

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 25, 2013

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Chuck Olson
General Counsel

Joe Burford
State Prosecution Support Director

Laura Murphree
Capital Litigation Director

Gary Bergman
State Prosecutor

Clara Bucci
State Prosecutor

Fay Eshleman
State Prosecutor

Al Martinez
State Prosecutor

Todd Hayes
Traffic Safety Resource Prosecutor

THIS WEEK:

- **DUI; Implied Consent Rights**
- **Forfeiture; Excessive Fines**
- **Out-of-Time Appeal; Right to Counsel**
- **DUI; Prosecutorial Misconduct**
- **DUI; Miranda**
- **Immunity; Statements**
- **Victim as Aggressor; Jury Charges**
- **Severance;**
- **Confessions; Jury Charges**

DUI; Implied Consent Rights

Jones v. State, A12A1795 (1/15/13)

Appellant was convicted of DUI-less safe, and possession of an open alcoholic beverage container in the passenger area of a vehicle. Appellant contended that the trial court erred in denying his motion to suppress the results of his state-administered breath test. Finding no error, the Court affirmed.

Appellant claimed that the trial court should have suppressed the breath test results because the officer who read him the implied consent notice referred only to a blood test and, as a result, he did not knowingly and voluntarily consent to taking a breath test. The trial court's order denying appellant's motion showed that the State and appellant stipulated to the following facts: an officer conducted a traffic stop of appellant. After the ensuing encounter, the officer arrested appellant for DUI. The officer thereafter read appellant the statutory implied consent notice for suspects

aged twenty-one or over, specifically asking only for a blood test. Appellant agreed. A second officer transported appellant to jail. At the jail, the second officer conducted a state-administered test of appellant's breath. No test was conducted on appellant's blood. Before administering the breath test, the officer did not re-read the implied consent notice to ask for a breath test. There was no conversation between the officer and appellant regarding which type of implied consent test would be conducted. Nevertheless, appellant voluntarily submitted to the state-administered breath test without protest. Based on these facts the trial court concluded that the results of appellant's state-administered breath test were admissible.

According to the trial court, the law "makes clear that police need not, at [the] time of arrest, designate the ultimate test to be performed," nor is there a requirement that an officer designate all of the tests that may later be requested before performing the initial test. The trial court added that, in *Collins v. State*, 290 Ga.App. 418 (2008), the Court found no implied consent violation even when the officer failed to designate any test but, instead, let the defendant choose whether to submit to a breath, blood, or urine test. "The determinative issue with the implied consent notice is whether the notice given was substantively accurate so as to permit the driver to make an informed decision about whether to consent to testing." Accordingly, because the implied consent warning begins by advising the defendant that "Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine or other bodily substances," the officer's failure to designate the specific test to be performed did not change the substance or meaning of the implied consent warning. Further, the trial court found that

appellant had consented to the breath test by submitting thereto without protest, and, as a result, the test results were admissible.

The Court found based on the facts and the trial court's analysis that appellant voluntarily consented to the breath test. The Court noted that appellant verbally consented to blood testing following the implied consent warning given by the officer; that he never revoked such consent; that he never indicated his refusal to submit to breath testing, either verbally or non-verbally; that he never inquired about a blood test or asked for an independent test; and that there was no evidence that he was forced or coerced into submitting to breath testing.

Forfeiture; Excessive Fines

Buchanan v. State of Ga., A12A1853 (1/15/13)

The trial court forfeited appellant's truck to the State on the ground that it was used to facilitate his possession of methamphetamine. Appellant contended that the trial court erred in finding that the forfeiture was not an excessive fine in violation of the Eighth Amendment to the United States Constitution and in failing to make on-the-record findings supporting the forfeiture, which are required by our Supreme Court's decision in *Howell v. State of Georgia*, 283 Ga. 24 (2008). The Court agreed that the record did not indicate whether the trial court considered these mandatory guidelines. The Court noted that it is important for the trial court to make findings of fact and conclusions of law on the record so as to provide an opportunity for meaningful appellate review and that the trial court's order did not indicate that the court even considered *Howell*. The Court remanded the case and directed the trial court to enter a new order including findings of fact and conclusions of law pursuant to *Howell*, appealable by either party within 30 days of its entry, regardless of whether the trial court holds another evidentiary hearing.

Out-of-Time Appeal; Right to Counsel

Brown v. State, A12A1717; A12A1719; A12A1720 (1/16/13)

Appellant, proceeding pro se, filed multiple appeals from orders disposing of various pro se motions he filed attempting to appeal from his guilty plea. The Court reversed in

Case No. A12A1717 and remanded for the entry of an order granting appellant an out-of-time appeal. The Court dismissed the appeals in Case Nos. A12A1719 and A12A1720 as moot.

The record showed that appellant entered a guilty plea to armed robbery, the lesser included offense of robbery by intimidation on a second count of armed robbery, and possession of a firearm by a convicted felon. Immediately after sentence was imposed, appellant protested that the terms of the negotiated plea had been misrepresented to him and attempted to withdraw his plea. The trial court responded, "The request is noted for the record and I respectfully decline it." Appellant's trial counsel filed a motion for modification of sentence and appellant filed a pro se motion to withdraw his guilty plea and a motion for appointment of appellate counsel. The trial court denied both the motion for modification of sentence and the motion to withdraw the guilty plea, but the record failed to show any court action on, or response to, appellant's motion for the appointment of appellate counsel, despite repeated inquiries by appellant and a second motion for the appointment of counsel. Unrepresented by counsel, appellant attempted to file pro se notices of appeal from the orders denying the motion for modification of sentence and the motion to withdraw his guilty plea. But, his notices of appeal were untimely, and the Court of Appeals dismissed both appeals. After dismissal of his appeals, appellant filed a flurry of pro se motions, including multiple motions for an out-of-time appeal. His motions for out of time appeal were denied, and he once again appealed.

Citing *Leonard v. State*, 293 Ga.App. 808 (2008), the Court stated that the disposition of a motion for out-of-time appeal hinges on a determination of who bore the ultimate responsibility for the failure to file a timely appeal. An out-of-time appeal is the remedy for a frustrated right of appeal, where the appellant was denied his right of appeal through counsel's negligence or ignorance, or if the appellant was not adequately informed of his appeal rights. A defendant has a right to appeal directly the denial of his timely motion to withdraw a guilty plea. A defendant is also entitled to the assistance of counsel for such a direct appeal. When a defendant's right to directly appeal the denial of his motion to withdraw a guilty plea has been frustrated,

he is entitled to an out-of-time appeal from the order on his motion. Thus, where a defendant has attempted to enforce his right to appeal; he was entitled to counsel on appeal; and nothing in the record shows that the trial court responded to his request for counsel; prejudice is presumed. Moreover, a harmless error analysis is inapplicable where there has been a total denial of the assistance of counsel.

Here, appellant repeatedly attempted to assert his right to appeal as well as his right to appellate counsel. He was entitled to counsel, and nothing in the record shows that the trial court ever responded to his motions or letters seeking the appointment of counsel to pursue his appeal. Therefore, the Court reversed and remanded this case for the entry of an order granting appellant an out-of-time appeal. In light of the reversal and remand in Case No. A12A1717, appellant's remaining assertions of error in Case No. A12A1719 and Case No. A12A1720 were moot.

DUI; Prosecutorial Misconduct

Cogblan v. State, A12A2388 (1/16/13)

Appellant was convicted of DUI (less safe) and acquitted of reckless driving and driving on the wrong side of the road. She asserted that the trial court erred by permitting the prosecutor to make certain remarks, citing three portions of the state's closing argument. The evidence showed, in part, that appellant was stopped for driving on the wrong side of the road. The officer took appellant's license and insurance information, told her to wait, and walked back to his vehicle. Appellant waited about two minutes and then restarted her engine and drove off. She was re-stopped by the officer a short time later.

First, appellant contended that the prosecutor impermissibly disparaged defense counsel by stating that her attorney - who moments prior had delivered closing argument on her behalf - had employed a "smoke and mirrors" strategy. The Court stated that without question, counsel should adhere to the highest standards of professionalism and proper courtroom decorum, and the Court does not condone any argument that unnecessarily impugns the integrity of opposing counsel, even if obliquely. However, counsel is permitted wide latitude in closing argument, and any limitation of argument is a matter for the court's discretion. Furthermore, closing arguments are judged

in the context in which they are made. Here, the State presented evidence that appellant fled a traffic stop, leaving behind her driving license, and the trial court correctly reasoned that this evidence was admissible in proving a DUI charge. The transcript showed that the prosecutor used the complained-of metaphor to argue that the defendant had not rebutted or explained the State's evidence. Having considered the "smoke and mirrors" characterization of the defense employed, within the context in which it was used, the Court stated it was "constrained to find no reversible error."

Appellant also challenged the following comments by the prosecutor: "The Defendant made a choice and that choice was to get behind the wheel . . . putting not only her life in danger, but the life of any other citizen who was on the roads traveling or walking in danger also. And I ask that you deliver a guilty of - a verdict of guilty sending the message of relating to take responsibility just like thousands of other people have taken the responsibility for the charge..." Appellant argued that these remarks violated the prohibition against making "golden rule" arguments, because they implied that the jurors (as "citizen[s]") were potential victims in this case. The Court disagreed. Though it is improper for the State to make a golden rule argument, one that asks the jurors to place themselves in a victim's position, it is not improper for the State to appeal to the jury to convict for the safety of the community or to curb an epidemic of violence in the community. Nor is it improper for the prosecutor to emphasize to the jury its responsibility to enforce the law. The State's argument here was therefore not improper.

Finally, appellant asserted that the prosecutor improperly injected his personal opinion into his closing argument when he made the statement: "I think [the officer who stopped appellant] did the responsible thing by calling [a DUI task force officer] out to the scene to do a further investigation." In support of his assertion, Appellant relied on the principle that it is improper for counsel to state to the jury counsel's personal belief as to the veracity of a witness.

Again, the Court disagreed. Despite the prosecutor's phraseology, the statement was reasonably seen as an attempt to draw an inference from the evidence. Inferences drawn from facts adduced at trial are acceptable argument, and the fact that the inferences

may have been improperly couched in the framework of a personal opinion does not render them reversible error. The Court noted that the transcript showed that the statement was made after the prosecutor had recited the circumstances faced by the patrol officer who called for an officer specially trained in DUI investigation, and after the prosecutor had next contrasted the work experiences of the patrol officer and the DUI task force officer. Moreover, the statement was responsive to the defense claim that the State's case hinged on mere opinion evidence that failed to meet the reasonable doubt burden of proof. Given the foregoing, the prosecutor's statement with which appellant took issue did not exceed the wide latitude afforded to counsel since it was fairly the conclusion the prosecutor wished the jury to draw from the evidence, and not a statement of the prosecutor's personal belief as to the veracity of a witness.

DUI; Miranda

Crider v. State, A12A2414 (1/17/13)

Appellant was convicted for driving under the influence (less safe and per se) and failure to maintain a lane. She asserted that she was in custody and entitled to Miranda warnings at the time she was interrogated by the police and asked to perform field sobriety tests. The record showed that appellant was stopped after an officer observed her weave within her lane and cross the fog line several times. When he first talked with her, he noticed that a strong odor of alcoholic beverage was coming from her breath, that her eyes were bloodshot and glassy, and that her speech was "somewhat slurred." When he asked if she had been drinking, she stated that she had tried to call a taxi, "but it was going to take too long." When he asked her again if she had been drinking, she acknowledged that she had consumed three beers and a couple of shots. After asking her to step outside of her vehicle, the officer asked her if she believed that she was safe to drive and she responded "no, she was not safe to be driving." Nevertheless, the officer asked her to perform three field sobriety tests. Following the completion of these three field sobriety tests, the officer arrested her.

Appellant contended that she was entitled to Miranda warnings after she admitted to the officer that she had been drinking and was not safe to drive. She argued that "no reasonable

person knowing what [appellant] knew (she had been drinking) and saying what [appellant] said (she should not have been driving)" would believe "they were free to go."

The Court stated that as a general rule, Miranda warnings are not required while an investigating officer conducts preliminary questioning or field sobriety tests. However, after a DUI suspect is arrested, Miranda warnings must precede further field sobriety tests in order for evidence of the results to be admissible. The test for determining whether a suspect is under arrest is whether a reasonable person in the suspect's position would have thought the detention would not be temporary. And, absent the officer making any statement that would cause a reasonable person to believe that she was under arrest and not temporarily detained during an investigation, the officer's "belief" that probable cause exists to make an arrest does not determine when the arrest is effectuated until the officer overtly acts so that a reasonable person would believe she was under arrest.

Here, the officer never told appellant that she was under arrest or that he planned to arrest her. Nor did he place her in handcuffs or the back of his patrol car. He declined her invitation to immediately take her to jail, and instead continued his preliminary investigation to determine whether an arrest was warranted. The Court therefore found that the facts and circumstances were insufficient to cause a reasonable person to believe that her detention would not be temporary. Accordingly, the Court affirmed the denial of appellant's motion to suppress.

Immunity; Statements

Rashid v. State, S12A1698 (1/22/13)

Appellant, a Pakistani emigrant, was convicted of malice murder in connection with the strangulation death of his daughter. The evidence showed that appellant murdered his daughter for not obeying his wishes by filing for divorce from a man appellant forced her to marry. At trial, the court granted use and derivative use immunity to appellant's sons following opening statements and some testimony from State's witnesses. Appellant contended that it was error to grant the immunity during what he characterized as the "middle of the trial," claiming that the timing undermined his entire trial strategy, including

that for voir dire and jury selection, and therefore, resulted in prejudice to him. He claimed further error in the trial court's limiting the immunity granted to that of "use and derivative use," arguing that the limited immunity subjected the sons to possible charges of perjury if their trial testimony deviated from their earlier statements even if the prior statements contained falsehoods.

The Court stated that although appellant would have preferred the trial court not order his sons to testify, in general he had no standing under Georgia law to challenge the offer and grant of immunity to his sons. The sons' rights, rather than appellant's rights, were at issue. Under O.C.G.A. § 24-9-28(a), the trial court had to consider whether the State's request to offer immunity was "necessary to the public interest." Further, assuming arguendo, that appellant did have standing to complain of any aspect of the grants of immunity, including the timing and breadth thereof, he did not show any resulting prejudice. He did not detail or explain how his defense strategy would have differed if immunity had been granted earlier or if blanket immunity had been given. The record showed that appellant knew or should have known that the grants of immunity were a possibility, if not a probability. In addition, the defense was well aware of the sons' prior statements to authorities, and therefore, was on notice of their possible trial testimony. Moreover, there were some significant discrepancies between the earlier statements to authorities and the trial testimony demonstrating that the sons did not feel constrained for any reason to mimic their prior statements.

Appellant contended that the trial court erred in admitting into evidence a videotape of his conversation with family members in the police interrogation room in which he repeatedly admitted having killed his daughter. He argued that the recordings amounted to an illegal search and seizure in violation of the Federal and State Constitutions because he had a reasonable subjective and objective expectation of privacy while making such statements.

The Court disagreed. To establish a Fourth Amendment violation, a defendant must demonstrate both a "subjective" expectation of privacy and that the expectation is one that society is willing to recognize as reasonable. The Court stated that appellant erroneously suggested that the "intimate . . . substance" of the family conversation denoted the

reasonableness of his expectation of privacy. However, the Court found, this confused the demonstration of a subjective expectation of privacy and the reasonableness thereof. While the subject-matter of his statements might evidence a subjective expectation of privacy, the location in which the incriminating statements were made, and other circumstances surrounding the conversation determine the reasonableness of that expectation. Relying on *Burgeson v. State*, 267 Ga. 102, 107(3) (1996), in which the Court found no error for the trial court's refusal to suppress the defendant's incriminating statements made in the back of a police patrol car, the Court found there was no evidence that the police did anything to foster a belief that appellant's conversation with his family would be private. In fact, appellant requested the family meeting without any prompt from law enforcement. Furthermore, appellant had admitted committing the murder to police and plainly knew that what he had done was against American law and that he was subject to punishment for his crime. In fact, he was handcuffed in the interview room throughout the conversation with his family, further evidencing the reality of his custody and the unreasonableness of any expectation of privacy.

Finally, appellant argued that the recording of the family conversation was inadmissible as "fruit" of an earlier interrogation, which subsequently was found to be unlawful under *Miranda*. In considering the admissibility of evidence that is alleged to be "fruit of the poisonous tree," the question is whether the evidence has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. The "fruit of the poisonous tree" doctrine fails where intervening circumstances attenuate the link between the illegality and the evidence obtained. Here the Court found, appellant's personal request to visit with his family amounts to an intervening cause. Second, the asserted illegality was a *Miranda* violation, for which the trial court excluded appellant's statements as the result of the police questioning. *Miranda* warnings are required only in custodial interrogations, not familial conversations; appellant's conversation with family members occurred while he was in custody, but they were not the product of interrogation. Nor was the purely family conversation tainted in any way by the prior interrogation merely

because following the family meeting, police re-entered the interview room and asked appellant for some contact information concerning his brother and the victim's husband. The subject conversation between appellant and his family "[s]imply" did not flow from the found illegality. Furthermore, there was no evidence that appellant's statements to police or to his family were coerced in any manner and the "fruit" of a voluntary statement obtained in violation of *Miranda* and *Edwards v. Arizona*, 451 U. S. 477 (101 SC 1880, 68 L.E.2d 378) (1981), is not subject to the exclusionary rule.

Victim as Aggressor; Jury Charges

Smith v. State, S12A1716 (1/22/13)

Appellant was convicted of the malice murder of his wife. He contended that the trial court erred by refusing to allow him to present evidence of the victim's acts of violence toward third parties. To make a prima facie showing of justification so as to allow evidence of violent acts of 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. Here, appellant did not present evidence that his wife was the aggressor in the incident that resulted in her death. Rather, appellant proffered that he awoke from sleeping on a couch and went into the bedroom occupied by his wife where he shot her while in his delusional state of belief that his wife was his abusive stepfather who had assaulted him when he was a child. The trial court ruled that appellant's proffer of evidence did not establish the prima facie case that was a prerequisite to the admission of the incidents involving the victim and third parties. The Court found that the trial court did not abuse its discretion in excluding evidence of the victim's violent acts against third parties because appellant did not establish a necessary prerequisite to their admission - that it was the victim who was the aggressor in the encounter which resulted in her death.

Appellant also contended that the trial court committed error when it failed to instruct the jury that the State had the burden of proving by a preponderance of the evidence that an incriminating statement made by appellant was voluntary. At the close of the evidence, the trial court instructed the jury that

before it could consider appellant's post-arrest statement, the jury had to decide whether the statement "was voluntary, freely and willingly given and without coercion, duress, threats, use of violence, fear of injury, or any suggestions or promises of leniency or reward . . . the product of a free will and not under compulsion or any necessity imposed by others." The Court noted that since appellant failed to object to the charge, its review must be limited to that of whether there was plain error. The Court found that it did not meet the test for plain error because it did not likely affect the outcome of the proceedings in light of the admission of a recording of appellant's pre-arrest statement to his neighbor and to a 911 operator that he had just killed his wife by shooting her twice, and appellant's trial testimony that he shot his wife while under a delusion that she was his abusive stepfather.

Severance

Griffin v. State, S12A1945; S12A1946 (1/22/13)

Appellants, Griffin and Boyd, were convicted of felony murder of Clark and Griffin was found guilty of the aggravated assault of Rosson. A third co-defendant was acquitted of all charges. The evidence showed that Griffin went to Clark's home in April, 2006 to collect on a drug debt. Clark refused to pay and in the ensuing argument, Griffin cut Rosson, a friend of Clark's, with a razor blade. In June of 2006, Clark approached Griffin on the street in an effort to purchase drugs. After speaking for a moment, Clark walked away. Griffin also walked away, then turned around and struck Clark in the back of the head, causing him to fall to the asphalt face first. Boyd, who had been standing some distance away, joined Griffin and the two men brutally kicked Clark in the head and torso, causing him to become unconscious. Clarke subsequently died from his injuries without regaining consciousness.

Both appellants contended that the trial court erred in refusing to grant their motions to sever. Griffin argued that the trial court erred in refusing to sever the April attack on Rosson from the June attack on Clark. The Court stated that whenever two or more offenses are joined for trial solely because they are of the same or similar character, a defendant has an absolute right to sever. If offenses are not joined solely because of their same or similar character, a trial court must decide whether

severance would promote a just determination of guilt or innocence as to each offense. Relevant factors in making this determination include whether, considering the number and complexity of the offenses charged, the trier of fact can separate the evidence and apply the law with regard to each charge, and whether evidence of one offense would be admissible in a trial of another offense.

Here, the trial court concluded the charges were not joined solely because of their similar character. The court recognized that both incidents involved a continuing dispute over a drug debt owed by Clark to Griffin and occurred in close physical and temporal proximity to each other. Moreover, the trial court properly determined that evidence of the offenses occurring in April 2006 would be admissible in the trial of the offenses committed in June 2006 to establish motive for the subsequent crimes and found no evidence that trying the offenses together would have confused or misled the jury. Accordingly the trial court did not abuse its discretion in denying the motion for severance.

Boyd contended the trial court erred by denying his motion to sever his trial from that of his two co-defendants. He contended severance was necessary because the inclusion of the separate counts charged against Griffin likely caused confusion in the mind of the jury, because a joint trial precluded him from calling his co-defendants as witnesses, and because a joint trial allowed the introduction of antagonistic defenses. The question of severance of the trial of defendants is within the discretion of the trial court. O.C.G.A. § 17-8-4. Factors which should be considered in exercising that discretion are (1) whether the number of defendants will create confusion; (2) whether there is danger that evidence against one defendant will be considered against another by the jury despite instructions from the court; and (3) whether the defenses of one defendant are antagonistic to defenses of another. A defendant who seeks severance must show clearly that he will be prejudiced by a joint trial and in the absence of such a showing, a trial court's denial of the motion to sever will not be disturbed.

The Court found that Boyd made no showing of prejudice requiring reversal of the trial court's denial of his motion to sever. There was no evidence that Boyd's co-defendants would have been willing to testify at a separate trial, let alone that their testimony would have

corroborated his defense of alibi. Although he contends the joint trial allowed the jury to consider against him evidence of the drug debt owed to Griffin, the same evidence would have been admissible at a separate trial to show his motive for the crimes. Moreover, there was no evidence that the number of defendants caused confusion. The court properly charged the jury that it was to determine independently the guilt or innocence of each defendant and provided the jury with separate verdicts for each defendant to avoid the potential for confusion. The verdict itself clearly showed the jury was able to understand the law and evidence as it applied to each defendant. Finally, to the extent that the defense of Boyd's co-defendants may have been antagonistic to his own defense, this in itself is insufficient to warrant the grant of a separate trial absent a showing of harm. Neither co-defendant testified or made any statement admitted at trial placing Boyd at the scene of the crime. Accordingly, Boyd failed to show any harm from the joint trial and the trial court acted within its discretion by denying the motion to sever.

Confessions; Jury Charges

Merritt v. State, S12A2039 (1/22/13)

Appellant was convicted of the murder of his wife. The evidence showed that he sent a text message to his sister early on the morning of December 6, 2008. In that message, appellant wrote: "Monica, plz call me! I thk I killed lisa. We argued last night. I choked hern she still on the floor naked. I havent touched her though. PLZ CALL ME[.] SCARFACE." Emergency workers found her face down on the floor in the bedroom of a home the victim shared with appellant. Appellant gave a statement to police officers. The night before her death, he said, he and the victim had argued about another woman, who apparently was pregnant with his child. He explained, however, that their argument did not lead to any physical contact, and he and the victim had fallen asleep around 11 p.m. The next morning, he awoke to find her on the floor, tried unsuccessfully to awaken her, and then returned to his bed. Appellant denied killing the victim, but he admitted sending the text message to his sister, a message that he was unable to explain.

Appellant contended that the evidence was insufficient to sustain his conviction. Specifically, he argued that the text message

to his sister was only an incriminating admission, not a confession, that the evidence of his guilt was, therefore, only circumstantial, and that the State was required to come forward with proof sufficient to exclude every reasonable hypothesis other than his guilt. But, the Court found, the text message was not a mere admission. In it, appellant admitted the “main fact” of the crime of which he was convicted, namely that he choked and caused the death of the victim. A confession is an admission of the main fact, from which the essential elements of the criminal act may be inferred, without a qualifying exclusion of a necessary ingredient of the crime charged, such as facts or circumstances which show excuse or justification. Here, the text message did not qualify this admission, was not exculpatory, and contained no proof of justification or excuse. Accordingly, the text message “is not a mere incriminating admission, but is a confession.” Therefore, contrary to appellant’s contentions, this was not a purely circumstantial case.

According to former O.C.G.A. § 24-3-53, “[a] confession alone, uncorroborated by any other evidence, shall not justify a conviction.” Nevertheless, a confession, freely and voluntarily made, is evidence of the highest character, and any corroboration thereof will be sufficient to sustain a conviction. When a jury finds that a confession is corroborated, it need not find proof of guilt beyond a reasonable doubt from evidence separate from and wholly independent of the confession, and it instead may consider the confession along with other facts and circumstances independent of and separate from it. The confession here was sufficiently corroborated by independent evidence that the victim was found dead on the floor, that she died from manual strangulation, that appellant was present at the time of her death, and that he previously had threatened to kill her in her sleep. Accordingly, the evidence was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that appellant was guilty of malice murder.

Appellant also contended that the trial court should have charged the jury on voluntary manslaughter as a lesser included offense. The record showed that appellant filed a written request for an instruction on voluntary manslaughter and argued at the charge conference that such an instruction ought to be given. But, he failed to object to the jury charge that the trial court eventually gave. Because

an objection voiced at the charge conference does not preserve objections to the charge as subsequently given, the failure to object to the charge as given precludes appellate review unless such portion of the jury charge constitutes plain error which affects substantial rights of the parties.

A trial court is required to give a requested charge on voluntary manslaughter if there is slight evidence showing that the victim seriously provoked the defendant, causing the defendant to kill the victim ‘solely as the result of a sudden, violent, and irresistible passion,’ O.C.G.A. § 16-5-2(a).” The Court found that the evidence showed, at most, that appellant and his wife argued about his own infidelity and that he choked and killed her early the next morning. As a matter of law, angry statements alone ordinarily do not amount to “serious provocation” within the meaning of O.C.G.A. § 16-5-2(a). Moreover, it appeared that a few hours passed between the argument and the killing. Although appellant took issue with the conclusion of the trial court that there was no evidence of physical contact between him and his wife, the evidence showed that appellant choked his wife. And he cannot, of course, rely upon his own act of choking his wife to establish the physical contact that might show provocation sufficient to form the basis for a voluntary manslaughter charge. Thus, because there was no evidence of serious provocation, the trial court did not err when it refused to charge the jury on voluntary manslaughter. For this reason, appellant failed to show plain error.