

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING MARCH 18, 2011

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## THIS WEEK:

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affect the substantial rights of the accused. It is the underlying reasons for the rule which must be served: 1) the allegations must definitely inform the accused as to the charges against him so as to enable him to present his defense and not to be taken by surprise, and 2) the allegations must be adequate to protect the accused against another prosecution for the same offense. Only if the allegations fail to meet these tests is the variance fatal. Here, the indictment sufficiently informed appellant of the firearm possession charges against him and he failed to show that he was unable to present a viable defense to the charges or that he was surprised or misled at trial by the admission of his 2001 conviction to establish his status as a convicted felon. Moreover, there was no danger that appellant could be prosecuted a second time for the same offense. In the absence of any evidence that his rights were affected, there was no fatal variance between the allegations and proof in this case.

## **Search & Seizure**

*Marlow v. State, S11A0228 (3/7/2011)*

Appellant was convicted of malice murder and other offenses. He contended that the trial court erred in denying his motion to suppress. The evidence showed that the police got a tip that appellant was at the home of the victim. They went to the house and knocked. No one answered. They knocked again. This time, someone came to an upstairs window, looked outside, and then retreated back into the interior of the house without answering the door. While waiting, the officers noticed a car in the driveway. They ran the tag and found that it was stolen. They then got a search warrant for the house to look for the keys to the stolen vehicle.

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## **Fatal Variance**

*Roscoe v. State, S11A0415 (3/7/2011)*

Appellant was convicted of malice murder and possession of a firearm by a convicted felon. He contended that the trial court erred by allowing the State to prove the offense of possession of a firearm by a convicted felon in a manner not charged in the indictment. The record showed that the indictment alleged a 1997 theft by taking felony. However, at trial, the State presented a 2001 VGCSA felony. The Court held that the true inquiry is not whether there has been a variance in proof, but whether there has been such a variance as to

Appellant contended that the warrant issued to search the victim's home for stolen car keys was not supported by probable cause because there was no nexus between the stolen car and the home. The Court disagreed. After discovering the stolen car parked at the home, police reasonably inferred that the keys had been removed from the car and taken inside because the car was locked and its alarm was activated. Based on this information, a search warrant was properly issued to enter the home to search for the keys. Moreover, the magistrate was presented with evidence that appellant had been reported to be staying at the victim's home, that a white male had been observed retreating into the house, and that this person would not respond to officers. All of this evidence supported a finding of probable cause supporting the warrant in issue to search the home for the stolen car keys.

### **Prosecutorial Misconduct**

*Dolphy v. State, S10A1347 (3/7/2011)*

Appellant was convicted of malice murder and other related offenses. He contended that prosecutorial misconduct deprived him of a fair trial. The record showed that during opening statement the prosecutor used a PowerPoint slide show. One slide read, "Defendant's Story Is a Lie" and another read, "People Lie When They Are Guilty." Over appellant's objections, the slides were immediately taken down and the trial court gave curative instructions. Appellant did not ask for a mistrial. Since the jury was properly charged on burden of proof, there was no due process violation.

Additionally, the Court found that the trial court did not violate OCGA § 17-8-75 with regard to the two slides. This statute provides "[w]here counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same. On objection made, the court shall also rebuke the counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his discretion, he may order a mistrial if the prosecuting attorney is the offender." The Court found that the statements were outside the evidence because they were made during opening statements. However, there was no error because it was doubtful that the prosecutor's saying "Defendant's Story Is a Lie" and "People Lie When They Are Guilty"

qualified as prejudicial within the meaning of OCGA § 17-8-75. The slides reflected evidence that the prosecutor expected to (and ultimately did) get admitted during the trial and argument that would be (and ultimately was) properly made during closing argument, so the same information later reached the jury appropriately. Moreover, reversal was not required because it was highly probable that any error did not contribute to the verdict.

### **Jury Charges**

*Howard v. State, S10A2028; S11A0026 (3/7/2011)*

Appellants, stepfather and stepson, were convicted of felony murder, numerous aggravated assault charges and other crimes. The evidence showed that White pulled a gun on the appellant stepson earlier in the evening. A few hours later, appellants opened fire on a vehicle carrying White and his friends, as it pulled into an apartment complex, killing a bystander. Appellant stepson contended that the trial court erred by failing to inform the jury of the definition of simple assault even though that offense is an essential element of aggravated assault. The Court stated that although the Court of Appeals held in *Coney v. State*, 290 Ga. App. 364, 368-369 (1) (2008) that it was "harmful error for a trial court to fail to charge the statutory definition of assault in a case where the jury could find a defendant guilty of aggravated assault based merely on criminal negligence rather than intent, [cit.] this is not such a case." Appellant's defense was mistaken identity and the undisputed evidence showed that appellants intentionally fired their guns, through the parking lot occupied by many pedestrians, and in the direction of the vehicle carrying White and his friends. Neither negligence nor reckless conduct was an issue in this case and thus, any error in the charge would not have affected the outcome of the case. "At this time, therefore, we do not need to address this Court's prior holding that '[t]here is no merit in [the] contention that a charge on simple assault ([cit.]) must be given in order to complete the definition of aggravated assault ([cit.]). The latter does not need the former to make it complete.'"

Appellant stepfather contended that a charge of voluntary manslaughter should have been given because the threat to his stepson with a gun provided at least slight evidence of provocation. The Court stated that it would

assume, for purposes of this appeal only, that the provocation involved may come from a person different from the homicide victim. However, words alone cannot constitute the serious provocation which will serve to reduce a killing from murder to manslaughter. Although more than mere words were used by White against the stepson, appellant was not present during the alleged provocation. Instead, the evidence showed that the incident was subsequently communicated to appellant, who picked his stepson up about 45 minutes after being called and obviously knew that he was uninjured, and the shooting occurred three to four hours after the initial confrontation. Thus, objectively, appellant's response to the provoking incident was unreasonable and the Court held, "as a matter of law" that the threat against the stepson allegedly committed by White with a gun did not rise to the level of a serious provocation of appellant sufficient to excite sudden, violent and irresistible passion in a reasonable person that would require a charge on voluntary manslaughter.

The Court also found that the trial court did not err by instructing the jury that it could consider the intelligence of the witnesses to decide their credibility. Noting *McKenzie v. State*, 293 Ga. App. 350, 352 (2) (2008), which described the charge as problematic and confusing, the Court also found that a reasonable juror could find a more intelligent witness to be more credible than a less intelligent one. Therefore, "even assuming that the better practice is to omit intelligence as one of the factors in the credibility charge, its inclusion is not reversible error."

### **Ineffective Assistance of Counsel**

*Crowder v. State, S10A1711 (3/7/2011)*

Appellant was charged in a 17 count indictment relating to the murder of his estranged wife. Prior to trial, he entered a plea to malice murder and was sentenced to life. He thereafter timely moved to withdraw his plea based on ineffective assistance of counsel. Specifically, appellant claimed that that his trial attorney told him he was unaffected by the newly amended OCGA § 17-10-6.1(c)(1) and that he would not have to serve a full thirty years before being eligible for parole.

The Court stated that there is no constitutional requirement that a defendant be in-

formed of his parole eligibility prior to entering a guilty plea for a guilty plea to be voluntary. However, if defense counsel makes an affirmative misrepresentation about the collateral consequences of a plea, such as parole eligibility, the misrepresentation may form the basis of an ineffective assistance of counsel claim. Here, counsel did not accurately state the law when he advised appellant that appellant would serve “probably 20 years or in excess of 20 years” and was not subject to serve a minimum of thirty years before he could be considered for parole eligibility. Thus, contrary to the trial court’s conclusion, counsel was deficient in that regard. Also, when considering whether appellant had been prejudiced, the trial court found appellant was not credible because at his guilty plea hearing he did not mention the issue of parole eligibility. But, the Court found, the fact that appellant stated that he “knew all of his rights” prior to entering his plea was an irrelevant basis to discredit appellant because, at the time, appellant had not in fact been correctly advised of his parole eligibility or its effect on his plea. Therefore, the trial court also erred when it found appellant had failed to establish prejudice on this basis. Accordingly, the Court remanded the case to the trial court to determine if appellant would have entered a plea if he had been properly advised that he would serve a minimum of 30 years.

## **Armed Robbery**

*Johnson v. State, S11A0257 (3/7/2011)*

Appellant was convicted of malice murder, two counts of felony murder, armed robbery, two counts of aggravated assault, possession of a knife during the commission of a crime, two counts of financial transaction card fraud and recidivism. The evidence showed that appellant was seen in the evening with the victim and others, entering the home of the victim. The following afternoon, the victim was found dead in his home. Appellant was later seen on videotape making ATM withdrawals using the victim’s debit card.

Appellant contended that the evidence was insufficient to support his conviction for armed robbery of the debit card. Under OCGA § 16-8-41 (a), “[a] person commits the offense of armed robbery when, with intent to commit theft, he or she takes property of another from the person or the immediate presence of another by use of an offensive weapon.” The

statute requires that the offensive weapon be used as a concomitant to a taking which involves the use of actual force or intimidation (constructive force) against another person. Here, the Court found, the evidence failed to establish whether appellant first took the debit card and then killed the victim or whether he killed the victim and then took the debit card. Under the former scenario, appellant would not be guilty of armed robbery because the theft was completed before force was employed against the victim. Under the latter scenario, appellant would be guilty of armed robbery. Because the evidence incriminating appellant of armed robbery was wholly circumstantial and both scenarios were equally reasonable, the Court concluded that the evidence was insufficient for a rational trier of fact to have found appellant guilty of armed robbery beyond a reasonable doubt. His conviction for armed robbery was therefore reversed.

## **Character Evidence; Plain Error**

*Collier v. State, S11A0050 (3/7/2011)*

Appellant was convicted of malice murder. He contended that the trial court erred by excluding evidence of the victim’s propensity for violence when intoxicated and his reputation for carrying dangerous weapons. A victim’s general reputation for violence, including his carrying of dangerous weapons, is inadmissible in a murder trial unless the defendant makes a prima facie showing that 1) the victim was the aggressor, 2) the victim assaulted the defendant, and 3) the defendant was honestly attempting to defend himself. To meet this three-pronged test, appellant relied upon his own testimony showing that the intoxicated victim started an argument and tried to hit appellant with a pipe before appellant took it away, that the victim then swung at him with his fist, that appellant then struck the victim in the head with the pipe, and that, while the victim was staggering and reaching towards his pocket, appellant struck him on the head a second time with the pipe even though there was nothing to indicate to him that the victim had a weapon in his pocket. The Court held that this testimony failed to show that appellant was honestly seeking to defend himself either time that he struck the victim with the pipe. Thus, appellant had already disarmed the victim before striking him the first time and,

after that first blow with the metal pipe, the victim neither committed nor demonstrated the ability to commit any further assault against him. Justification may not be based on a deadly assault which has completely ended, unless the assailant has some further apparent ability to continue it. Furthermore, verbal threats and fisticuffs do not justify the use of deadly force. The Court also rejected appellant’s argument that the three-pronged test should not be used to determine whether the victim’s reputation for violence is admissible, because it was not used to determine whether the jury should be charged on justification. Since the test is an essential and long-standing prerequisite to application of the reputation exception to the venerable rule that evidence of a victim’s character is inadmissible, the Court reaffirmed the three-pronged test in this context regardless of whether it has a role to play in determining the applicability of instructions on justification.

Finally, the Court held that the trial court did not commit plain error in charging the jury on impeachment. The trial court charged that “[t]o impeach a witness is to prove that the witness is unworthy of belief. A witness may be impeached by disproving the facts to which the witness testified or proof that the defendant has been convicted of the offenses of Violation of the Georgia Controlled Substances Act.” Since appellant did not object at trial, the Court “assumed” that a plain error analysis was applicable pursuant to OCGA § 17-8-58 (b). The trial court neither suggested that it found appellant’s testimony less than credible, nor did it otherwise impermissibly comment on the evidence by simply recognizing that the drug convictions were the only ones offered for impeachment purposes.

Justice Nahmias issued another long special concurring opinion regarding the standard of review of jury instructions where appellant fails to object prior to deliberations under OCGA § 17-8-58, as amended in 2007. He argued that under OCGA § 17-8-58 (b), “we need not ‘assume’ that plain error review is proper in this case; § 17-8-58 (b) clearly says that it is.”

## **Search & Seizure; Roadblocks**

*Jacobs v. State, A11A0107 (2/28/2011)*

Appellant was convicted of DUI. He contended that the roadblock at which he

was stopped was illegally constituted because it was not made by a supervisory officer at the programmatic level. The State was required to show, in part, that the roadblock was ordered by a supervisor rather than by officers in the field and was “implemented to ensure roadway safety rather than as a constitutionally impermissible pretext aimed at discovering general evidence of ordinary crime.”

The Court found that the State met its burden. The captain who initially screened appellant at the roadblock was a supervisor by virtue of the fact that her rank and job duties required her to supervise the work of a number of officers of subordinate rank, even though she supervised those subordinates in the field, rather than from behind a desk. On whether the State proved that the roadblock was implemented at the “programmatic level for a legitimate primary purpose,” the Court noted that Georgia appellate decisions have not precisely defined what it means for a decision to be made at the programmatic level, but concluded that the captain’s decision to implement the particular roadblock that resulted in appellant’s arrest was made at the programmatic level for a legitimate primary purpose because she decided to set up the roadblock to carry out the directive of her superior officers to conduct road safety checks at a prescribed frequency. Her uncontradicted testimony that she was expressly authorized to plan and implement roadblocks was sufficient to establish that fact, regardless of whether this delegation of authority was memorialized in a written manual or policy. Further, the fact that she also who worked the roadblock did not mean that the roadblock was not implemented at the programmatic level. There was no evidence that she spontaneously decided in the field to conduct the roadblock or that the roadblock had any other characteristic of a roving patrol. Thus, appellant’s argument that he was stopped at a highway roadblock that was implemented by a field officer, rather than by a supervisor at the programmatic level, was without merit. Accordingly, the trial court properly denied his motion to suppress.

### **Trafficking in Methamphetamine**

*Aquino v. State, A10A2246 (3/2/2011)*

Appellant was one of five men charged with trafficking in methamphetamine. He

was tried first, separately, and convicted. He contended that the evidence was insufficient to support his conviction. The Court agreed and reversed. The evidence showed that through the use of a confidential informant, who did not testify, the police targeted a particular house. Men were seen driving up to the house and later leaving. When the police executed a search warrant, appellant was found outside the house. He had keys to the house and the evidence showed that unbeknownst to the landlord, the locks to which appellant had correct keys, had been changed without her consent. Appellant also he been seen opening the door of the house earlier the same evening on the day of his arrest, holding a black bag that could have been the bag that held the drugs; his driver’s license was found in a bedroom; and he was in possession of a key to a Corvette parked on the premises whose license tag was found in the basement, which held a strong odor of acetone.

The Court found that this evidence was not sufficient to prove appellant had actual or constructive possession of the methamphetamine found in the main level of the house. Presence at the scene of a crime is not sufficient to show that a defendant is a party to the crime under O.C.G.A. § 16-2-20. Even approval of the act, not amounting to encouragement, will not suffice. Moreover, where the evidence on the possession of contraband is entirely circumstantial, it is usually sufficient to convict where the proof shows the premises to be occupied by and under the control of the accused, but if the proof also shows that others than the accused have equal right of access and occupancy it is usually insufficient. There was evidence here that others were in the house on the night of the arrest; documents such as licenses, checks, and real estate documents for several other people were located in the house; a man named Hernandez paid part of the rent four days earlier, yet he was not indicted and neither his whereabouts nor his role were explained at trial; and an officer admitted that there were other unidentified people at the house on the night before the raid who could have been responsible for the drugs. Thus, several other people with access to the house are unaccounted for and were not charged. Moreover, despite the keys to the house and the car, the changed locks, the license and the tags, or even his appearance in the open front door holding a black bag, there was nothing in this case linking appellant to the drugs or

manufacturing equipment in the house.

### **Theft by Taking; Sentencing**

*Porter v. State, A11A0288 (2/28/2011)*

Appellant was convicted of felony theft by taking. He contended that the trial court erred in not sentencing him to misdemeanor theft by taking because the State failed to prove the value of the stolen items to be above \$500. The Court agreed and remanded for resentencing.

Under OCGA § 16-8-12, a person convicted of theft by taking “shall be punished as for a misdemeanor,” but if the stolen property exceeded \$500 in value, then a felony sentence of one to ten years may be imposed. Appellant was convicted of taking an aluminum slide, a ladder, and fishing poles. The proper measure of value is the fair cash market value either at the time and place of the theft or at any time during the receipt or concealment of the property. The testimony that the fishing poles were worth \$60, which was based on personal experience in buying them, was sufficient to establish their current fair market value. Also, the jury could find the value of the extension ladder, an everyday object, was worth \$150, based on the owner’s testimony. But the State did not establish the fair market value of the aluminum slide. The testimony of the owner as to its value without giving reasons therefor was insufficient. Here, the owner gave no reason for her opinion as to the current fair market value of the slide, explaining that it would depend on the current value of scrap metal, of which she had no knowledge. Although the owner testified that the purchase price was \$400, evidence of purchase price, standing alone, is insufficient to establish the fair market value of the property. Thus, although the State proved beyond a reasonable doubt that appellant committed the offense of theft by taking, the evidence was insufficient to establish that the current fair market value of the stolen items exceeded \$500. Accordingly, the 10-year felony sentence imposed by the trial court was vacated, and the case remanded with directions that sentencing be imposed for misdemeanor theft by taking.

### **Search & Seizure; Refreshing Recollection**

*In the Interest of H. A., A10A2130 (2/28/2011)*

Appellant was adjudicated delinquent for

acts that, if committed by an adult, would constitute burglary. The evidence showed that a resident saw a vehicle pulling into his driveway. The vehicle occupants seemed surprised to see the resident and left after asking about someone who did not live there. The resident then called the police, giving a description of the vehicle and tag number. A BOLO was issued. Thereafter, a resident of another home came home and interrupted a burglary in progress at his home. A second BOLO resulted, which was different from the first BOLO. Thereafter, officers located a vehicle matching the first BOLO and stopped the vehicle.

Appellant contended that the stop was without probable cause because the BOLO did not match the one given for the burgled residence. He also argued that the trial court erred in not allowing the arresting officer to refresh his recollection as to the second BOLO with the audio tape from his patrol car. As to the latter issue, the Court held that the trial court erred. As long as the witness is willing to swear from his memory as refreshed, his memory may be refreshed by any kind of stimulus. The officer testified that he was present when the later BOLO dispatch was received but could not recall whether that dispatch contained a vehicle description; he further stated that a recording of that dispatch might refresh his recollection on the issue. Thus, the trial court's refusal to permit the officer to refresh his recollection was error.

However, the error was harmless and thus does not warrant reversal of appellant's adjudication because there was evidence that the officers received at least one BOLO dispatch matching the description of the minivan they stopped that day, which provided them with articulable suspicion to warrant their investigative stop of the vehicle. Also, there was evidence that, upon stopping that vehicle, the officers detected the odor of marijuana and a drug dog alerted to the vehicle; these circumstances provided probable cause for their warrantless search of the vehicle. That other BOLO dispatches may have contained different information did not render illegal the stop or subsequent search. Consequently, the court's refusal in the suppression hearing to allow the officer to refresh his recollection about the contents of one of the later BOLO dispatches did not contribute either to the court's decision on the suppression motion or to the court's adjudication of appellant as delinquent.

### **Prior Inconsistent Statements; Character of Victim**

*Daniely v. State, A10A1701 (2/28/2011)*

Appellant was convicted of voluntary manslaughter and possession of a knife during commission of a felony. He contended that the trial court erred in allowing the State to introduce, through a police investigator, evidence of a statement made to an officer shortly after the incident, to the effect that the witness had seen "something silver" in appellant's hand prior to the stabbing. The statement contradicted the witness's trial testimony that she had seen nothing in appellant's hand. A prior inconsistent statement of a witness who is present and available for cross-examination may be admitted as substantive evidence or as impeachment evidence if the time, place, person, and circumstances attending the former statement are called to the witness's mind with as much certainty as possible. The purpose of laying such a foundation is to give the witness the opportunity to explain or deny the prior inconsistent statement. If such a foundation is not sufficiently established, it is error for the trial court to admit a prior inconsistent statement.

The Court found that the witness was not given the opportunity to explain or deny the prior statement because she testified before the issue of the statement was raised at trial and was not confronted with it during her testimony. Thus, the witness was never questioned with the specificity necessary to establish the foundation for the admission of the statement. Without such a foundation, the trial court erred in admitting evidence of the prior inconsistent statement. However, the error was deemed harmless in light of the overwhelming evidence of guilt.

The trial court refused to allow appellant to introduce photographs depicting the victim with tattoos indicating gang affiliation. Appellant contended that these photos were relevant as evidence of the victim's prior acts of violence and supported of his claim that he acted in self-defense during the fight with the victim. The Court disagreed. The evidence concerned only the victim's possible gang affiliation. "Mere membership in a gang is not a specific act of violence." Therefore, the trial court did not abuse its discretion in excluding the evidence.

### **Informants; In-Camera Hearings**

*Hernandez v. State, A10A1742 (3/2/2011)*

In *Hernandez v. State*, 291 Ga. App. 562, 571 (3) (2008), the Court held that appellant was entitled to an in-camera hearing on whether the informant should have been revealed to him because appellant had made the necessary initial showing that the confidential informant's testimony was relevant, material, and necessary. The Court therefore remanded the case to the trial court to conduct the in camera hearing with the informant to determine whether failure to disclose the informant's identity was harmful error or not. If the trial court determined during the course of the hearing that the informer's testimony would corroborate the State's evidence, the State would not have been required to disclose the informer's identity to the defendant, and thus the failure to do so was harmless error. Conversely if, during the in-camera proceedings, the informant proved to be a material witness for the defense within the meaning of *Roviaro* and appellant's interest in knowing the informant's identity would have outweighed the State's interest in keeping that identity secret, then the failure to disclose the identity was harmful error. Following the in camera hearing on remand in the trial court, appellant appealed the decision by the trial court finding that the error was harmless.

The Court upheld the judgment. The trial court found that the informant's testimony sharply contradicted appellant's testimony that he never talked to the undercover officer about a methamphetamine transaction, and substantially corroborated the officer's testimony that appellant participated in negotiating the deal. Thus, disclosing the informant's identity would not have given appellant access to any exculpatory evidence; to the contrary, the informant's testimony was inculpatory. Therefore, the Court concluded, the error in failing to grant appellant's motion to disclose the informant's identity was harmless.

### **Rape Shield; Juries**

*Walker v. State, A10A1937 (3/3/2011)*

Appellant was convicted of numerous counts of child molestation and aggravated child molestation. He contended that the trial court violated his Sixth Amendment right

of confrontation by barring evidence under the Rape Shield Statute that the 8-year-old victim (1) saw sexually explicit photographs of her mother, (2) overheard a conversation about the taste of semen, and (3) made a prior false allegation of molestation. Regarding both the sexually explicit photographs and conversation, the Court agreed with the trial court's decision to bar this evidence from being introduced at trial. In the absence of a showing of relevance, evidence of a child's exposure to sexually explicit material is clearly inadmissible. Here, any alleged exposure to the sexually explicit photographs of her mother or her mother's sexually explicit conversation was wholly irrelevant to the issue of whether appellant committed the acts alleged by the victim and was thus properly excluded by the trial court. As to the alleged prior false allegation of molestation, the Rape Shield Statute does not prohibit the introduction of evidence that a victim has made prior false accusations of sexual misconduct. But, a trial court must, before admitting such evidence, make a threshold determination outside the presence of the jury that a reasonable probability of falsity exists. While the trial court was faced with conflicting evidence as to the truth or falsity of the victim's prior allegation, appellant failed to demonstrate that the trial court abused its discretion in concluding that appellant's proffered evidence did not establish a reasonable probability of falsity.

Appellant also contended that the trial court erred when, after learning that the jury had reached a verdict on some counts, it instructed the foreperson as follows: "I understand you want to recess for the night, but this is what I'm going to ask you to do. Go back as foreperson, poll the jury. And if, in fact, you have reached a final judgment on those counts, write it on a separate sheet of paper, ["W]e the jury, find count, whatever it is, count one, count five, six, eight, whatever, guilty or not guilty.[" Sign it, date it, fold it over. But only after you talk to the jurors and you are fixed in that decision. . . . And then come back and I'll give you further instructions about recessing for the night." After retiring to deliberate on these instructions, the jury surprised the court by returning with a guilty verdict on all counts. Citing *Disby v. State*, 238 Ga. 178 (1977), the Court held that the instruction was not error. The fact that the jury decided to continue in its deliberations and reached a verdict on all

counts did not mean that the trial judge's instruction was premature, improper, or unduly suggestive, because the judge's actions did not improperly curtail the jury's consideration of the remaining counts.

### ***Attempted Manufacturing of Methamphetamine; Possession of a Firearm During Commission of a Crime***

*Davenport v. State*, A10A1750; A10A1751 (3/2/2011)

Appellant was convicted of attempting to manufacture methamphetamine and three counts of possessing a firearm during the commission of a felony, all of which arose from a vehicle stop. He challenged the sufficiency of each conviction. Specifically, appellant argued that the evidence was insufficient to support a finding that he took a substantial step toward committing the crime of manufacturing methamphetamine because (1) the officers did not locate all of the items necessary for the production of methamphetamine, (2) the items present each had a legal use, and (3) the single pack of antihistamines found would only produce a small amount of methamphetamine. The Court disagreed. The evidence presented at his trial showed that appellant's SUV contained most of the ingredients and components necessary for the clandestine manufacturing of methamphetamine (some of which were in rather large quantities). Moreover, the State presented expert testimony that these items, when used together, indicate that methamphetamine is being produced. Further, the officers located methamphetamine in the vehicle, and a co-defendant told an officer that appellant was a "big time meth cooker." Finally, appellant was found to have methamphetamine in his system. The Court also added that while it was certainly true that much of the evidence consisted of common household items, these items in combination unquestionably presented evidence of the attempted manufacture of methamphetamine. "It is, of course, impossible for this Court to announce a bright-line rule or definitive checklist of the ingredients, components, and amounts that must be present to warrant a finding that substantial steps have been taken toward the manufacturing of methamphetamine. Such determinations will and must be made on

a case-by-case basis. And here, the jury was presented with sufficient evidence to infer that [appellant] had taken a substantial step toward the manufacturing of methamphetamine by transporting most of the chemicals, tools, and supplies necessary to commit that crime."

Appellant also contended that the evidence was insufficient to support his three convictions for possession of a firearm during the commission of a felony in violation of OCGA § 16-11-106 (b). The Court again disagreed. The search of appellant's SUV produced two handguns halfway under appellant's seat in a partially unzipped case and a .22 caliber rifle with a scope protruding from under the back-seat. The "possession" specifically proscribed by OCGA § 16-11-106 (b) is the act of having "on or *within arm's reach* of [one's] person a firearm . . ." (Emphasis supplied). The phrase "within arm's reach" eliminated "the narrow judicial reading given the provision formerly." Indeed, "[b]y adding the words 'within arm's reach,' the legislature extended the application of the statute to include weapons [to which] a felon had immediate access in addition to those weapons the felon actually had on his person." And when a defendant is charged under this statute, the evidence is sufficient to sustain a conviction when it is shown at trial that a firearm was within arm's reach of the defendant at any point during the commission of the crime, thus giving the defendant immediate access to the weapon. The jury may make such an inference from both circumstantial and direct evidence.

The Court found "considerable confusion surrounding the evidence necessary to sustain a conviction for violating OCGA § 16-11-106 (b) . . . [and] [g]iven this apparent confusion, we reiterate that 'possession' of a weapon for purposes of OCGA § 16-11-106 (b) is specifically delineated in the statute: The evidence must show that while committing or attempting to commit one of the specified crimes, one or more of the specified weapons was either on the defendant's person or within arm's reach of his person. The inclusion of 'within arm's reach' in OCGA § 16-11-106(b) defines constructive possession for purposes of this statute and makes the proof of possession for purposes of the statute narrower than the proof sufficient to establish constructive possession of contraband or weapons in other contexts. And to the extent that any of our prior opinions can possibly be read as suggesting otherwise,

those decisions are of no precedential utility in construing and applying the plain meaning of OCGA § 16-11-106 (b).”