translate for appellant, and the other, Ms. Epps, was appointed as the courtroom interpreter tasked with translating counsel's questions to and the testimony of all Spanish speaking witnesses. On the third day of trial, Ms. Epps noted during a bench conference that the second alternate juror, Juror 14, had been shouting out words during the interpretation. The trial court asked the bailiff to instruct Juror 14 to refrain from commenting. After the close of evidence, the trial court informed Juror 14 that it was aware she had been expressing her thoughts about the case to other jurors. During questioning, Juror 14 denied making comments about the case or her intended verdict, but she admitted she had responded to one juror's question about the number of words used in Spanish translations, explaining more words may be required to express the same thought in Spanish. The trial court then individually questioned jurors, learning from some that Juror 14 had stated she could not live with herself if she found appellant guilty and that a majority of the jurors had heard Juror 14 make comments critiquing or commenting on the interpreter's interpretation. Defense counsel's motion for a mistrial was denied by the trial court after further questioning of the jurors who all stated unequivocally that they could set aside Juror 14's comments and follow the official interpretation provided by the courtroom interpreter. The trial court then dismissed Juror 14 from service.

Appellant argued that trial counsel was deficient for failing to object to the courtroom interpretation after its adequacy was called into question by Juror 14's comments. Specifically, he was prejudiced by counsel's failure to object because expert testimony presented on motion for new trial demonstrated that the interpretation interfered with defense counsel's ability to present a defense and changed the meaning of the questions asked or answers given, thereby denying him a fair trial. The Court disagreed.

The Court found that the evidence was insufficient to satisfy appellant's burden of establishing that the interpretation in this case was so inadequate as to deny him a fundamentally fair trial. Although the interpreter sometimes failed to provide word for word interpretations, had to seek clarification, paused, or made more than one attempt to accurately interpret counsel's

questions or a witness' testimony, none of the alleged errors prevented appellant from effectively presenting his defense, and there was no instance where the meaning of a witness' testimony was altered in a legally significant manner. While nuances of translation may, in some cases, provide an alternate but totally different meaning, this was not one of those cases. Moreover, the record showed that appellant spoke English and had no difficulty communicating in English with his counsel both prior to and during trial. Yet, there was no indication that appellant alerted counsel or the interpreter assisting him at the defense table to the possibility of interpretation errors. While appellant may have had no legal obligation to bring the alleged errors to the attention of his defense team, the Court found it significant, in light of the fact that the evidence showed he spoke both Spanish and English, that he himself made no objection to the adequacy of the interpretation. The record also showed that when the courtroom interpreter was uncertain of the correct translation or intended meaning of a question or witness response, she asked the trial court for permission to clarify and, when necessary, conferred with the second interpreter. In the rare instance when she concluded there had been an error in interpretation, she immediately informed the trial court and her interpretation was corrected. Rather than showing that the interpretation was deficient, this evidence demonstrated the interpreter's efforts to provide an accurate translation of the witnesses' testimony. Finally, the second interpreter testified on motion for new trial that she listened to the witnesses' statements and the courtroom interpretation throughout trial, that only on one occasion did she consider the interpretation to be inaccurate, that she brought her concern about this inaccuracy to the interpreter's attention, and that after agreeing on the correct translation, the trial court was notified of the error and the record was corrected. Therefore, the Court concluded, appellant failed to demonstrate how the interpreter's interpretation rendered his trial fundamentally unfair and accordingly, defense counsel's failure to object to the interpretation did not affect the outcome of the proceedings in this case.

Appellant also contended counsel was ineffective by failing to insist on a hearing to determine the accuracy of the interpretation as

authorized under the Supreme Court's Rules for the Use of Interpreters. The Court agreed with appellant that once it became apparent to defense counsel that a Spanish-speaking juror was taking issue with portions of the interpreter's interpretation, the information known to defense counsel was sufficient to call into question the accuracy of the official interpretation. But, the Court stated, at that point, the better course would have been for defense counsel to request a hearing, thereby allowing the trial court to determine during trial whether the interpreter was able to communicate accurately with the non-English speaking witnesses. However, the Court found, it did not need to determine whether counsel's failure to request such a hearing constituted deficient performance because appellant did not satisfy his burden of proving prejudice. Appellant simply failed to demonstrate that had counsel requested such a hearing, the trial court would have ruled that the courtroom interpretation fell below the constitutionally required standard of accuracy. Accordingly, the Court concluded, appellant failed to show sufficient prejudice resulting from counsel's failure to request a hearing.

Prior Convictions; Former O.C.G.A. § 24-9-84.1

Williams v. State, S16A1116 (10/17/16)

Appellant was convicted for the murder of one victim, the aggravated assault of another victim and related offenses. After the State rested its case and appellant announced his intent to testify, the State sought a preliminary ruling permitting it to introduce evidence of appellant's prior felony convictions, basing its request upon former O.C.G.A. § 24-9-84.1, which addressed impeachment of credibility by prior convictions. Specifically, the State sought to impeach appellant with a 2007 conviction for terroristic threats and a 2009 conviction for theft by taking. Appellant argued that he was entitled to a new trial based on the court's erroneous ruling allowing the evidence to come in. The Court agreed.

The record showed that when appellant testified, he mentioned in his direct testimony that he surrendered to the authorities after visiting his parole officer. Citing *Morgan v. State*, 275 Ga. 222, 223 (3) (2002), the Court stated that a defendant's reference to his parole status made in his direct testimony does not

place defendant's character at issue, but does raise an issue that can be fully explored on cross-examination with respect to the conviction for which he was on parole. Thus, because the record reflected that appellant was on parole for the theft by taking offense, no error was shown by the State's cross-examination of appellant with respect to his conviction for this crime.

However, the Court noted, the State initially based its request for permission to introduce evidence of both prior convictions for the purpose of impeachment of credibility by felony conviction, pursuant to O.C.G.A. § 24-9-84.1(a)(2). At that time, the State argued that the probative value of the evidence relating to the terroristic threats conviction satisfied the balancing test of the statute, but the trial court ruled against the State, presumably concluding the balancing test was not met. The Court agreed that the State's argument did not support admission for the purpose of attacking credibility since the State essentially argued that the evidence relating to the terroristic threats conviction made it more likely that he committed the charged crimes, which was not the purpose of admission pursuant to O.C.G.A. § 24-9-84.1(a)(2), and, indeed, the argument suggested the prejudicial impact of the evidence. After appellant testified and the State again sought permission to present evidence of his prior convictions, the State no longer offered the evidence for the purpose of impeaching appellant's credibility pursuant to this statute. Instead, in response to objections both before and after cross-examination, the State asserted appellant had introduced his character into evidence thereby opening the door to cross-examination relating to character.

But, the Court found, for evidence of appellant's conviction for terroristic threats to be admissible pursuant to O.C.G.A. § 24-9-84.1(a)(2), the trial court was required to make an on-the-record finding that the probative value of admitting that conviction substantially outweighed the prejudicial effect of its admission. The trial transcript showed the court did not make that required finding. Thus, the Court found, even though it has held that a trial court has no duty to conduct the balancing test of O.C.G.A. § 24-9-84.1 absent an objection, the State in this case did not seek at trial to admit the challenged evidence for the purpose of impeaching

appellant's credibility, and it was clear that this was not the ground on which it was admitted at trial. Therefore, the Court determined, it could not say that appellant waived his right to have the required statutory determination made before the trial court ruled the evidence was properly admitted since it was neither offered nor admitted for this purpose at trial.

Thus, the Court concluded, the evidence relating to the terroristic threats conviction was improperly admitted. Because appellant presented a credible defense, the admission was not harmless error because the evidence of guilt was not overwhelming. Accordingly, appellant was entitled to a new trial.

Foundation Questions; Re-opening of Evidence

State v. Warren, A16A0715 (10/12/16)

The State appealed the trial court's orders granting in part a motion to suppress filed by Warren and denying the State's subsequent motion to reopen evidence in this DUI case. At the motion to suppress hearing, the State attempted to get in the results of an Alco-Sensor test pursuant to O.C.G.A. § 40-6-392(a)(1)(A). After the officer testified that Warren had performed the test on his handheld Alco-Sensor, the prosecutor began to ask the deputy, "And was that device, the handheld Alco-Sensor, authorized by the Division of Forensic Sciences —" Before the prosecutor could complete her question, defense counsel objected to the question as leading. The trial court sustained the objection. The prosecutor tried to reframe her question, but apparently did not get the answer she was looking for. The trial court denied most of Warren's motions, but excluded the results of the preliminary breath test. The trial court concluded that the State did not lay a foundation that the device used for the test was approved by the Division of Forensic Sciences of the Georgia Bureau of Investigations for use as a preliminary screening device. The State filed a motion to reconsider and a motion to reopen the evidence. Both were denied after a hearing.

The State argued that the objected-to question was not leading because it called for a "yes" or "no" answer. Alternatively, the State argued that even if the question was leading, the officer should have been permitted to answer because the question was necessary to developing his testimony. The State further sought a remand

so that it may ask the objected-to question again in order to lay the proper foundation for the admission of the breath test results.

The Court stated that under the circumstances, it did not matter if the question was leading. Thus, the Court stated, it was “not an expounder of theoretical law,” and it corrects only errors that practically wrong the complaining party. A judgment will not be reversed on the basis that the trial court refused to allow a witness to testify where the record does not show what testimony the witness was expected to give. Here, the prosecutor did not tell the trial court what the officer’s answer to the prosecutor’s question would have been had he been allowed to answer. Instead, in responding to the defense counsel’s argument that the breath test results should be excluded due to the State’s failure to lay a foundation, the State merely argued that the officer had testified that he believed the breath testing device “was authorized for the use by the sheriff, by the GBI,” complained that the State’s attempts to lay a foundation had been frustrated by the defense objection, and represented that any additional steps needed to lay a foundation would be taken at trial. Therefore, the ruling on the defense objection to the question was not a basis for reversal because without knowing how the officer might have answered the prosecutor’s question, the Court could not know whether the State was harmed by any erroneous ruling on the defense objection. The Court could not assume the answer to the prosecutor’s question would have been “yes,” and, indeed, the State merely requested that it be given a new chance to ask it on remand. And, the Court noted, the testimony by the officer strongly suggested that he did not know the answer to the question: When he finally thought of the GBI as a potential suspect in the prosecutor’s quest for an answer as to who authorized the preliminary screening device, he merely said he “would imagine” that agency was responsible. Because the State did not offer a contrary proffer as to how the officer might have answered the objected-to question, the Court affirmed the trial court’s ruling on the suppression motion.

As to the State’s request for a remand, the Court noted that the trial court ruled that it would not reopen the evidence because the suppression hearing “was the day to get [the foundational evidence] in” and, if the court were to grant the motion, it “would be inviting everyone to ask to open evidence every time

[the court] ruled against them.” The State asked that it be given a new opportunity to ask the objected-to question because it was improperly deemed a leading question. But, the Court held, because the State did not challenge the trial court’s reasoning on appeal, or even argue specifically in its brief that the trial court erred in denying the motion to reopen evidence, it could not say the trial court abused its discretion in denying the State’s request to reopen the evidence.

Entrapment; Informant Testimony

Hampton v. State, A16A1270 (10/13/16)

Appellant was convicted of trafficking in methamphetamine. The evidence, very briefly stated, showed appellant’s boss was working as an informant and asked appellant to set up a drug deal for a friend to buy 28 grams of methamphetamine for \$1,400. The “friend” was an undercover officer. Appellant set up the deal and appellant, the informant, and the undercover officer sat in the officer’s car at a convenience store, the designated site for the sale, waiting for the sellers to appear. Unbeknownst to appellant, the conversation in the car was video-taped and recorded. After three hours of waiting, the officer called off the sale. About 30 minutes later, after the three of them had parted company, appellant called the informant to tell them that the sellers had finally arrived. Without the presence of the informant, the officers went back to the location. The officer noted that appellant spoke briefly to one of the sellers in front of the convenience store; the seller then returned to his car and appellant went inside the store. The officers then took down the sellers. Appellant went out the back door of the store and was arrested a week later.

Appellant raised the defense of entrapment and filed a motion to reveal the identity of the informant. Prior to trial, the court conducted an in camera hearing with the informant and the State, absent appellant and his counsel to determine whether to grant the motion and compel the State to produce the informant as a witness. Following the hearing immediately before trial, the trial court found that, based on the informant’s in camera testimony, evidence from him would be inculpatory, not exculpatory, and further noted that the jury would be able to see the informant, appellant, and the undercover agent interact during the

video recording. The State then presented its case-on-chief, which consisted in part of the testimony of the case agent and the 3-hour video from the undercover officer’s vehicle. After the State rested, appellant took the stand in his own defense. He testified that he was essentially coerced into setting up the deal because he had no other source of income other than his job with the informant and the informant threatened to fire him if he did not set up the deal for his friend. Afterwards, appellant unsuccessfully renewed his motion to reveal the informant and to allow appellant to call the informant as a witness.

The Court stated that the issue here was not whether the trial court erred in declining to require the State to identify the informant. Appellant knew who the informant was. The informant’s identity was also known to the jury, who watched the informant onscreen during the lengthy video recording of him sitting with appellant and the undercover agent. In fact, the informant had come into the courtroom twice and had to be removed. The issue was whether the trial court erred in finding that the State’s interest in preventing the informant from testifying outweighed appellant’s right to compel the attendance of the only witness besides appellant who had evidence related to appellant’s entrapment defense.

The Court found that the informant’s testimony was material to appellant’s entrapment defense, as it was the only source of evidence about it other than appellant himself. Further, the informant was not a “mere tipster” — one who provides information about criminal activity and whose relevant testimony would be inadmissible hearsay, but a “decoy” — a person used to obtain evidence (the informer-participant) or to establish facts (the informer-witness) upon which to base a prosecution. The informant testified in camera that he brought up the subject of drug sales in the first place, that he told appellant not to set up “no nickel and dime stuff,” and that he threatened to work appellant for \$5 a day if the sellers did not show up. The informant was not even sure if he had been in trouble with the county when he orchestrated this deal. Moreover, the Court noted, neither the trial court nor the State questioned the informant during the in camera hearing about any quid pro quo he received for his facilitation of the drug deal.

Thus, the Court found, appellant had no opportunity to question the informant about

his partiality as it might affect his testimony about whether he coerced appellant into setting up the deal. Appellant's conduct and statements during the video may have been relevant to his credibility, but it was not the only proof of whether he set up the deal under duress. Further, post-trial counsel moved the court for both a copy of the in-camera transcript and to compel the attendance of the informant at the new trial hearing to establish what kind of benefits he might have obtained from the police while working as an informant, but the trial court denied both motions.

Next, the Court addressed whether the error harmed appellant. The Court noted that the informant himself testified in camera that his identity as an informant for the police was well-known in county and that he had been severely beaten a year before because of his informant activities. Thus, the State no longer had an overriding interest in maintaining the informant's anonymity to continue securing the flow of information from him. And, although the informant denied during the in camera hearing that the idea for committing the crime originated with him and denied that he used undue persuasion or incitement to induce appellant to set up the methamphetamine sale, appellant testified otherwise. Thus, appellant obviously made an arguably persuasive case of entrapment, as the trial court charged the jury on the defense. Further, the trial court's conclusion that the informant's testimony was inculpatory, not exculpatory, was not dispositive. Regardless of whether the informant disputed or corroborated appellant's testimony, the Court stated, appellant was entitled to confront the informant and let a jury determine the relative credibility of both men. Accordingly, because the trial court erred in not granting appellant's motion to compel the State to produce the informant to testify at trial, the Court reversed the conviction and remanded for a new trial.

Informant's Statements; Relevancy of Testimony

Jones v. State, A16A1279 (10/13/16)

Appellant was convicted of trafficking in heroin and related offenses. The evidence showed that at law enforcement's request, an informant called a particular telephone number for the purposes of making a drug transaction. Appellant argued that the trial court erred in

permitting the State to play the recording of the monitored phone call between the informant and appellant when the informant did not testify at trial. Specifically, he contended, both that the informant's statements amounted to inadmissible hearsay and that he was deprived of his Sixth Amendment right of confrontation. The Court disagreed.

The Court noted that recording of the monitored phone call reflects that when the call was placed, appellant's codefendant answered and then handed the phone to appellant when the informant asked for "TJ." The informant then told appellant that he needed a "G," and appellant replied, "Alright. I got you." The informant also inquired as to whether appellant had another unintelligible substance available, and appellant replied, "No, not at all. Not right now." The informant then asked about a price break on "two Gs," to which appellant responded, "No, it's still \$150. Let me know what you got [sic] toward the second one and I'll work with you." Hearing this, the informant advised appellant that he could "throw you \$75 now for the second one" or, in other words, pay "half of it." Appellant responded, "Oh yeah. Bring the other piece. Yeah, I could do that for you." The detective who monitored the call testified that, based upon his training and experience, this conversation was a negotiation of a drug transaction, and that "G" is a slang term used to refer to a gram of heroin.

The Court, citing pre- and post-*Crawford* cases from the Eleventh Circuit, stated that the federal court has held that statements offered by a non-testifying speaker are not hearsay and do not violate the Confrontation Clause when the statements are not offered for their truth, but only to place the defendant's statements in context. And here, that is exactly what the informant's recorded statements did—provided context for appellant's portion of the telephone conversation, which entailed admissions of a party opponent. Thus, the Court held, because the informant's statements were not hearsay, and because the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted, the trial court did not err in admitting the recording.

Appellant also contended that the trial court erred by permitting a law-enforcement officer to testify about the pernicious effects of heroin and addiction. The record showed that

over numerous objections by appellant, the State was permitted to present the testimony of an officer who described heroin's deleterious effect on individuals and its addictive nature. The State argued at trial that this testimony "puts in context what the substance is" and that it was "trying to provide some context for what heroin is." And on appeal, the State further argued that the testimony was "relevant to explain . . . why someone may engage in an enterprise to distribute heroin and possess a trafficking amount," to "demonstrate . . . how heroin's effect on [a] user . . . would provide a motive for an individual to engage in distributing heroin to make money," and to explain why heroin is a Schedule I controlled substance.

The Court found that the State's contentions as to relevancy were "not especially convincing". But, "O.C.G.A. § 24-4-401 sets a low threshold for relevancy while O.C.G.A. § 24-4-403 requires that relevant evidence be 'substantially outweighed by the danger of unfair prejudice' in order to be excluded." And in evaluating a trial court's ruling under O.C.G.A. § 24-4-403, the Court was required to view the evidence in the light most favorable to admission, maximizing its probative value and minimizing its undue prejudicial impact. Accordingly, the Court held, given these considerations, the trial court's admission of this testimony was not error.