

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 16, 2011

State Prosecution Support Staff

Stan Gunter
Executive Director

Chuck Olson
General Counsel

Joe Burford
State Prosecution Support Director

Laura Murphree
Capital Litigation Director

Fay McCormack
Traffic Safety Resource Coordinator

Gary Bergman
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Todd Hayes
Traffic Safety Resource Prosecutor

THIS WEEK:

- **Speedy Trial; *Barker v. Wingo***
- **Prior Bad Acts of Victim**
- **Sentencing**
- **Merger; *Drinkard v. Walker***
- **Defenses; Claim of Right**
- **Constructive Possession; Equal Access**
- **Drivers' Licenses; Safe Harbor Provisions**
- **Restitution**
- **Venue**
- **Indictments; Attempting to Elude**
- **Similar Transactions; Lustful Disposition**
- **Expert Testimony; *Harper***
- **Impeachment; OCGA § 24-9-84.1(b)**

Speedy Trial; Barker v. Wingo

Higgenbottom v. State, S11A0948 (11/29/11)

Appellant appealed from his motion to dismiss alleging that his constitutional right to a speedy trial had been violated. The record showed that on December 20, 1992, the victim, a 15-day-old infant, died from head injuries. Appellant, who was 15 years old at the time, had stayed at the home of the victim the evening that the baby's fatal injuries were sustained. At that time, the police were told that the baby was dropped by the infant's 4-year-old sister. Shortly after the infant's death, an autopsy was performed by Dr. James, who concluded that the death was accidental. Dr. James died in 2004, and, in June 2007, GBI

Chief Medical Examiner, Dr. Sperry, issued a revised opinion on the infant's death, concluding that it should have been ruled a homicide and not an accident. On August 30, 2007, appellant was arrested for the murder of the baby. He was released on bond on September 7, 2007. He was indicted on April 8, 2009. On February 17, 2010, he filed the motion to dismiss the indictment for failure to provide a speedy trial.

The Court stated that this case involved an "old" and once "cold" homicide which had been initially determined to be an accident and was not ruled a criminal homicide until 15 years after the victim's death. Nevertheless, the trial court rightly acknowledged that the 30-month delay might invoke the presumption of prejudice, and proceeded to apply the full *Barker v. Wingo* test. First, the length of the delay was presumptively prejudicial. The reason for the delay was attributed mostly to the State, but the Court acknowledged that at least some part of the delay was attributable to the defense's request for a continuance. The trial court therefore properly weighed this factor benignly against the State, finding that even if the delay resulted from governmental negligence, there was no intent to delay.

As to the assertion of the right, the trial court properly weighed this factor heavily against appellant. The Court noted that appellant did not file his constitutional speedy trial motion to dismiss until over two years following his arrest and after he requested and was granted a continuance. Nor did he avail himself of his statutory right to a speedy trial.

Finally, as to the prejudice prong, the appellant conceded that there was no oppressive incarceration and the trial court properly found that anxiety and concern are always present to some extent during the pendency of a criminal prosecution, and appellant failed

to make any unusual showing in this regard. Therefore, this interest was not determined in his favor. Appellant also claimed that he suffered prejudice from the death of Dr. James. However, the Court noted, an accused's constitutional rights to a speedy trial attach at the time of arrest or when formal charges are brought, whichever is first in time. Thus, any impact on appellant's case by the death of Dr. James existed prior to the attachment of his constitutional rights to a speedy trial. Furthermore, it appeared that the State was willing to stipulate to the admission of Dr. James's autopsy report. Thus, appellant failed to show that the trial court was in error in finding that he made no showing of actual prejudice to his defense.

In weighing all the factors, the Court found that the trial court did not abuse its discretion in denying the motion to dismiss.

Prior Bad Acts of Victim

Cloud v. State, S11A0927 (11/29/11)

Appellant was convicted of malice murder against one victim and aggravated assault against a second victim. The evidence showed that the victims approached appellant after appellant slapped the daughter of one of the victims a couple of days earlier. After words were exchanged, the victims began to walk away when appellant made a remark about the same victim's wife and daughter. The two victims then overpowered appellant and delivered several blows to him with their hands and feet. Again, the two began walking back to their vehicle. As they did, appellant produced a shotgun. The victims then ran toward their vehicle. Appellant fired, shooting one victim in the back as he reached the rear of his vehicle on the passenger side, which was 30 to 50 feet from appellant. Appellant then fired a second shot, which struck the vehicle on the driver's side window, but did not hit the other victim.

Appellant contended that the trial court erred in not allowing him to introduce evidence of prior acts of violence by the victims against third parties. The Court found that evidence of a victim's specific acts of violence against third parties is admissible when a defendant claims justification and makes a prima facie showing thereof, follows procedural requirements, and establishes the existence of the prior violent acts by competent evidence. To make a prima facie showing of justification

so as to allow evidence of violent acts by the victim against third parties, the defendant must show that the victim was the aggressor, the victim assaulted the defendant, and the defendant was honestly trying to defend himself.

The trial court properly found that appellant had not met his burden to show that he was honestly trying to defend himself. Appellant asserted that he fired because he did not know why the victims were running to their vehicle and that they could have been returning to it to secure a weapon. However, there was no evidence that the victims had any sort of weapons upon their persons, or in their vehicle, and appellant certainly had not seen any weapon. Justification cannot be based on an assault which has ended, and the mere fact that assailants are departing and could, theoretically, return and continue an assault does not mean that the person asserting justification is in imminent danger. Appellant did not get his shotgun and hold it at the ready in case the men got weapons and returned, but shot at them as they fled. Testimony, and appellant's statement to investigating law enforcement personnel, established that the victims began running at a time that coincided with appellant's production of the shotgun. Therefore, the trial court did not clearly err by denying the introduction of the bad act evidence.

Sentencing

State v. Sanchez, A11A1509 (11/22/11)

The State appealed from an order modifying Sanchez' misdemeanor sentence. The State contended that the modification constituted an illegal judgment and was therefore void. Specifically, the State argued that the trial court was without jurisdiction to modify a sentence outside the term of court in which it was entered and which had been served in its entirety. The Court agreed and vacated the trial court's order.

The record showed that Sanchez pleaded guilty to two misdemeanor state offenses and, on September 16, 2008, the trial court sentenced Sanchez to consecutive, 12-month periods in the state penal system; the sentences to be served on probation. Because the court's sentencing order remanded Sanchez into the custody of the State Department of Corrections, the sentence was imposed pursuant to OCGA § 17-10-3 (a) (2). On February 23, 2011, Sanchez filed a motion to modify his sentence. The motion was filed outside the

term of court in which it was entered and five months after the sentence had been served. On March 22, 2011, the trial court entered an order, modifying Sanchez' sentences to consecutive 11-month periods.

The Court found that as a general rule for felony and misdemeanor sentences, a trial court loses power to modify, suspend or vacate its judgments after the term at which they are rendered. But, the rule is different for misdemeanor sentences imposed under OCGA § 17-10-3 (a) (1). When a court sentences a misdemeanant to serve his sentence in county custody pursuant to OCGA § 17-10-3 (a) (1), the sentencing court retains "jurisdiction to amend, modify, alter, suspend, or probate" that sentence "at any time[.]" OCGA § 17-10-3 (b). Since the trial court did not direct that Sanchez be remanded into county custody, it did not retain jurisdiction to modify his sentence at any time. Therefore, Sanchez' motion to modify was filed outside the term of court in which it was entered, and no exception to that rule applied, the trial court lacked authority to modify it. Accordingly, the trial court's order modifying Sanchez' sentence was a nullity and was vacated.

Merger; Drinkard v. Walker

Smith v. State, A11A1405 (12/1/11)

Appellant was convicted of attempted rape, aggravated assault with intent to rape, aggravated assault with a knife, kidnapping, and misdemeanor battery. He contended that because his conviction for aggravated assault with intent to rape merged into his conviction for attempted rape, the conviction for aggravated assault with intent to rape should have been vacated.

The Court found that appellant's conviction for attempted rape was supported by evidence that, with the intent to commit rape by having forcible and non-consensual carnal knowledge of the victim, he took a substantial step toward committing the rape but failed to consummate it. As alleged in the indictment and shown by the evidence produced at trial, appellant took a substantial step toward committing the rape by assaulting the victim, forcing her into a storage unit, and threatening her if she did not remove her clothes. Appellant's conviction for aggravated assault with intent to rape was supported by the same evidence that he assaulted the victim with the intent to rape.

Under OCGA § 16-1-6 (1), to determine whether convictions under two criminal provisions merge because one is included in the other, the *Drinkard v. Walker* “required evidence” test is used to determine “whether each provision requires proof of a fact which the other does not.” As set forth in OCGA § 16-1-7 (a), “[w]hen the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. He may not, however, be convicted of more than one crime if . . . [o]ne crime is included in the other. . . .” The important question is not the number of acts involved, or whether the crimes have overlapping elements, but whether, looking at the evidence required to prove each crime, one of the crimes was established by proof of the same or less than all the facts required to establish the commission of the other crime charged. Because appellant’s conviction for aggravated assault with intent to rape was established by proof of the same or less than all the facts required to establish his conviction for attempted rape, the former merged into the latter under the required evidence test. By contrast, the Court noted, even if the same conduct established appellant’s convictions for aggravated assault with a knife and attempted rape, the convictions did not merge because each offense required proof of an additional fact that the other did not. Aggravated assault, but not attempted rape, required proof that appellant assaulted the victim with a knife, an object that when used offensively against a person is likely to result in serious bodily injury. OCGA § 16-5-21 (a) (2). Attempted rape, but not aggravated assault with a knife, required proof of intent to commit rape. OCGA § § 16-4-1; 16-6-1. Moreover, these two offenses are not so closely related that multiple convictions are prohibited under other provisions of OCGA § § 16-1-6 and 16-1-7.

Defenses; Claim of Right

Stratacos v. State, A11A0803 (11/22/11)

Appellant was convicted of 10 counts of theft by deception. The evidence showed that appellant would contract with a victim for home improvement services, accept a significant down payment, do a little work and then disappear. He argued that the trial court erred by failing to charge the jury on claim of right, his sole defense. He acknowledged that he never requested the charge, or objected to

the charge as given, but argued that pursuant to OCGA § 5-5-24 (c), the failure to charge on his sole defense was harmful as a matter of law, regardless of whether an objection was made.

The Court stated that when the evidence could support a charge on the defendant’s sole defense, such charge must be given by the trial court whether or not requested by the defendant. Even though appellant did not object to the charge or reserve the right to later object, the Court must consider a substantial error in a jury charge that is harmful as a matter of law, regardless of whether or not objection was made. If an affirmative defense is raised by the evidence, including the defendants’ own statements, the trial court must present the affirmative defense to the jury as part of the case in its charge, even absent a request.

Pursuant to OCGA § 16-8-10, “[i]t is an affirmative defense to a prosecution for violation of Code Sections 16-8-2 through 16-8-7 that the person . . . (2) Acted under an honest claim of . . . a right to acquire . . . [the property] as he did. . . .” OCGA § 16-8-10 (c). However, the Court found, merely denying any intent to deprive the owner of the property does not set forth a “claim of right” to the property as an affirmative defense to a theft prosecution. In its order denying appellant’s motion for new trial, the trial court found that the evidence did not support a charge on the defense of claim of right. Further, the Court noted, such defense would have been in addition to other theories pursued by appellant, e.g., that there was insufficient evidence of his intent to deprive the owners of their property at the time he obtained it, and that it became impossible for him to perform the work as promised. Thus, as appellant did not object to the charge as given, and an instruction to the jury on claim of right was not warranted as his sole defense, the trial court did not err in failing to sua sponte charge the jury on this affirmative defense.

Constructive Possession; Equal Access

Holiman v. State, A11A1321 (11/30/11)

Appellant was convicted of trafficking in 400 grams or more of a mixture containing cocaine, based on evidence that two others, Jamison and appellant’s brother, Royrecaus, had joint constructive possession of the mixture. He argued that, because the State did not prosecute his brother, and because it was

undisputed that his brother had equal access to the mixture, proof of joint constructive possession cannot sustain his conviction, and the State instead was required to prove that he had sole constructive possession of the mixture.

Citing *Reid v. State*, 212 Ga. App. 787, 788 n.1 (1994), the Court noted that when more than one individual has equal access to contraband, but only one of these individuals is prosecuted for its possession, and the State relies on evidence of constructive possession, the State must prove that the individual charged “was in sole constructive possession” of the contraband. (Emphasis in original.) But, the Court stated, it has “found no mention of this principle in any case that preceded *Reid*, and our opinion in *Reid* cites no authority for it and does not explain why it must be so. The principle was not mentioned again for some time, but in the past few years, this Court has invoked the principle again and again, but never explaining its basis [cites]. Given the absence of an explanation for the principle, some reasonable people might question whether it is a sound one, especially considering the settled rule that the failure of the State to prosecute one party to a crime ordinarily offers no defense to other parties to the crime. See OCGA § 16-2-21.” Nevertheless, the Court found that it was “unnecessary in this case, however, to pass upon the soundness of the principle, and we will assume that the *Reid* principle is sound.”

The Court found that it was undisputed that the State did not prosecute Royrecaus for his joint constructive possession of the cocaine mixture in the apartment, but it was equally undisputed that the United States did prosecute Royrecaus in federal court. “We never have held that the *Reid* principle applies when, although all persons with equal access to the contraband are prosecuted, they are prosecuted by different sovereigns or in different courts. And it makes no sense to apply the *Reid* principle in such a case, especially considering that the law generally bars a prosecution in our courts if the offender already has been prosecuted in federal court for the same conduct, see OCGA § 16-1-8 (c), reflecting a public policy that duplicative prosecutions in state and federal court ought not be encouraged.” Therefore, the Court concluded, because appellant’s brother was prosecuted in federal court for possession of the cocaine mixture in the apartment, the State was permitted to prove its case against appellant by proof of

joint constructive possession even if the *Reid* principle is proper.

It should be noted that this was a decision by a three judge panel and one judge concurred in judgment only.

Drivers' Licenses; Safe Harbor Provisions

Colotl v. State, A11A0997 (11/9/11)

Appellant was convicted of driving without a valid driver's license. She argued that the trial court erred by denying her motion for judgment notwithstanding the verdict. In support, she relied on OCGA § 40-5-20 (a), which provides, in relevant part, as follows: "No person, except those expressly exempted in this chapter, shall drive any motor vehicle upon a highway in this state unless such person has a valid driver's license under this chapter for the type or class of vehicle being driven. . . . Any violation of this subsection shall be punished as provided in Code Section 40-5-121, except . . . if such person produces in court a valid driver's license issued by this state to such person, he or she shall not be guilty of such offenses . . ." (Emphasis added). Based on this safe-harbor provision, appellant argued that the trial court should not have convicted her because she presented evidence that she had obtained a valid learner's permit issued by the State of Georgia six days before trial.

The Court disagreed. It determined that the safe-harbor provision requires a defendant to produce a driver's license that was valid at the time the vehicle was being driven. This avoids a construction conflicting with the statute's clear purpose of protecting public safety by ensuring that people who drive have met minimum qualifications. To permit driving before the operator meets these qualifications would frustrate this purpose and lead to the absurd result that unlicensed drivers would not be guilty of driving without a license when there is no dispute that they drove without being licensed. Therefore, the Court held, in light of the principles of statutory construction, appellant's interpretation that a later-obtained license satisfies the safe-harbor provision in OCGA § 40-5-20 (a) was without merit.

Restitution

Turner v. State, A11A1192 (11/22/11)

Appellant pleaded guilty to three counts of theft by taking as a fiduciary and was sen-

tenced by the trial court as a first offender to serve 15 years, followed by 30 years on probation. Additionally, the trial court ordered that as a term of her probation, she pay her former employer, the victim, a total of \$1,877,531.03 in restitution. The evidence showed that her employer was in the loan-making business. Appellant and another woman worked at the same branch. Through the use of fake loans, the two women stole from the employer an amount of \$1,883,542.59. When questioned about accounting discrepancies, the two admitted their actions, and the other employee committed suicide.

Appellant contended that the State failed to demonstrate the amount of restitution by a preponderance of the evidence. Pursuant to OCGA § 17-14-7, a dispute regarding the proper amount of restitution is resolved in the required hearing "by the preponderance of the evidence." At this hearing, the State has the burden of demonstrating the amount of loss sustained by the victim, while the defendant has the burden of demonstrating his or her financial resources and the financial needs of any dependents. Naturally, "[t]he amount of restitution ordered shall not exceed the victim's damages." And in this context, "damages" means "all special damages which a victim could recover against an offender in a civil action . . . based on the same act or acts for which the offender is sentenced, except punitive damages and damages for pain and suffering, mental anguish, or loss of consortium. Such special damages shall not be limited by any law which may cap economic damages."

Here, the court instructed the State to prepare an order reflecting an award of restitution in the amount of \$1,883,542.59, plus accounting fees. Thereafter, the order prepared by the State and signed by the trial court directed that appellant "pay a total of \$1,932,531.03 restitution, which includes [the] \$1,883,542.59 monetary loss by [the victim] and \$48,988.44 for accounting/auditing/attorney fees associated with the theft by [appellant] and her co-conspirator . . . who is deceased." That total was then reduced by \$55,000.00 to account for payments received from an insurance policy, making \$1,877,531.03 the final total to be repaid. The Court found that although the State demonstrated the amount of money lost by the victim through the creation of fake loans by a preponderance of the evidence (i.e., \$1,883,542.59), the record did

not contain sufficient evidence to support the additional \$48,988.44 for "accounting/auditing/attorney fees." Indeed, the record contained only a vague reference to accounting expenses including mention of possibly having all associated bills faxed "at a later time." But nothing in the record supported or explained what was encompassed by the addition of \$48,988.44 in "accounting/auditing/attorney fees associated with the theft" to the restitution award. Accordingly, the Court vacated that portion of the trial court's award that was unsupported by the record and remanded for further proceedings.

Appellant also contended that due to the deceased's involvement in the loan-scheme, the trial court erred in ordering that she be responsible for the entirety of the damages when it had the authority to apportion liability. OCGA § 17-14-7 provides that "[i]f the ordering authority finds that more than one offender has contributed to the loss of a victim, the court may make each offender liable for payment of the full amount of restitution or may apportion liability among the offenders to reflect the level of contribution to the victim's loss and economic circumstances of each offender."

The Court stated that although the trial court was permitted to apportion liability, it was not required to do so. Consideration of the factors in OCGA § 17-14-10 could, in some situations, result in a determination that certain defendants should be liable for a greater share of the amount of restitution. Here, the State presented evidence that appellant was personally responsible for approximately \$1.3 million of the total loss and that her participation was necessary to effectuate the entire scheme. Accordingly, appellant failed to show that it was error for the trial court to order her to pay the entire amount of the victim's loss.

Venue

In the Interest of G. Q., A11A1607 (11/29/11)

Appellant was adjudicated a delinquent for battery, theft by receiving stolen property, and other crimes. He argued that the evidence was insufficient as to venue and that the juvenile court erred when it sentenced him as a designated felon. The evidence showed that after smoking marijuana, appellant battered his mother and stole her jewelry from their home at "601 Lafayette Street, Hahira, Georgia." A City of Hahira police officer responded and, after a struggle, arrested appellant at the scene.

The State conceded that the evidence was insufficient to prove venue in Lowndes County. The Court noted that Lowndes County was sometimes mentioned on the same page of pleadings that also referred to the Hahira address of the crime scene, and appellant was released into the custody of the Lowndes County Sheriff's Department after his apprehension. But, the Court determined, these references are not competent evidence that any of the crimes were committed in Lowndes County. Moreover, proving that a crime took place within a city without also proving that the city is entirely within a county does not establish venue.

Indictments; Attempting to Elude

Dixson v. State, A11A1329; A11A1330 (11/23/11)

Appellant was convicted of five counts of misdemeanor theft by receiving and one count of felony fleeing and eluding. She argued that the trial court erred in denying her motion in arrest of judgment as to the count of fleeing and attempting to elude police, contending that it was improperly and incompletely alleged.

The indictment alleged that appellant “did unlawfully willfully fail to bring her vehicle to a stop after having been given an audible and visual signal to bring her vehicle to a stop by an officer. . . said officer at the time giving such signal, being in uniform prominently displaying his badge of office, and his vehicle being appropriately marked showing it to be an official police vehicle, while fleeing in an attempt to escape arrest for Theft by Receiving and did flee in traffic conditions which placed the general public at risk of receiving serious injuries in violation of OCGA § 40-6-365...” She contended that the indictment failed to allege every material element of the offense by omitting the “pursuing” element and by not specifying the type of signal given. Thus, she argued, she could admit all of the allegations of the indictment and be innocent of the crime of fleeing and eluding because there would be no admission that she attempted to flee from a “pursuing” police officer after having been given a signal to stop by “hand, voice, emergency light, or siren.”

The Court disagreed. Where an indictment or accusation charges the accused with having committed certain acts “in violation of” a specified penal statute, the indictment

or accusation incorporates the terms of the referenced Code section. Because an accused cannot admit an allegation that her acts were “in violation of” a specified Code section and yet not be guilty of the offense set out in that Code section, such an accusation is not fatally defective. Thus, the trial court did not err in denying appellant’s motion in arrest of judgment.

Similar Transactions; Lustful Disposition

Ledford v. State, A11A1407 (12/1/11)

Appellant was convicted of two counts of aggravated child molestation, two counts of aggravated sexual battery and two counts of child molestation based on his sexual assault of his two stepdaughters, ages 6 and 8. He contended that the trial court erred in allowing the State to introduce similar transaction evidence, which purportedly occurred when appellant was either 11 or 12 years old. He argued that evidence of his behavior as a child was irrelevant to any sexual activity he was alleged to have committed as an adult.

A divided Court disagreed. The exception to the general rule that evidence of other crimes is not admissible has been most liberally extended in the area of sexual offenses: In crimes involving sexual offenses, evidence of similar previous transactions is admissible to show the lustful disposition of the defendant and to corroborate the victim’s testimony. There need only be evidence that the defendant was the perpetrator of both crimes and sufficient similarity or connection between the independent crime and the offenses charged.

The en banc Court stated that youth at the time of the similar transaction should be considered when deciding if the testimony should be admitted to show lustful disposition and inclination, i.e., bent of mind. The age of the defendant when the similar transaction occurred is relevant when balancing the probative value of the evidence against its potentially prejudicial impact. Depending on the circumstances of the case, the defendant’s age can act to diminish the probative value of the evidence, resulting in the exclusion of the evidence as more prejudicial than probative. To that end, the State must show a “probative connection” between the similar transaction and the crime for which the defendant is presently being tried.

Here, appellant’s cousin, 11 at the time of the trial, testified that when she was 3 or 4

years old, appellant, who was then either 11 or 12 years old, touched her on her “private parts” and also attempted to put his “private parts” in her mouth. The two were in appellant’s bedroom on one occasion and in the bathroom on a separate occasion. The trial court properly considered appellant’s youth at the time of the similar transaction, along with the significant age difference—eight or nine years—between him and the cousin, appellant’s attempt to conceal his behavior by acting in secluded locations, and the nature of the acts he committed before concluding that the evidence was admissible. The Court held that despite appellant’s age at the time, this evidence was relevant to show his lustful disposition with regard to younger females—the conduct with which he was charged. Accordingly, the trial court properly admitted the similar transaction evidence at issue.

Two judges dissented. They argued that the State failed to prove that at age 11, appellant understood the nature of the acts he allegedly committed against his young cousin.

Expert Testimony; Harper

Jefferson v. State, A11A1295; A11A1296 (11/3/11)

Appellants were convicted of three counts of armed robbery, three counts of aggravated assault, three counts of false imprisonment, and six counts of possession of a firearm in the commission of a crime. They 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 the getaway car. The trial court ruled that the testimony on fracture match analysis was admissible after determining that fracture match analysis was “based on procedures and techniques that have reached a scientific stage of verifiable certainty.”

The Court stated that 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. Under *Harper v. State*, 249 Ga. 519, 525-526 (1) (1982), the State was required to

demonstrate that “the procedure or technique in question has reached a scientific stage of verifiable certainty, or in the words of Professor Irving Younger, whether 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. Or 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 evidence available to him 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 Court found, 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 the court regarding the issue. Nor was evidence of exhibits or treatises presented to or cited by the court. Likewise, no rationale of cases from either Georgia or other jurisdictions was presented or cited to 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 Court found no Georgia appellate cases admitting such testimony under *Harper*. Finally, the cases identified by the State on appeal did not analyze whether fracture match analysis had reached a scientific stage of verifiable certainty.

Instead, the State’s expert’s testimony was the only foundation evidence for fracture match analysis under the *Harper* test. The expert witness’s testimony addressed *how* the fracture match analysis was performed but did not address the core of the *Harper* test —whether fracture match analysis had reached a scientific stage of verifiable certainty such that the evidence thereof constituted competent evidence. Thus, the State failed to demonstrate that the fracture match analysis evidence was founded on valid scientific principles under *Harper*.

Nevertheless, the Court found that the trial court’s error in ruling that the *Harper* test had been satisfied did not require reversal, because the expert witness’s 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. For example, juries do not have the benefit of a stereo microscope, nor would most think to or have the ability to remove the adhesive over the cloth scrim to better examine the tear in a piece of duct tape. While 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. For example, 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 in this case.

Impeachment; OCGA § 24-9-84.1(b)

Robinson v. State, A11A0837; A11A0838 (11/21/11)

Appellants Robinson and Rogers were convicted on one count of conspiracy to commit theft by receiving stolen property, as well as 12 counts of theft by receiving stolen property. Robinson argued that it was error to allow the State, over his objection, to impeach him with his prior bail-jumping conviction. The evidence showed that on cross-examination, the State was permitted to impeach Robinson’s credibility by introducing a certified copy of his 1984 conviction for bail jumping.

When ruling upon the admissibility of a defendant’s prior conviction that is more than 10 years old, the trial court is authorized to admit such evidence only when it “determines, in the interest of justice, that the probative value

of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.” OCGA § 24-9-84.1 (b). A trial court’s findings must be made expressly on the record to ensure compliance with the procedural safeguards provided under the statute.

With respect to a defendant’s prior convictions that are *less* than 10 years old, the Court noted that it was error when a trial court admits such without making an express ruling that the probative value of admitting the evidence substantially outweighs its prejudicial effect to the defendant, as required by OCGA § 24-9-84.1 (a) (2). The Court reasoned “that the legislature, in using the word ‘substantially’ in OCGA § 24-9-84.1 (a) (2) for the impeachment of a defendant, intended to create a standard different from that provided in OCGA § 24-9-84.1 (a) (1) for the impeachment of a witness.”

The Court construed OCGA § 24-9-84.1 (b) in the same light, recognizing that where the legislature uses certain language in one part of the statute and different language in another, the Court must assume different meanings were intended. Accordingly, the Court assumed that the legislature intended to address the slight probative value of over-age convictions by creating a standard different from those provided in OCGA § 24-9-84.1 (a) (1) and (2). Thus, the Court held, when ruling on the admissibility of prior convictions under OCGA § 24-9-84.1 (b), a trial court is required to make express findings that in the interest of justice, the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. As with the express balancing test required under OCGA § 24-9-84.1 (a) (2), factors to be considered include the kind of felony involved, the date of the conviction, and the importance of the witness’s credibility.

Here, the trial court ruled that “given [Robinson’s] testimony and given the facts of this case,” his 1984 bail-jumping conviction was “something that the jury [could] consider.” Although the trial court made a ruling that Robinson’s prior conviction was admissible, it failed to make the required express findings under the proper standard. Although the trial court’s error was subject to scrutiny for harmless error, the fact that Robinson’s convictions were primarily based upon circumstantial evidence foreclosed the conclusion that the overwhelming evidence

established Robinson's guilt so as to make the admissibility of the prior conviction harmless beyond a reasonable doubt.

Under these circumstances, the Court could not conclude whether a new trial was required. Instead, the Court remanded the case with direction to the trial court to enter express findings on the record as to whether, in interest of justice, the probative value of Robinson's 1984 bail-jumping conviction substantially outweighed its prejudicial effect. If the trial court determine that the prior conviction was inadmissible after engaging in the balancing test required under OCGA § 24-9-84.1 (b), then a new trial will be required. But, if the trial court determines that the prior conviction was admissible, a new trial will not be mandated, subject to appellate review for an abuse of discretion.