

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 15, 2013

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THIS WEEK:

- **Child Molestation; Jury Charges**
- **Search & Seizure; DUI**
- **Guilty Pleas; Merger**
- **Kidnapping; Criminal Intent**
- **First Offender Act; Sexual Offenses**
- **Double Jeopardy;**
- **Prosecutorial Vindictiveness; North Carolina v. Pearce**
- **Variance; O.C.G.A. § 16-13-31(e)**
- **Theft by Receiving; Jury Charges**
- **Search & Seizure; Consent**
- **Ineffective Assistance of Counsel**
- **Variance; Prosecutorial Misconduct**
- **Voir Dire; Batson**
- **Jury Charges; Variance**

Child Molestation; Jury Charges

Luna-Fraide v. State, A12A2300 (3/01/13)

Appellant was convicted of rape, two counts of child molestation, two counts of aggravated child molestation, and false imprisonment. He argued that the trial court did not sufficiently tailor its charge on child molestation to Count 2 of the indictment, which specified that he had touched the victim with his hand. A person commits child molestation when that person does any immoral or indecent act to or in the presence of or with any child under the age of 16 years

with the intent to arouse or satisfy the sexual desires of either the child or the person. Count 2 of the indictment charged appellant with committing an “immoral and indecent act . . . with the intent to arouse and satisfy the sexual desires of the accused by touching her vagina with his hand.” The record showed that the trial court read the indictment verbatim to the jury and charged them that “no person shall be convicted of any crime unless and until each element of the crime *as charged* is proven beyond a reasonable doubt.” The trial court then charged the jury that “a person commits the offense of child molestation when that person does an immoral and indecent act to a child less than 16 years of age with the intent to arouse and satisfy the sexual desires of that person.” Because appellant did not object to this or any other portion of the charge, the Court’s review was under the standard of plain error.

The Court held that the child molestation statute does not set forth alternative methods by which the crime may be committed, so no error arose from reading the entire definition. The charge was tailored to the indictment in that it specified that appellant touched the victim with the intent of satisfying *his* rather than *the victim’s* desires. Even though the portion of the charge consisting of the reading of the statute did not specify the immoral or indecent act committed, the charge taken as a whole, including the indictment, did so specify, and thus cannot be reasonably deemed to have presented the jury with a basis for finding appellant guilty of a crime not charged. Therefore, the Court found no error in the charge.

Search & Seizure; DUI

State v. Zeth, A12A1808 (3/07/13)

Zeth was charged by accusation with driving under the influence of alcohol with a blood-alcohol concentration greater than 0.08 grams, driving under the influence of alcohol to the extent she was a less safe driver, driving with an open container of alcohol and failing to maintain a single lane. She filed a motion to suppress, which the trial court granted, finding that the officer who had stopped her did not have reasonable suspicion for the stop. The evidence showed that Zeth was traveling on an unmarked road when she negotiated a sharp curve. While taking the turn, she veered over to the left side of the road. The officer then pulled over Zeth for failing to maintain lane. The trial court granted the motion to suppress because the officer initially charged Zeth with failure to maintain lane under O.C.G.A. § 40-6-48, which pertains to driving on roads laned for traffic, and it was undisputed that the road in question did not have clearly marked lanes. The trial court further reasoned that her driving on the left side of the road did not pose a danger to oncoming traffic because the driver of an approaching vehicle could have seen Zeth's headlights.

The Court stated that an officer may conduct a brief investigative stop of a vehicle if the stop is justified by specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The trial court must consider whether, under the totality of the circumstances, the police officer had a particularized and objective basis for suspecting the particular person stopped of criminal activity. However, the stop of a vehicle is also authorized merely if the officer observed a traffic offense. Here, the Court rejected the notion that the police officer must know with certainty that each element of a particular crime was established. Additionally, if an officer acted in good faith and believed that an unlawful act has been committed, his actions are not rendered improper by a later legal determination that the defendant's actions were not a crime according to a technical legal definition or distinction determined to exist in the penal statute. The evidence showed that the officer saw Zeth driving on the wrong side of the road despite

the fact that the center lane was not marked. Thus, the Court held, the officer was clearly authorized to stop the vehicle and investigate the "apparent" violation of the traffic laws. Therefore, the trial court committed error when it granted the motion to suppress.

Guilty Pleas; Merger

Andrews v. State, A12A1874 (3/07/13)

Appellant was charged with rape, aggravated assault, two counts of burglary, theft by taking, and three counts of robbery. He later entered a non-negotiated guilty plea to each count. The trial court sentenced him to twenty years to serve concurrently on the burglary, aggravated assault, and robbery charges (Counts 1, 2, 4, 5, 6 and 7); ten years to serve concurrently on the theft by taking charge (Count 8); and life in prison on the rape charge (Count 3). Following his sentence, appellant filed a pro se letter to the Clerk and District Attorney stating that he wished to withdraw his plea on the grounds of misrepresentation and ineffectiveness of counsel. Following an evidentiary hearing, the trial court construed appellant's letter as a motion to withdraw his guilty plea and denied the motion. The trial court found that the two burglary counts (Counts 1 and 2), and the three robbery counts (Counts 5, 6 and 7) should have merged, but the merger issue was waived because appellant entered a plea. The trial court also found that the sentence imposed was not void because appellant was sentenced to twenty years on the burglary, robbery and aggravated assault counts (Counts 1, 2, 4, 5, 6 and 7), and the 20-year sentences on those counts did not exceed the maximum permitted under the Georgia Code.

Appellant contended that the trial court erred in finding that the duplicitous counts in the indictment did not merge for sentencing purposes. The Court noted that by pleading guilty to the eight counts in the indictment, appellant waived all defenses except that the indictment charged no crime, including the issue of whether the offenses merged as a matter of law or fact. Here, appellant did not contend that the indictment was invalid or that it failed to apprise him of the charges against him. He entered his plea knowing the maximum sentence and fine he faced and he knowingly invited sentencing within the

statutory ranges on all eight counts. Moreover, the fact that his plea was non-negotiated did not alter the trial court's proper conclusion that he waived his right to argue that the burglary and robbery counts should have merged.

Additionally, appellant's claim of ineffective counsel was without merit because the record showed that he was fully aware of the sentencing consequences arising from a non-negotiated plea and, the Court held, the trial court properly concluded that appellant's sentences were not void because they fell within the statutory limitations of the Georgia Code.

Kidnapping; Criminal Intent

Thomas v. State, A12A1987 (3/05/13)

Appellant was convicted of kidnapping. The evidence showed that the six-year old victim was playing with other children inside a fenced backyard of her aunt's house. Appellant lived in the same neighborhood as the victim's aunt and was out walking. Appellant entered the fenced area, approached the victim, carried her out of the backyard, and ran into the back alley. He carried the victim past three houses before putting her down. The other children informed the aunt that the victim had been snatched and patrolling officers arrested appellant.

Appellant first contended that the evidence was insufficient to sustain his conviction for kidnapping because he claimed there was no asportation. A person commits the offense of kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will. See O.C.G.A. § 16-5-40(a). For the State to prove the essential element that the defendant has 'stolen away' or 'abducted' his alleged victim, it must show that an unlawful movement, or asportation, of the person has taken place against the victim's will. Under O.C.G.A. § 16-5-40(b)(1), *slight movement* shall be sufficient; provided, however, that any such slight movement of another person which occurs while in the commission of any other offense shall not constitute the offense of kidnapping if such movement is merely incidental to such other offense. Additionally, movement shall not be considered merely incidental to another offense if it: conceals or

isolates the victim; makes the commission of the other offense substantially easier; lessens the risk of detection; *or* is for the purpose of avoiding apprehension. See O.C.G.A. § 16-5-40(b)(2).

Appellant argued that the movement of the victim did not constitute kidnapping because it occurred during the commission of, and was merely incidental to, another offense, specifically simple battery. Here, the record showed that appellant was *not* charged with simple battery and was not required to be charged with simple battery according to the plain language of O.C.G.A. § 16-5-40(b)(1). Nevertheless, the evidence showed that the movement of the victim was not merely incidental to the offense of simple battery. Significantly, the movement of the victim took place after appellant grabbed the victim and lifted her. Additionally, appellant moved the victim from the aunt's backyard and down the alley, passing at least three houses. Therefore, the Court held that the evidence supported the asportation element of the kidnapping statute.

Second, appellant contended that evidence of his mental illness demonstrated his lack of criminal intent to commit the offense. Appellant's claimed lack of intent derived from evidence that showed that he was suffering from Schizoaffective Disorder and Borderline Intellectual Functioning, and that he had not been taking his medications at the time of the offense. However, the Court stated, mental abnormality is not a defense to a crime unless it amounts to insanity. Here, the evidence did not show that appellant's mental illness prevented him from forming the intent to kidnap. Rather, the forensic psychiatrist who examined him after his arrest testified that he was not exhibiting any symptoms consistent with psychosis at the time. The psychiatrist testified that at the time of the incident, appellant knew the difference between right and wrong, and that his actions during the offense were purposeful. Moreover, appellant's mental illness, by itself, did not establish his inability to form a criminal intent. Therefore, the Court held that the jury was authorized to find proof of appellant's criminal intent based upon the testimony of the psychiatrist, as well as his conduct and other circumstances associated with the offense.

First Offender Act; Sexual Offenses

Tew v. State, A12A2038 (3/06/13)

Appellant was convicted of statutory rape. He contended that the trial court erred in ruling that he was not legally eligible for first offender consideration. Specifically, he argued that O.C.G.A. § 17-10-6.2, which governs the sentencing of persons convicted of sexual offenses, including statutory rape, allowed the trial court to exercise its discretion to grant him first offender status under O.C.G.A. § 42-8-60.

First, the Court noted that the trial court has the discretion whether or not to sentence a defendant under the First Offender Act. However, that discretion is abused if the trial court refuses to consider first offender treatment based upon an erroneous expression of belief that the law does not permit the exercise of such discretion. Further, the defendant seeking first offender treatment has the burden on appeal to establish upon the record that the trial court based its decision upon an erroneous expression of belief, and absent evidence in the record demonstrating error, the trial court is presumed to have acted properly in imposing the sentence.

O.C.G.A. § 17-10-6.2(b) sets forth the mandatory sentence guidelines for persons convicted of a sexual offense. It provides that: "Except as provided in subsection (c) of this Code section . . . any person convicted of a sexual offense shall be sentenced to a split sentence which shall include the minimum term of imprisonment specified in the Code section applicable to the offense. No portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the sentencing court and the sentence shall include, in addition to the mandatory imprisonment, an additional probated sentence of at least one year. *No person convicted of a sexual offense shall be sentenced as a first offender pursuant to Article 3 of Chapter 8 of Title 42, relating to probation for first offenders, or any other provision of Georgia law relating to the sentencing of first offenders.*" (Emphasis supplied). Subsection (c)(1) of O.C.G.A. § 17-10-6.2 further provides that "[i]n the court's discretion, the court may deviate from the mandatory minimum sentence as set forth in subsection (b) of this Code section, *or any*

portion thereof, provided that" the defendant satisfied all six requirements set forth in subsection (c)(1)(A)-(F). (Emphasis supplied).

The trial court ruled that appellant satisfied all six requirements of the statute and deviated from the mandatory sentence guidelines of O.C.G.A. § 17-10-6.2(b) for the purpose of sentencing appellant to a probated sentence. However, it found that he was not eligible for first offender status, finding that the phrase "or any portion thereof" in Subsection (c)(1) applied only to the first two sentences of Subsection (b) setting forth mandatory minimum sentence guidelines, and not to the final sentence of Subsection (b), which precludes defendants convicted of certain enumerated sexual offenses from receiving first offender status. Appellant argued that the phrase "or any portion thereof" in Subsection (c)(1) refers to the entirety of Subsection (b) and not simply to the first two sentences referring to the mandatory minimum sentencing guidelines.

The Court held that the grammatical structure and punctuation of O.C.G.A. § 17-10-6.2(c)(1) demonstrated that the legislature intended the "or any portion thereof" language of Subsection (c)(1) to modify the *entire* phrase directly preceding it, which states, "the court may deviate from the mandatory minimum sentence as set forth in subsection (b) of this Code section." The mandatory minimum sentence is set forth only in the first two sentences of Subsection (b) and is not discussed in the final sentence, which addressed first offender status. The legislative intent was further clarified in reading the first two sentences of Subsection (b), which, mirroring the "portion" language of Subsection (c)(1), state, in part, that "[n]o *portion* of the mandatory minimum sentence imposed shall be suspended, stayed, deferred, probated or withheld by the sentencing court . . ." Thus, the Court held, the most sensible interpretation of the "any portion thereof" language in Subsection (c)(1) indicated that the legislature's intent was not to allow the trial court to deviate from the entirety of Subsection (b), but rather to grant the trial court discretion to deviate only from the mandatory minimum sentence guidelines set forth in the first two sentences.

Moreover, "a statute must be construed in relation to other statutes of which it is a part, and all statutes relating to the same

subject-matter, briefly called statutes in pari materia, are construed together, and harmonized whenever possible, so as to ascertain the legislative intent and give effect thereto.” When O.C.G.A. § 17-10-6.2(c)(1) is construed in pari materia with the First Offender Statute, O.C.G.A. § 42-8-60, appellant’s interpretation of the “or any portion thereof” language in a manner that grants the trial court discretion to award first offender status to him becomes untenable. O.C.G.A. § 42-8-60 specifically states, without exception, that no person convicted of a sexual offense may be given first offender treatment. This conclusion was supported by case law. Therefore, the Court held that appellant’s assertion that he was eligible for first offender statute was without merit.

Double Jeopardy

Banks v. State, A12A1688 (3/05/13)

Appellant appealed from the denial of his plea in bar. The record showed that on February 19, 2009, the West Georgia Drug Task Force, using a confidential informant, purchased methamphetamine from appellant at 18 Bitter Sweet Lane in Newnan. This event led to the State’s initial accusation against appellant for sale of methamphetamine. (Case No. 2009-R-445). A few days prior to the events that led to this first accusation, the Coweta County Crime Suppression Unit began conducting an independent investigation of appellant at a residence on Price Road in Newnan. On February 17, 2009, appellant’s truck was stopped by an officer who noticed items consistent with the manufacture of methamphetamine in the back of his truck. The Crime Suppression Unit instructed the officer to allow appellant to drive away, but used the observations from the stop to obtain a search warrant for a different residence on Price Road connected with appellant.

On February 19, 2009, the Crime Suppression Unit was informed that appellant had sold methamphetamine from a residence on Bitter Sweet Lane. Later that same day, the Crime Suppression Unit served an arrest warrant for unpaid child support on appellant at the Bitter Sweet Lane residence. While serving the arrest warrant, the officers observed items used to smoke methamphetamine in plain view. A search warrant was then obtained for the premises and the outbuildings. The

search warrant was issued five hours after appellant sold methamphetamine to the confidential informant, (which gave rise to Case No. 2009-R-445) and the house was not kept under surveillance between the sale and the execution of the search warrant of unpaid child support. The search revealed bottles used in the manufacture of methamphetamine in one of the outbuildings. (Case No. 2010-R-0243).

The sale of methamphetamine case file was received by the Coweta County District Attorney’s Office from the West Georgia Drug Task Force on March 19, 2009. On May 11, 2009, the State filed an accusation in Case No. 2009-R-445 against appellant on the charge of sale of methamphetamine, and he entered a guilty plea on August 17, 2009. On September 18, 2009, the Coweta County District Attorney’s Office received a *second* case file, arising from the execution of the search warrant at Bitter Sweet Lane. Appellant was subsequently indicted with charges arising from the execution of the search warrant on March 1, 2010. (Case No. 2010-R-0243) Appellant filed the plea in bar against this indictment.

Appellant argued that the events giving rise to his guilty plea and the subsequent indictment arose from one continuous course of conduct, and thus, subjected him to two prosecutions in violation of his constitutional and statutory right to be free from double jeopardy. The Court stated that Georgia’s statutory bar to successive prosecutions, the procedural aspect of double jeopardy, is codified in O.C.G.A. § 16-1-7(b), which requires the State to prosecute crimes in a single prosecution “[i]f the several crimes arising from the conduct are known to the proper prosecuting officer *at the time of commencing the prosecution* and are within the jurisdiction of a single court.” (Emphasis supplied). Thus, O.C.G.A. § 16-1-7(b) prohibits successive prosecutions for crimes “(1) arising from the same conduct, (2) known to the proper prosecuting officer, and (3) subject to jurisdiction in the same court.” Thus, for procedural double jeopardy to attach, all three prongs outlined above must be satisfied. Additionally, appellant bore the burden of showing that further prosecution was barred by the previous prosecution.

The Court focused on whether the prosecuting attorney had knowledge of the

charges arising from the execution of the search warrant at the time of appellant’s plea. The Court held that O.C.G.A. § 16-1-7(b) applies only to such crimes which are *actually* known to the prosecuting officer *actually* handling the proceedings. Here, the record showed that the Coweta County District Attorney’s Office prosecuted appellant in both cases. The district attorney’s office received the case file of the sale of methamphetamine case on March 19, 2009, an accusation charging appellant with that offense was filed on May 11, 2009, and he plead guilty to that charge on August 17, 2009. The district attorney’s office, however, did not receive the case file regarding the execution of the search warrant until September 18, 2009, after the plea hearing had already taken place.

Nevertheless, appellant pointed to the transcript of his plea hearing as affirmative proof that the prosecuting attorney was aware of the events giving rise to the subsequent indictment. But, the Court noted, while the record showed that the transcript was read aloud during the plea in bar hearing, it only indicated that the prosecuting attorney had knowledge that appellant *could* face other charges, not that he had knowledge that the events giving rise to these other charges took place on the same day or at the same location as the sale of methamphetamine charge. The State explained that the delay in receiving this file probably was due to the district attorney’s policy of not accepting a case file “without it being complete[,] including crime lab reports and things of that nature which take a little while to obtain.” Therefore, appellant did not affirmatively show the prosecutor actually knew of the other crimes when he prosecuted the first offense.

Prosecutorial Vindictiveness; North Carolina v. Pearce

Piper v. State, A12A2276 (3/05/2013)

Appellant appealed from the trial court’s order denying his plea in bar in which appellant alleged that the State was prosecuting him out of spite and vindictiveness. The trial court, in denying the plea in bar, concluded that there was no evidence of vindictiveness. The record showed that appellant was charged on December 8, 2008 with possession of methamphetamine and possession of a drug-

related object (Case No. 08-CR-1027-J). On February 16, 2009, appellant was indicted for theft by conversion, theft by receiving, and theft by taking (Case No. 09-CR-086-A). In return for a guilty plea in Case No. 09-CR-086-A, the State entered a nolle prosequi in Case No. 08-CR-1027-J. Appellant was sentenced to probation for the 2009 case but later arrested for violating his probation. He served several months in jail and petitioned for a writ of habeas corpus, which was granted on June 24, 2011. The superior court granted the writ because it could not determine whether appellant signed the necessary paperwork in connection with the plea or whether he was even aware that the plea was being taken.

On December 15, 2011, the State charged appellant with possession of methamphetamine and possession of drug-related objects, the offenses that were nolle pros'd in connection with the plea agreement. Appellant claimed that because he had already served time under the plea agreement, the State was pursuing the nolle pros'd case for having prevailed on the habeas petition. The prosecutor responded at the hearing on the plea in bar, stating that this was not a case of retribution; but rather that, because the habeas petition was granted, "[w]e are simply moving back to the point we were prior to the plea."

Appellant relied on *North Carolina v. Pearce*, 395 U. S. 711 (1969), as authority for his claim that this was a constitutionally impermissible vindictive prosecution. *North Carolina v. Pearce* held that the Fourteenth Amendment requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. The Court stated that to avoid a presumption that the trial court has acted vindictively, the record must affirmatively show objective information justifying the increased sentence. However, the application of the *Pearce* presumption should be limited to circumstances in which there is a reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness. The mere opportunity for vindictiveness is not sufficient to apply the *Pearce* rule and the prosecutor's charging decision is presumptively lawful.

Here, the Court found, the record showed that the prosecutor was "simply moving back to the point we were prior to the plea." Appellant did not come forward with actual evidence of vindictiveness to refute the prosecutor's statement. He only presented the fact that any sentence will be an increase and therefore, argued that vindictiveness should be presumed. Therefore, the Court held, the trial court correctly denied his plea in bar seeking to have the indictment dismissed.

Variance; O.C.G.A. § 16-13-31(e)

In the Interest of S.C.P., A12A2540 (3/07/13)

Appellant challenged the juvenile court's order that placed him in restrictive custody for acts that, if committed by an adult, would constitute the designated felony of trafficking methamphetamine in violation of O.C.G.A. §16-13-31. Specifically, he argued that the order should be reversed because the petition alleged that he participated in the delivery of a certain amount of methamphetamine but the State proved only that he participated in the delivery of that amount of a methamphetamine mixture. The evidence showed that appellant delivered to a C.I. 445.9 grams of a substance that tested positive for methamphetamine. O.C.G.A. § 16-13-31(e) pertinently provides that a person commits the felony offense of trafficking if that person "knowingly ... delivers [] ... 28 grams or more of methamphetamine, amphetamine, or any mixture containing either methamphetamine or amphetamine, as described in Schedule II, in violation of this article." There is no purity requirement in the statute.

Appellant contended that there was a fatal variance between the delinquency petition's allegations and the hearing evidence, because the State proved only that appellant delivered a mixture containing some amount of methamphetamine. The Court noted that there was a split of authority on the issue. On the one hand, there is *Elrod v. State*, 269 Ga.App. 112 (2004), cited by appellant, which concerned a charge that the defendant violated O.C.G.A. § 16-13-31(e) by possessing more than 28 grams of amphetamine. In *Elrod*, evidence was presented that the substance at issue weighed more than 28 grams and tested positive for amphetamine, but no evidence was presented concerning the purity

or composition of the substance. The *Elrod* Court held this evidence to be insufficient to show that the defendant was in possession of 28 grams or more of amphetamine as charged in the indictment. In so holding, the *Elrod* Court stated that O.C.G.A. § 16-13-31(e) sets forth two methods of committing this offense — "by possessing 28 grams or more of amphetamine or by possessing 28 grams or more of any mixture containing amphetamine" — and cited the rule that where the indictment alleges that the crime was committed by one method, the State is required by the indictment to prove commission of the crime by that particular method. The same conclusion was found in *Daniel v. State*, 251 Ga.App. 792 (2001).

The State, however, relied on the other line of authority which holds that the variance is not fatal because O.C.G.A. § 16-13-31(e) treats equally the substances of methamphetamine, amphetamine, and a mixture containing either methamphetamine or amphetamine. Thus, in *Sims v. State*, 258 Ga.App. 536 (2002), the defendant was charged with violating O.C.G.A. § 16-13-31(e) by "possessing more than 200 grams of amphetamine," but the trial evidence showed that the defendant possessed more than 200 grams of a mixture of amphetamine and methamphetamine. The *Sims* Court held that the variance was not fatal because it would not subject the defendant to the dangers which the fatal variance rule protects. Additionally, the Supreme Court of Georgia used the *Sims* rationale to find no fatal variance where a defendant was accused of violating another criminal statute involving a controlled substance, explaining that for the purposes of that particular statute "'ephedrine' and 'pseudoephedrine' are synonymous, so that the one includes the other. . . . Therefore, there was no fatal variance between the accusation charging possession of ephedrine and the proof at trial showing possession of pseudoephedrine." *Rocheffort v. State*, 279 Ga. 738 (2005).

Thus, the Court held, "[f]aced with the choice in this case of whether to follow the line of authority represented by *Sims*, or the line of authority represented by *Elrod* and *Daniel*, we must take the lead of our Supreme Court and follow *Sims*. Because 'methamphetamine' and a 'mixture containing methamphetamine' are synonymous for purposes of O.C.G.A. § 16-

13-31(e), there was no fatal variance between the delinquency petition charging delivery of a certain amount of methamphetamine and the proof at the hearing showing delivery of that amount of a mixture containing methamphetamine. [Cites]. To the extent this holding conflicts with the holdings set forth in *Elrod*...and *Daniel*...and their progeny, those decisions are hereby overruled.”

Theft by Receiving; Jury Charges

Marriott v. State, A12A2001 (3/01/13)

Appellant was convicted of five counts of theft by receiving stolen property and one count of theft by deception. The evidence showed that appellant’s parents contacted the police department regarding missing firearms from their home. The investigation by the police department revealed that appellant traveled to pawn shops to sell her father’s firearms. On each occasion, she claimed that her father had died and that she inherited the guns.

Appellant first contended that the evidence was insufficient to sustain her claim of theft by receiving because she claimed the evidence supported that she was the principal in the original theft and therefore, she could not have “received” the stolen property. Under Georgia law, “[a] person commits the offense of theft by receiving stolen property when he receives, disposes of, or retains stolen property which he knows or should know was stolen unless the property is received, disposed of, or retained with intent to restore it to the owner.” O.C.G.A. § 16-8-7(a). The purpose is to punish a person who buys or receives stolen goods, as distinct from the principal thief of those goods. An essential element of the crime of theft by receiving is that the goods be stolen by some person other than the accused. However, there must be *direct and uncontested evidence* that identifies the defendant as the original thief for an appellate court to overturn a conviction of theft by receiving. Moreover, the Court noted that where the identity of the principal thief is either uncertain or unknown, there is no burden on the State to prove that the thief was not the defendant.

The Court stated that in a prosecution for theft by receiving stolen property, where the identity of the principal thief is either

uncertain or unknown, there is no burden on the State to prove that the thief was not the defendant. Additionally, the State may charge a defendant with both theft by taking and theft by receiving the same property. Such charges may be brought in the alternative and the jury allowed to determine of which crime the defendant was guilty, depending on the State’s ability to carry its burden of proof with respect to the identity of the thief.

Here, appellant argued that the evidence showed that she was the only person who stole the guns. The Court disagreed. Although the Court conceded that the jury could have found appellant as the principal thief, the evidence presented at trial was circumstantial and not direct. For example, the evidence showed that three of the stolen guns were sold before appellant’s parents reported the crime and a neighbor’s testimony could not positively identify appellant’s car as the one he saw at appellant’s parents’ home on the day the alleged theft occurred. Additionally, the Court noted that the jury acquitted appellant of the one count of burglary and thirteen counts of theft by taking with which she was also charged, which showed that it had doubts about her identity as the person who stole the guns. Therefore, the Court held the evidence sufficient to sustain the theft by receiving convictions.

Next, appellant contended that the trial court’s charge on theft by receiving was incorrect as a matter of law because it failed to inform the jury that the crimes of theft by taking and theft by receiving were mutually exclusive, and therefore to convict appellant of theft by receiving they had to conclude that someone other than appellant stole the firearms at issue. Although appellant was correct in her assertion that the jury could not convict on both counts, here, the jury acquitted her of all thirteen counts of theft by taking. Therefore, the Court could not conclude that the trial court’s failure to instruct in this regard constituted plain error and it was highly unlikely that the erroneous jury charge affected the outcome of appellant’s trial.

Search & Seizure; Consent

Durham v. State, A12A1893 (3/04/13)

Appellant was convicted of VGCSA. The evidence showed that a DEA informant

tip led GBI officers to the home of appellant. When no one answered the front door, a GBI agent walked over to the neighbor’s yard and looked into appellant’s garage. From that vantage point, he was able to see “Coleman camping fuel” and could smell the odor of methamphetamine inside the garage. Based on the information, the officer waited at appellant’s home while other GBI officers left to obtain a search warrant. While waiting, the officer encountered appellant as she arrived at the home and the officer sought consent to enter her home. When she refused consent and protested the officer’s presence, the officer detained appellant based on his belief that the location was used for manufacturing methamphetamine. About 25 minutes into the detention, appellant sought out the officer and stated that she would consent to a search of her residence. The GBI officer read appellant the consent form, emphasizing to her that he could not promise any favorable treatment in exchange for her consent, and she signed the form, providing her house key to the officers. The GBI officer called the other officers to tell them a warrant would not be needed, and they returned to the scene to search the premises. In the garage, the officers found materials commonly used to manufacture methamphetamine.

Appellant contended that the trial court erred by denying her motion to suppress, arguing that her consent was invalid because it was involuntary. In determining whether appellant’s consent was voluntary, the State had the burden of proving voluntariness based on the totality of all the surrounding circumstances. The factors of voluntariness include the fluency of the consenting person regarding the language being used by the police, the age, education and intelligence of the consenting person, the length of and basis for the duration of detention until the consent was obtained, whether the accused was advised of his relevant constitutional rights including his right to refuse to consent, the prolonged nature and intensity of any questioning, the use of threats or physical punishment, and the psychological impact of all these factors on the consenting person. As a general rule, an officer may detain an individual to secure a scene while waiting for a search warrant.

First, the Court noted that the officer had sufficient authority, based on his knowledge, training, observations and the trustworthy

information he had received from the DEA informant, to detain appellant and secure the scene while a warrant was obtained, even construing her detention as an arrest, as opposed to a temporary investigatory detention. Therefore, her consent was not based on an unauthorized detention. Next, the Court held that appellant's consent to search the home was voluntary. The record showed that appellant was not interrogated or questioned, she was not intoxicated, she spoke English, she was not threatened, and she sought out the officer to give him consent to search. Furthermore, the officer explained that her consent would not benefit her in a resulting investigation and he read the consent form to her before she signed it. Therefore, the Court held, based on the totality of circumstances, the trial court did not err in denying her motion.

Ineffective Assistance of Counsel

Jackson v. State, A12A2557 (3/01/2013)

Appellant was convicted of selling cocaine. He contended that his counsel was ineffective for failing to object to the introduction of improper character evidence at trial. The evidence showed that appellant was recorded by a confidential informant during a drug buy. After the drug buy, the confidential informant returned to his vehicle to meet the officers at the "rendezvous location" and uttered the statement "the one that shot Freak Nasty in the stomach" to himself. The video was played at trial and during deliberations, the jury asked to review that portion of the video relating to appellant. The judge then allowed the jurors to review approximately three minutes of the recording, although it was not clear whether that portion of the video viewed by the jury included the informant's statement.

Appellant claimed that his attorney's failure to object to the confidential informant's remark about "the one that shot Freak Nasty in the stomach" constituted ineffective assistance of counsel. Under the *Strickland v. Washington*, to prevail on such a claim, appellant must prove that his lawyer's performance was deficient and that he suffered prejudice as a result of this deficient performance. With respect to the deficiency prong, he must show that his attorney performed his duties at trial in an

objectively unreasonable way, considering all the circumstances, and in light of prevailing professional norms. In addressing the first prong, the Court held that the statement was objectionable as improper character evidence. Therefore, appellant's attorney performed deficiently when he failed to object to that portion of the audio/video recording when it was played at trial.

Next, the Court addressed whether appellant suffered prejudice as a result of his attorney's performance. To prove prejudice, appellant must prove a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In Georgia, prejudice is determined by whether the improper character evidence is isolated and brief, whether the jury's exposure was repeated or extensive, and whether the introduction of the objectionable evidence was inadvertent or whether it was deliberately elicited by the State. Additionally, prejudice may occur when the case comes down to a question of whether the jury believes the version of events as told by the defendant or as told by a witness for the State, and the improper character evidence reflects directly on the defendant's credibility. Lastly, the Court must analyze whether, considering the foregoing factors and in light of the evidence presented at trial, there was a possibility that the jury's exposure to the improper character evidence contributed to the guilty verdict.

The Court held that appellant failed to prove a reasonable probability that the confidential informant's remark about the shooting of "Freak Nasty" contributed to his guilty verdict. Although the remark could have been interpreted as referring to appellant, it was not an affirmative statement that he was the one that shot "Freak Nasty." Moreover, the State did not elicit this statement and the evidence indicated that it was likely heard by the jury only once and no more than twice. Additionally, the remark was a brief, single comment made towards the end of an approximately 30 minute recording and almost a full minute after the informant had completed the transaction and left appellant. Furthermore, this case was not a "swearing contest" between the State's witness and appellant. Therefore, the remark had no impact on the issue of credibility. Lastly, the Court emphasized that despite the admission of the statement, the evidence at trial against

appellant was substantial. Thus, appellant did not show that his trial would have had a different result if his attorney had objected to the statement.

Variance; Prosecutorial Misconduct

Thompson v. State, A12A2000 (3/07/13)

Appellant contended that the trial court erred in denying his motion for a directed verdict based on a fatal variance between the indictment and the evidence. The record showed that appellant was indicted for and convicted of the armed robbery and false imprisonment of Israel Cruz, the aggravated assault and false imprisonment of Pedro Moncera Arellano, and the burglary of the dwelling house of Israel Cruz, Pedro Moncera Arellano, and Luis Perez. However at trial, one of the victims identified himself variously as Luis Garcia, Luis Roberto Garcia, and Alberto Garcia, and the investigating officer testified that the victim had given his name as "Luis Roberto Garcia-Perez." Additionally, Perez testified about the home invasion, during which his roommates "Israel Penya" and "Pedro Moncero" were present. When asked to refer to the other victims using "their whole name," the witness replied, "I just know his name like that, Israel." He later testified that when the robbers burst into the apartment, "Israel" was asleep in the living room and "Pedro" was in his room. The robbers placed "Israel" on the ground and brought "Pedro" out of his room into the living room, and when they left, they took a wallet of "Israel's." Because the evidence at trial identified two of the victims as "Israel Penya" and "Pedro Moncera" but not "Israel Cruz" and "Pedro Moncera Arellano," appellant contended that he was entitled to directed verdicts on the charges involving Cruz and Arellano.

The Court stated that if a variance exists between the victim's name as alleged in the indictment and as proven at trial, the variance is not fatal if the two names in fact refer to the same individual, such as where a mere misnomer is involved or where the variance is attributable to the use of a nickname or alias by the victim. Additionally, the State need not put forth evidence to demonstrate why the variance existed; the law only requires that the different names actually refer to the same person. Therefore, the controlling issue for the

trial court was not the name, but the identity of the person in the indictment. Here, the difference in one of the victim's name between the indictment—Pedro Moncera Arellano—and the proof—Pedro Moncero was facially similar by each first name. The Court also found that the difference between the names of Israel Cruz and Israel Penya was greater, but the issue was still whether the State presented sufficient evidence to allow a reasonable trier of fact to conclude that the two names referred to the same person. Considering the evidence as a whole, the Court found that the State presented sufficient evidence to allow a reasonable trier of fact to conclude that the names in the indictment referred to the victims present during the home invasion. Therefore, the trial court did not err in denying appellant's motion for a directed verdict as to the counts involving these victims.

Appellant also argued that the trial court erred by overruling his objection when the prosecutor sat in the witness stand during closing argument. He contended that allowing the prosecutor to do so "suggests to the jury that evidence presented from that chair is aligned with the prosecution" and constituted "unfair means in the trial to the prejudice of the accused." The record showed that during closing argument, the prosecutor sat in the witness box for two and a half pages out of a fifteen-page transcript while discussing some of the co-defendants' testimony. The Court noted that counsel is permitted wide latitude in closing argument, and any limitation of argument is a matter for the trial court's discretion. The Court emphasized that in the conduct of trials, both civil and criminal, broad discretion is vested in the judge, and subject to an abuse of discretion standard of review. Under this standard, the Court held that appellant failed to show error and affirmed the judgment of conviction.

Voir Dire; Batson

Littlejohn v. State, A12A2456 (3/08/13)

Appellant was convicted of burglary, theft by taking, and second degree criminal damage to property. He contended that the trial court erred in denying his *Batson* challenge since the State used peremptory strikes in a discriminatory manner. The record showed that after the jury was selected, trial counsel initially confirmed that the composition of

the jury appeared to be correct. The trial court then excused the jury pool. Before the jury was sworn, however, trial counsel announced that he had a *Batson* motion that he wanted to make on the record. Defense counsel argued the basis for his motion, noting that the State had exercised its strikes as to jurors 3, 8, 67, 69, 70, and 85, all of whom were African-Americans. Defense counsel later acknowledged that the State had a valid basis for striking juror 69 since his occupation as a counselor for inmates may have caused concern for the State. Defense counsel nevertheless insisted that the State's exercise of strikes against the other five jurors was discriminatory. The trial court directed the prosecutor to explain the basis for her strikes. After the prosecutor gave her explanations, the trial court denied the *Batson* motion. The trial court ruled that appellant's challenge was untimely since it was not raised until after the jury had been released from the courtroom. The trial court further found that the prosecutor had offered race-neutral explanations for its strikes and that no intentional discrimination had been shown.

First, the Court noted that the trial court erred in ruling that appellant's *Batson* challenge was untimely. A *Batson* challenge is untimely when it is made after the jury has been sworn. Since he made his *Batson* challenge before the jury was sworn, it was timely. Second, the analysis of a *Batson* challenge involves a three-step process: (1) the opponent of a peremptory challenge must make a prima facie showing of racial discrimination; (2) the proponent of the strike must then provide a race-neutral explanation for the strike; and (3) the trial court must decide whether the opponent of the strike has proven the proponent's discriminatory intent. Although there was no voir dire transcript in the record, there was no requirement that the State's racially neutral explanation for its use of peremptory strikes be supported by a transcript of voir dire. Because the trial court had the opportunity to observe the jurors' actions during the voir dire proceedings, the Court must affirm the trial court's determination that the prosecutor's explanations were race-neutral absent any erroneous finding.

Since the trial court directed the State to explain its strikes, the preliminary question of whether appellant had established a prima facie case of discrimination is moot. Therefore,

the State's explanations must be examined. At step two, the proponent of the strike need only articulate a facially race-neutral reason for the strike. Step two does not demand an explanation that is persuasive, or even plausible. At this second step of the inquiry, the issue is the facial *validity* of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. If the proponent of the strike carries its burden by providing a race-neutral explanation for the peremptory strike, the trial court must advance to step three of the *Batson* analysis and decide whether the opponent of the strike has proven the proponent's discriminatory intent in light of all the circumstances that bear upon the issue of racial animosity. This involves an evaluation of the credibility of the strike's proponent, the trial judge's duty is to ferret out and eliminate invidious discrimination in the jury selection process.

The record showed that the prosecutor stated that she struck jurors 3 and 8 because they were unemployed. The prosecutor's explanation presented a justifiable and race-neutral basis, and thus, the trial court's findings as to these strikes were proper. Second, the prosecutor said that she struck juror 67 because he nodded his head when she asked whether he could listen to and fairly consider the testimony of a confidential informant. She claimed that based upon juror 67's nodding of his head, she believed that he would have a problem judging the confidential informant's testimony fairly. The prosecutor also explained that she struck juror 70 because the juror did not make eye contact with her, she felt that the juror was more inclined towards the defense position, and she did not feel any interpersonal interaction with the juror. The trial court was authorized to conclude that the prosecutor had offered race-neutral explanations for these strikes. Lastly, the prosecutor stated that she struck juror 85 because his hair was in a ponytail. The trial court was authorized to find that the prosecutor's explanation was race-neutral, since the growing of long, unkempt hair is not a characteristic that is peculiar to any race. Therefore, the Court held that the State provided race-neutral explanations for each strike and appellant's *Batson* challenge failed to present a basis for reversal.

Jury Charges; Variance

Johnson v. State, A12A2510 (3/07/13)

Appellant was convicted of aggravated assault, obstruction, and possession of a firearm by a convicted felon. He contended that the trial court erred when it refused to charge the jury on the lesser included offense of simple assault. The Court noted that it is not error to give such a charge when there is “undisputed” evidence that showed that the assault occurred with a deadly weapon. Here, appellant failed to present any evidence or facts that suggested that he did not assault the victim with a gun. Therefore, the Court held that the trial court did not err when it refused to charge the jury on simple assault.

Next, appellant contended that he was entitled to a charge on reckless conduct. O.C.G.A. § 16-5-60(d) defines reckless conduct as causing bodily harm or endangering the bodily safety of another person “by consciously disregarding a substantial and unjustifiable risk that his act or omission will cause harm or endanger the safety of the other person” when “the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise.” Here, appellant did not testify and did not present any evidence suggesting that the gun discharged accidentally or negligently. Thus, the Court noted, the jury was only left to decide between two conclusions: that appellant shot at the victims, or that he shot into the air in order to scare them. The Court held that neither scenario presented the “negligent” discharge required to warrant a charge of reckless conduct.

Lastly, appellant contended that there was a fatal variance between the trial court’s charge that appellant used a “deadly weapon” in the assaults and the indictment’s specification that he used a .25-caliber handgun. To show a fatal variance, the critical requirements are that the accused be definitely informed as to the charges against him, so that he is able to present his defense, and that he may be protected against another prosecution for the same offense. Additionally, a variance between an indictment naming a particular kind of firearm and proof establishing that a different firearm was actually used is not fatal to a criminal conviction. Here, the record did show that when the indictment was read to the jury, it specified that appellant committed

the assaults with a .25 caliber handgun, and at least one witness in this case described the gun at issue as a .25-caliber. Therefore, the Court held, appellant was definitely informed as to the charges against him and there was no evidence that he was at risk of another prosecution for the same offense.