

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 29, 2013

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Resource Prosecutor

THIS WEEK:

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- **O.C.G.A. § 40-5-20(a); Illegal Immigrants**
- **Sufficiency of Evidence; Prosecutorial Misconduct**
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- **Evidence Tampering; Motion for Mistrial**
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Competency to Stand Trial

Hall v. State, S13A0057 (3/25/13)

Appellant was convicted of malice murder in connection with a robbery which occurred in December, 2001. The record showed that the trial court ordered a mental evaluation of appellant in January 2001, and he was declared competent to stand trial following the evaluation. In February 2002, defense counsel filed a motion to have another psychiatric evaluation performed, which was denied after an evidentiary hearing. On the first day of trial, the trial court confirmed on the record that appellant was able to communicate with his attorney.

Appellant contended that the trial court denied him a fair trial by rejecting his request for the second psychiatric examination and failed to determine that appellant was able to understand the criminal charges against him. After hearing evidence about appellant's competency, the trial court found that the medical evidence showed that he had suffered no strokes or seizures while in jail, he was engaged in "a fair amount of malingering," and he could talk when he wanted to talk. In addition, the court found his writings were coherent, logical, and responsive, and his trial counsel said that appellant could respond to him in writing and these written responses indicated that he understood him. The trial court was able to observe appellant's behavior and demeanor when he testified during the hearing and later during the trial. Based on this evidence, the Court held that the trial court did not err in denying the motion for a second evaluation and in determining appellant was able to understand and assist in his defense.

O.C.G.A. § 40-5-20(a); Illegal Immigrants

Castillo-Solis v. State, S12A1601 (3/25/13)

The Court granted appellant's application for interlocutory appeal challenging the trial court's ruling that O.C.G.A. § 40-5-20(a), which prohibits driving in Georgia without a valid driver's license, is constitutional as applied to him, an illegal immigrant. The evidence showed that a police officer stopped appellant's van and after running the license plate number, determined that the vehicle's registration had been suspended. Appellant was unable to produce a valid driver's license, so the officer cited him for violating O.C.G.A. § 40-5-20(a). The code section provides as follows: "No person, except those expressly exempted in this chapter, shall drive any motor vehicle upon a highway in this state unless such person has a valid driver's license under this chapter for the type or class of vehicle being driven. Any person who is a resident of this state for 30 days shall obtain a Georgia driver's license before operating a motor vehicle in this state. Any violation of this subsection shall be punished as provided in Code Section 40-5-121, except the violation of driving with an expired license, or a violation of Code Section 40-5-29 [failure to carry driver's license when operating a motor vehicle] *or if such person produces in court a valid driver's license issued by this state to such person, he or she shall not be guilty of such offenses...*" (emphasis supplied).

Appellant challenged the exemption from the enhanced punishment of § 40-5-20(a) violations, the so-called "safe-harbor provision." The Court noted that the provision allows a driver who is able to produce a valid Georgia driver's license in court not merely to have his punishment reduced, but to be found not guilty of the § 40-5-20(a) violation, thereby receiving no punishment at all under that statute.

First, appellant contended that the law allowed him to obtain a license after the § 40-5-20(a) violation to obtain the benefit of the "safe harbor provision." The Court disagreed. The Court interpreted the statute as requiring the production in court of a Georgia driver's license that was valid *at the time the vehicle was being driven* when the violation occurred. Furthermore, there is no language in § 40-5-20(a) which a "subsequently obtained" license would

operate retroactively. Rather, the statute operates as if a licensee's failure to possess a license gives rise to a statutory presumption that the driver is driving without being licensed. Production in court of a Georgia driver's license that is valid at the time of the citation rebuts the presumption and precludes a conviction for driving without a valid license. Therefore, the Court held that appellant's premise of retroactive relief under the statute runs contrary to the language of the statute and the intent of the legislature.

Appellant also contended that because he is an illegal immigrant, his inability to have taken advantage of O.C.G.A. § 40-5-20(a)'s safe-harbor provision violates due process and equal protection. Not so, the Court found. First, the statute was not subject to heightened scrutiny because appellant did not fall within a suspect class as an illegal immigrant. Therefore, O.C.G.A. § 40-5-20(a) was analyzed under the rational basis standard. The Court noted that a licensing scheme rationally advances the State's legitimate interest in protecting the safety of the traveling public. The requirement that licensees keep their licenses in their immediate possession when driving, and the statutory presumption that drivers who refuse or cannot present their licenses on demand do not have a valid license, are rational means of enforcing the licensing requirement. Additionally, the Court found from an evidentiary perspective, it was rational and reasonable for the legislature to presume that Georgia courts are more familiar with Georgia drivers' licenses and can more readily assess whether the document the defendant produces in court is authentic and was in fact valid on the date of the citation.

Lastly, appellant contended that Georgia law was preempted by federal law. The Court stated that Georgia law is preempted when there is a direct conflict between state and federal regulation; where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress; or where Congress has occupied the field in a given area so as to oust all state regulation. Because appellant failed to cite any preempting law from Congress and regulation of motor vehicles fell within "the historic police powers" of the state, the Court found appellant's claim without merit.

Sufficiency of Evidence; Prosecutorial Misconduct

Jones v. State, S12A1626 (3/25/13)

Appellant was convicted of aggravated assault and a violation of O.C.G.A. § 16-15-1 et seq, the Georgia Street Gang Terrorism and Prevention Act. The evidence showed that following an altercation between a group of women and children at a public pool, two cars pulled into the parking lot in which appellant was a passenger. A witness then observed the group of men loading weapons after exiting their vehicles. An officer at the scene then noticed a third vehicle approach and park across the street from the pool. The occupant exited, walked over to the parking lot, and began shooting at the direction of the first two cars. The occupants of the first two cars returned fire. An innocent bystander was shot in the hip during the exchange in which appellant was seen with a .22 caliber pistol. Police found the shell casing from appellant's weapon and later located the weapon in the trunk of his grandmother's vehicle.

Appellant first contended that the evidence was insufficient to sustain his aggravated assault conviction. The Court noted that although appellant was not seen firing his weapon, the evidence from the record did show that he was involved in the gun battle. The Court held that a rational jury could have inferred that appellant shared a common criminal intent to engage in a gunfight in the presence of the innocent bystanders at the pool. Additionally, there was sufficient evidence for a rational trier of fact to find that appellant was a party to the crime of aggravated assault under the doctrine of transferred intent because the unintended victim received the result of an unlawful act directed at another individual. Therefore, the Court held the evidence adduced at trial was sufficient to sustain the aggravated assault conviction.

Appellant also challenged the sufficiency of the evidence to sustain his conviction under the Street Gang Act. The indictment charged appellant with association in the "Southside Bloods," and in order to violate the Act, the State was required to show that appellant was, in fact, associated with the Southside Bloods, that the Southside Bloods was a "criminal street gang," that appellant committed a predicate act of "criminal street gang activity,"

namely the aggravated assault upon the victim, and that the commission of the predicate act was intended to further the interests of the Southside Bloods. The Court found that although there was some evidence presented at trial about the existence and activities of the Southside Bloods, the State failed to adduce any evidence that appellant was associated with the Southside Bloods or that his commission of an aggravated assault was intended in any way to further the interests of the Southside Bloods. No witness testified that appellant was a member of the Southside Bloods. No witness testified that those accompanying appellant at the time of the shooting were members of the Southside Bloods. No witness testified that appellant was associated in any way with the Southside Bloods. And although officers testified at trial that members of the Southside Bloods often display certain symbols and colors, no evidence was presented that appellant or any of his accomplices displayed those symbols or colors, either on the day of the shooting or at any other time.

Next, appellant contended that the trial court erred by failing to respond as required by O.C.G.A. § 17-8-75 when the prosecutor spoke in his closing argument of matters outside the record. The record showed that during closing argument, the prosecutor attempted to link appellant to an earlier gang-related shooting in a public place. Testimony had only shown that members of the “blood” gang were involved and no connection was established to appellant in the record. Appellant timely objected to the statement and moved for a mistrial, but the court denied the motion and the prosecutor stated he would retract his statement. However, the prosecutor continued to mention the prior incident and appellant’s counsel again objected and asked for an admonishment and curative instruction, to which the trial court gave only the standard jury charge that opening statements and closing arguments are not evidence. After arguing that the instruction was insufficient for the error, the trial court refused to give any further instruction. The Court held that because the prosecutor made a statement in his closing argument about a prejudicial matter which was not in evidence, it was the duty of the court to interpose and prevent it under O.C.G.A. § 17-8-75. And when appellant timely objected, the court also was required to rebuke the prosecutor and by all needful and proper instructions to the jury

endeavor to remove the improper impression from their minds, or if the trial court thought it necessary, to order a mistrial. The Court held that the curative measure was inadequate under O.C.G.A. § 17-8-75 because the evidence against the appellant was not overwhelming, and it was highly prejudicial for the prosecutor to argue that he had been involved in a prior gang shooting. Therefore, any error was not harmless and the Court reversed the aggravated assault conviction.

Brady; Effective Assistance of Counsel

Charleston v. State, S12A1990 (3/25/13)

Appellant was found guilty along with his co-defendant for malice murder. The record showed that both defendants visited the victim on several occasions regarding the possession and sale of a firearm to appellant. The night of the murder, the victim’s girlfriend heard an exchange of obscenities outside the apartment before hearing the single gunshot that killed the victim.

Appellant contended that the State failed to put the victim’s brother on its witness list, as required by O.C.G.A. § 17-16-3, and that the trial court erred in not granting him a continuance before the brother testified. However, the Court held that appellant failed to raise this discovery objection or move for a continuance in the trial court, and was therefore barred from raising the issue on appeal. Additionally, to the extent appellant contended that the State violated his right to due process by failing to disclose *Brady* evidence to the defense before trial of the substance of the brother’s statement, the Court explained that the brother’s suspicions regarding the girlfriend’s possible involvement were nothing more than uncorroborated speculation that, even if true, would have done little to rebut or mitigate appellant’s guilt.

Appellant also contended that counsel was ineffective in failing to object to the brother’s testimony on the ground that the State failed to put him on its witness list as required by O.C.G.A. § 17-16-3. However, the Court noted, appellant offered no evidence at the motion for new trial hearing to show how he could have benefitted from a continuance or that the State acted in bad faith in leaving the victim’s brother off its witness list. Therefore,

the Court held, appellant failed to show that there was a reasonable probability that the outcome of the trial would have been different.

Evidence Tampering; Motion for Mistrial

Jackson v. State, S12A2083 (3/25/13)

Appellant was convicted for fatally shooting his girlfriend and burning her body inside her vehicle to conceal her death. The evidence showed that appellant and the victim were driving around in the victim’s vehicle. Sometime after 11 p.m., they picked up appellant’s friend and while near a stop sign, appellant and the victim started to argue. Appellant’s friend testified after the altercation, he saw appellant pull out a gun and shoot the victim in her face. After saying he “didn’t mean to do it,” appellant began driving again. The friend said he observed that the victim’s body stopped moving, at which point he presumed that she was dead. Later that evening, the appellant was seen walking away from a distant fire and also wearing a different shirt from earlier that night.

The Court held that the evidence presented at trial was sufficient to authorize a rational trier of fact to find appellant guilty beyond a reasonable doubt of the crimes for which he was convicted. Although the evidence was sufficient to authorize appellant’s conviction for tampering with evidence, the Court held that the appellant committed misdemeanor tampering, rather than felony tampering because he tampered with evidence in his own case. Therefore, the ten-year sentence imposed on appellant for tampering was vacated and the case was remanded for imposition of a sentence for misdemeanor tampering.

Next, appellant alleged the trial court erred when it denied his motion for mistrial when a portion of the videotape of appellant’s non-custodial statement revealed to the jury appellant’s prior criminal conduct. The record showed that there was a brief mention made on the videotape of a “possible” prior drug arrest concerning appellant. At the mention of the drug arrest, the trial court immediately ordered the prosecutor to stop playing the videotape, sustained defense counsel’s objection, and gave a curative instruction to the jury to disregard any mention of “any other criminal offense” by appellant. The trial court then denied appellant’s motion for mistrial. Here,

the Court held, there was no abuse of discretion in the denial of mistrial. The immediate curative instruction by the judge and cessation of the tape preserved the appellant's right to a fair trial.

Bruton

Dulcio v. State S12A1371; S12A1372 (3/25/2013)

Dulcio appealed his convictions for malice murder and possession of a firearm during the commission of a felony, and co-defendant Morrison appealed her convictions for felony murder while in the commission of aggravated assault and possession of a firearm during the commission of a felony, all in connection with the fatal shooting of the victim. The evidence showed that the co-defendants and two other individuals were involved in an escort service and had received a call from the victim requesting the services of a prostitute. Another prostitute had told the group that the victim kept at least \$40,000 in cash in his apartment and the escort service sent Morrison as a prostitute over with Dulcio and another individual to rob the victim. Upon arrival, Dulcio shot the victim with a pistol and fled while Morrison remained in the vehicle.

First, Morrison contended that the trial court committed reversible error when it denied her motion for mistrial after a State's witness gave testimony that a co-indictee, who was a fugitive at the time of trial, allegedly told him that the murder was Morrison's fault. She urged that the statements were hearsay and violative of *Bruton v. United States*, 391 U.S. 123 (1968). The Court found that the trial court twice instructed the jury to strike the comments from its consideration and to disregard that portion of the testimony, and thus, there was no abuse in failing to grant a mistrial. Additionally, the Court held that the statements did not constitute inadmissible hearsay. Pursuant to former O.C.G.A. § 24-3-5, statements made by a co-conspirator during the pendency of the criminal project, including in the concealment phase, are admissible against all other co-conspirators. Here, the evidence showed the existence of an agreement among the four co-indictees to forcibly rob the victim, which triggered the events culminating in the victim's murder. Thus, the Court held that the statements made by the co-indictee qualified as those made by a co-conspirator.

Additionally, the Court noted that *Bruton* only prohibits statements by a non-testifying co-defendant that directly inculpate the defendant; it is not violated if a co-defendant's statement does not incriminate the defendant on its face and only becomes incriminating when linked with other evidence. Here, the meaning of the statement about Morrison was unclear; it was interpreted by the trial court as the out-of-court declarant saying that Morrison was responsible for an argument which ensued prior to the shooting.

Merger; Sentencing

Daniels v. State, A12A1982 (3/13/13)

Appellant was convicted of 11 counts of sex crimes against a minor. All of the counts for which he was charged occurred over a wide range of time from 2005 through 2008. In each pair of counts, appellant was charged with one of various types of sexual misconduct toward the victim. In one count he was alleged to have committed the misconduct in two separate time periods occurring before July 1, 2006; in the other count he was charged with the identical misconduct in two separate time periods occurring on or after July 1, 2006. For example, in Counts 1 and 2, appellant was charged with child molestation in that he "did touch said child upon her vagina with his hand." In Count 1, it was alleged that the crime occurred "on or about" the periods between January 1, 2005 and September 20, 2005, and the periods between October 7, 2005 and June 30, 2006, "the exact dates being unknown." Then for Count 2, it was alleged that the crime occurred "on or about" the periods between July 1, 2006 and September 25, 2007, and the periods between March 7, 2008 and May 29, 2008, "the exact dates being unknown." Thus, a total of 6 pairs of counts were charged in this fashion because on July 1, 2006, the legislature modified and amended the punishment provisions related to the crimes.

Following trial, the jury returned a verdict against appellant, and he was sentenced on all 11 counts for which he was convicted. In Counts 6, 8, and 12, appellant was given the post-July 1, 2006 sentence even though each of these counts alleged conduct occurring before July 1, 2006. Appellant then moved for a new trial and amended his motion, to assert that the court erred by applying an ex post facto

sentence on Counts 6, 8, and 12. In reply, the State agreed that appellant was sentenced in violation of ex post facto prohibitions on Counts 6, 8, and 12, and it added that he was also improperly sentenced pursuant to O.C.G.A. § 17-10-6.2 on Counts 1, 3, 6, 8, and 12 because that statute went into effect on July 1, 2006.

First, appellant challenged the trial court's failure to merge for sentencing one count in each of five pairs of counts in which the crimes alleged were identical but the date range was different. He contended the sentence on one count in each pair was void because it should have merged into the corresponding count for sentencing, given that the only difference in the counts in each pair was the alleged range of dates when the crimes were committed.

The Court agreed. The trial court charged the jury that the dates were not material averments. The Court held that the State charged the appellant with identical conduct in each pair of counts without identifying specific particularized incidents. The date ranges alleged in each count were not made material allegations of the indictment, and they were described as being "on or about" a certain set of dates with "the exact dates being unknown." Therefore, appellant's charges were merged with both counts of each pair.

Next, appellant contended that the rule of lenity dictated that he should have been sentenced under the pre-July 1, 2006 version of the statutes. The Court again agreed. Because the jury was instructed that the dates were not material averments, it may have found appellant guilty on both counts of each pair based on events occurring prior to July 1, 2006. Thus, Court held that appellant cannot be given the higher sentence imposed by the newer version of the sentencing provision.

Search & Seizure; Consent

Corey v. State A12A2365 (3/13/2013)

Appellant was charged with DUI and challenged the evidence on the ground that it was obtained illegally. The evidence showed that a uniformed officer received a dispatch from an off duty officer who saw a vehicle driving erratically and thought the driver could be intoxicated. When the on duty officer met with the off duty officer in a residential area, the on duty officer learned that appellant had

just pulled into her garage. The officer then pulled into the base of the driveway and saw appellant inside the garage. The officer began a conversation with appellant and walked into the garage to continue speaking with her. It was undisputed that when the officer engaged the appellant at the top of the driveway, she was getting ready to enter her home. The officer stated that, “she was hand on door handle, foot on step,” and she was getting ready to lower the garage door as well. Upon further investigation, the officer suspected that appellant had consumed a mixture of alcohol and medication and further decided that appellant was not free to leave the garage. After three field sobriety tests, the officer determined that appellant was less safe to drive as a result of the influence of drugs or alcohol, and he decided to take her into custody.

Appellant first contended that the trial court abused its discretion by finding that the officer was authorized to enter her garage without a warrant, exigent circumstances or consent. The Court stated that the Fourth Amendment protects the home and curtilage and is limited by the open fields doctrine. In Georgia, open fields include “the yards and grounds of a particular address, its gardens, barns, and buildings.” A court must also consider the facts that bear on whether an individual may treat an area in question as part of the home itself by considering the proximity of the area claimed to be curtilage, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

The evidence showed that appellant used her garage for parking and for personally entering the living quarters of the home and on the occasion in question, she intended to close the garage door as a part of entering the home. There was no evidence that appellant routinely left her garage door open or had left it open that day while she was out. Additionally, there was no evidence that showed she allowed deliverymen or other members of the public to approach the home through the garage to reach the interior door to the home. The Court held that appellant treated her garage as a part of the home and maintained an expectation of privacy. Therefore, the garage came within the protection of the Fourth Amendment.

Next, the Court addressed whether the officer had probable cause for arrest or exigent circumstances to enter appellant’s garage. Here, the Court stated that there may have been articulable suspicion of DUI, but not probable cause for arrest. The Court also noted that the threat of dissipating evidence of an individual’s blood alcohol level did not justify an officer to enter areas protected by the Fourth Amendment under exigent circumstances because the operation of the car and consequent threat to public safety had ended. Thus, the Court held that the officer’s entry into the garage was not supported by probable cause for arrest or exigent circumstances.

Appellant then contended that she did not consent to the officer’s entry into her garage. The State has the burden of proving that the consent was voluntary under the totality of the circumstances and that it was not the result of express or implied coercion. Here, the officer admitted that he did not ask appellant for permission to enter into the garage. However, the officer said he inferred consent by appellant’s behavior. However, the Court held, the mere fact that appellant continued the conversation with the officer after his point of entry into the garage may have shown consent to continue a conversation, but not consent to enter the garage. In order to interpret the continued conversation after the illegal entry as consent for the officer’s presence in the garage, the State would have to have shown that the consent was “sufficiently attenuated or distinguishable from the illegality to be purged of any taint,” as opposed to “the product of and tainted by the illegality.” The Court found that the evidence showed that during the initial encounter, appellant expressed concern about her children and she stated that she had to urinate, which the officer did not allow her to do. The Court held that appellant was held against her will and not free to leave, and therefore, the State failed to prove that appellant’s subsequent conversation with the officer was not sufficiently attenuated from the illegal entry to be purged from the taint.

Enticing a Child; Asportation

Tudor v. State, A12A1676 (3/19/13)

Appellant was convicted of two counts of aggravated sexual battery, four counts of child molestation, and one count of enticing

a child for indecent purposes. The evidence showed that appellant performed indecent acts on minors while his wife was away from the home. On one occasion, he called the two minors over from the living room sofa to the kitchen table to commit the sexual offense.

Appellant attempted to expand the application of the Georgia Supreme Court’s decision in *Garza v. State*, 284 Ga. 696 (2008), regarding kidnapping offenses, by arguing that the evidence against him failed to satisfy the asportation element required for enticing a child for indecent purposes under O.C.G.A. § 16-6-5(a). The Court, however, rejected his “invitation.” Both the Court of Appeals and the Georgia Supreme Court have held that the element of “soliciting, enticing, or taking” of a child requires asportation—i.e., to satisfy this element of the O.C.G.A. § 16-6-5(a), the evidence must show some movement of or by the child. However, the Court held, appellant’s reliance on *Garza* was misplaced. In *Garza*, the Supreme Court grappled with the serious concerns that emerged from the distinctive elements of kidnapping, not the crime of enticing a child for indecent purposes. Especially, the Supreme Court was concerned in *Garza* with the principle that slight movement of the victim would satisfy the asportation element of the kidnapping statute even though there had been no actual abduction or “stealing away” of the victim. Moreover, the Court found, *Garza*’s four part test was inapplicable as applied to enticing a child because the crimes of kidnapping and enticing a child for indecent purposes punish very different conduct. Additionally, while slight movement of a victim during the commission of some other crime may not represent the evil the kidnapping statute is designed to address, the same cannot be said for the slight movement of a child for indecent purposes. Indeed, the statute at issue is designed to punish any movement of a child, if that movement is for the purpose of sexually molesting, assaulting, or battering the child. Moreover, the purpose of the enticing statute — which is to punish the movement of any child for the purpose of indecent acts against him — means that the movement it prohibits is, by definition, movement that presents a significant danger to the victim independent of the danger posed by any separate offense. Finally, unlike a true kidnapping, the enticement of a child for indecent purposes will often be “incidental” to other crimes, including the

crimes that were committed when indecent acts were committed against the child. The fact that asportation of a child might be incidental to the molestation of that child, however, does not mean that the movement of the child, standing alone, cannot constitute a separate offense. For these reasons, the Court stated, it declined to extend the rationale of *Garza* to O.C.G.A. § 16-6-5.

Thus, the Court held, the movement of the victims from the living room to the kitchen satisfied the asportation requirement of enticing a child for indecent purposes.

Search & Seizure

Kelley v. State, A12A2159 (3/18/13)

Appellant was charged with possession of cocaine and possession of tools for the commission of crime. The evidence showed that an officer attempted to stop a car that he observed speeding. The driver did not stop immediately but instead drove to a residence and parked in its driveway. The officer placed the driver in custody for attempting to elude police. By that time, a group of people had gathered around the appellant, who was sitting in the passenger seat of the car with his hands sticking out of the window. The officer dispersed the people and asked appellant to get out of the car. He then performed a pat-down search of appellant while appellant held his hands in the air. During the pat-down search, he felt in one of appellant's pockets a round object, slightly smaller than a piece of candy that he could not identify. When the officer asked appellant to identify the object, he reached toward his pocket. At that point, the officer handcuffed appellant, reached into his pocket and extracted a small bag of a substance later determined to be crack cocaine.

Appellant contended that the trial court erred in denying his motion to suppress, arguing that the officer had exceeded the scope of a constitutionally permissible pat down. The Court agreed. The evidence showed that the officer did not believe that appellant was armed and dangerous, only stating that he was "concerned" about the people who had approached the car at the house. Despite this admission, the Court further noted that even if the officer had articulated evidence of reasonable suspicion justifying the pat down, he nonetheless exceeded the scope of his search under *Terry*. A

Terry search, unlike a full search, is conducted for the purpose of ensuring the safety of the officer and of others nearby, not to obtain evidence for use at trial. However, an officer may intrude beneath the outer surface of a suspect's clothing if he comes across something that feels like a weapon and if he feels an object whose contour or mass makes its identity as contraband immediately apparent.

Here, the Court found that the officer did not express a "degree of certainty" in identifying the round object found in appellant's pocket. Furthermore, the Court held that an officer is not authorized during a pat-down search to intrude into a defendant's pocket to retrieve an item that the officer cannot identify, simply because the officer believes the item could be a weapon or could contain a weapon. Therefore, the Court held, the trial court erred in refusing to suppress the evidence seized from appellant's pockets.

Jury Trials; Waiver

Seitman v. State, A12A2287 (3/21/13)

Appellant was convicted after a bench trial of eight counts of serious injury by vehicle and one count of reckless driving. Appellant asserted that she did not voluntarily, knowingly, and intelligently waive her right to a jury trial. The record showed a pleading, signed by both appellant and her trial counsel, stating: "WAIVER OF JURY TRIAL. COMES NOW, the Defendant in the above styled case and files this her waiver of jury trial." Additionally, the trial court asked trial counsel before trial began if appellant had waived a trial by jury, and he replied, "Yes, Your Honor, we filed that."

The Court noted that appellant correctly observed that a waiver by counsel, standing alone, cannot suffice for the State to meet its burden. There must be some additional extrinsic evidence from which the trial court could conclude that the appellant's waiver was knowing and intelligent. Here, the State presented evidence that the attorney explained several options and consequences to the appellant, telling her that if she lost a three to four day trial, the "likelihood" of getting a greater sentence would be much greater. Furthermore, the experienced defense counsel testified that he discussed with appellant his belief that a judge would be more receptive than a jury to

a technical legal defense. The appellant was also highly educated; had been summoned to jury service; and had actually served on a jury. The Court held that the record as a whole supported the conclusion that appellant was informed about the advantages and disadvantages of a jury trial and that the trial court's conclusion that appellant waived her right to a trial by jury was not erroneous. In so holding, the Court rejected appellant's contention that to knowingly and intelligently waive a jury trial, a defendant must be informed *by the trial court* of all the complexities of the jury process.

Effective Assistance of Counsel

State v. Wofford, A12A2296 (3/19/13)

Wofford was convicted of several counts of aggravated child molestation against two victims which, according to the indictment, occurred between January 1, 2004 and September 19, 2005. Wofford filed a motion for new trial on the basis that his counsel was deficient by failing to call the victim's prior school teachers as impeachment witnesses. The record showed that during trial, defense counsel did not place Wofford on the stand. Defense counsel's trial strategy was to impeach the victims on cross examination and elicit testimony showing that the victims lacked credibility.

However, Wofford complained at the hearing on his motion for new trial that his counsel provided ineffective assistance by failing to call two former teachers of one of the victims to the stand during trial. First, a special education teacher, who had taught the victim during a part of the 2003-2004 school year, was asked whether the victim had a reputation in the school community for truthfulness or untruthfulness; the teacher responded, "She definitely had times when she was not truthful." That teacher further testified that, "at [victim's] age and where she was emotionally" during that school year, she would not have believed the child under oath. The second teacher called by Wofford at the new trial hearing had taught the victim's kindergarten class during the school year 2002-2003; she testified that the victim had a reputation in the school community for untruthfulness and that, at that time; she would not have believed her under oath.

Wofford's counsel then testified that he had not known any specific facts about the teachers. The only reference that "may" have established a connection to the teachers was from a doctor's report that counsel chose to overlook because that particular doctor "was then suffering" from dementia and "could offer nothing helpful to the defense." Therefore, the trial court held, in considering appellant's trial strategy of attacking the credibility of the victim, the failure to call the witnesses fell below a reasonable standard of professional assistance and that failure was prejudicial to Wofford, even though the court could not effectively conclude whether "this testimony would probably have little or no impact on the jury's consideration of the case."

The State then appealed, arguing that Wofford did not carry his burden of demonstrating ineffective assistance of trial counsel. Under the focus of the *Strickland* test, the Court first addressed the performance prong of the trial counsel. Attacking witness credibility falls within permissible trial tactics and the Court must always consider whether the defense counsel performance was within the wide range of reasonable professional assistance. Here, the Court found error because the trial court did not make an express finding that the lawyer should have reasonably known about the two teachers. Additionally, Wofford's counsel provided ample testimony at the new trial hearing as to how he sought to discredit the victims. The trial transcript provided numerous examples of this strategy, including one outcry witness that expressed concerns about the victim's truthfulness. Therefore, the Court held, without "resorting to hindsight," the tactics employed by the defense counsel to impeach the victims at trial amounted to reasonable professional judgment that did not fall outside the wide range of conduct. The Court therefore reversed the trial court's order for a new trial. Moreover, since Wofford failed to show deficient performance, the Court declined to address the prejudice prong of *Strickland*.

Jury Deliberations; Right to Be Present At Trial

Bryant v. State, A12A2394 (3/19/13)

Following a jury trial, appellant contended that the trial court abused its discretion by

dismissing a juror after "significant deliberations" had occurred. The record showed that the jury could not come to a verdict on appellant's charges late in the week. When it could not make a finding late Friday evening, the court allowed deliberation to continue Monday morning. When the trial reconvened, the court had received a call from juror 12 that she was at the emergency room at a hospital. The trial court related that it had verified, as best it could under the Health Insurance Portability and Accountability Act ("HIPAA") laws, that the juror was at the hospital, and provided the parties with a note signed by a registered nurse at the hospital that "[juror 12] is a patient at [the hospital]." The trial court informed the parties that it would allow the jury to continue deliberations with an alternate juror. Appellant objected and moved for a mistrial, asserting that continued deliberations after not being able to reach a consensus were putting "undue pressure" on the jury to reach a verdict. Over appellant's objection, the alternate was substituted in and the jury returned a unanimous verdict later that morning.

Appellant contended that the trial court made its decision to replace the juror without a hearing or inquiry or the presence of the State or appellant. The Court stated that the trial court must exercise its discretion in removing a juror, and it may effect such a removal even after deliberations have begun. However, there must be some sound basis upon which the trial judge exercises his discretion to remove the juror. Where the basis for the juror's incapacity is not certain or obvious, some hearing or inquiry into the situation is appropriate to the proper exercise of judicial discretion. Here, the trial court did not merely rely upon the juror's own claim of illness, but made an independent inquiry into the circumstances and then reported its finding to appellant and the State. It allowed both sides input before it determined that the juror would be replaced with the alternate. The Court held that the removal of juror 12 was proper.

Nevertheless a trial court commits error when it communicates with a jury in the absence of the defendant or his counsel because a defendant on trial must be present when the court takes any action materially affecting his case. Although appellant contended that he was absent from the discussion when the juror was dismissed and replaced with an alternate, the record reflected that his attorney

participated in the discussion. While the record did not reflect whether appellant himself was either absent or present, the absence of this information did not prove appellant was not present in the courtroom. Therefore, the Court concluded that the trial court proceeded properly by making sure appellant was present when necessary.

DUI; Miranda

State v. Mosley, A12A1830 (3/19/13)

Mosley was charged with DUI. The State appealed from the trial court's order granting his motion to suppress. The evidence showed that a deputy was dispatched to a convenience store after a store clerk called law enforcement because she witnessed a dispute in the parking lot between a man and a woman. Upon his arrival at the scene, the deputy observed Mosley and a woman standing next to a vehicle which looked like it had recently been in an accident. As the deputy approached the vehicle, Mosley attempted to leave, stating that he "just want[ed] to walk home." The deputy requested that Mosley return to the vehicle so that he could investigate the reason for the clerk's call. And as Mosley was walking toward him, the deputy observed that he was staggering and detected a strong odor of alcohol coming from his person. Then, in response to questions from the deputy, Mosley stated that he had been driving with his female companion—whom he had just encountered at a nightclub—when his vehicle got a flat tire and she became upset with him. Although Mosley at first stated that he would not perform field evaluations because he wasn't going to drive, he agreed after the officer requested he perform the field evaluations to see if he was safe to "walk away." Mosley's performance on the field sobriety tests lead to his arrest. The trial court suppressed the results, finding that Mosley was in custody and that the field sobriety tests were conducted without first informing Mosley of his Miranda rights.

The State contended that the video evidence at trial did not show that Mosley was in custody at the time he agreed to submit to the field sobriety test. In Georgia, it is well established that during the course of an investigation, a law-enforcement officer may temporarily detain an individual and that such a detention does not normally trigger the protections of *Miranda*. With respect to a DUI

investigation in particular, Miranda warnings are not required “while an investigating officer conducts preliminary questioning or field sobriety tests.” Once in custody, *Miranda* is triggered before any further field sobriety tests in order for the resulting evidence to be admissible. To determine custody, the court looks to see whether a reasonable person, one who is neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances, would conclude that his or her freedom of action was only temporarily curtailed and that a final determination of his or her status was merely delayed. The officer’s subjective belief of probable cause is wholly irrelevant unless the officer took an “overt step to communicate that belief.”

Here, after reviewing the video, the Court held that Mosley was not in custody for *Miranda* purposes. Although Mosley was not permitted to leave the scene during the course of the deputy’s questioning, there was nothing in the deputy’s words or actions that would cause a reasonable person to conclude that Mosley’s freedom of action was more than temporarily curtailed pending the outcome of the officer’s investigation. Furthermore, at no time did the deputy tell Mosley that he was under arrest. In fact, the deputy explicitly answered in the negative when Mosley asked whether he was under arrest. In view of all the circumstances, the Court found that the deputy was conducting field-sobriety testing for the very purpose of determining whether to take Mosley into custody. Consequently, the Court reversed the grant of the motion to suppress.

Law of the Case

Paradise v. State, A12A1892 (3/19/2013)

Appellant was found guilty of four counts each of aggravated child molestation, aggravated sodomy, and child molestation. His conviction was affirmed on appeal in 1994. Thereafter, in 1998, 2004 and 2006, he unsuccessfully sought to have his sentence overturned as void. In 2012, he filed a similar motion in an unsuccessful attempt to void his sentence.

While the State contended that appellant’s appeal should be dismissed as *res judicata*, the Court held that it was barred by the “law-of-the-case-rule.” O.C.G.A. § 9-11-60(h)

provides “any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be.” The rule not only applies to civil cases, but also to criminal cases. Here, the appellant’s appeal involved “substantially” the same subject matter before the Court that appellant had raised thrice before. Therefore, because appellant had previously litigated the issue, the Court concluded that the appellant could not raise the same issue again.

Search & Seizure; Inevitable Discovery Doctrine

Wildler v. State, A12A1904 (3/19/13)

Appellant was convicted of rape, aggravated child molestation, two counts of child molestation and two counts of sexual exploitation of a child based on acts he committed with a 15-year-old girl. The Court of Appeals affirmed the convictions, holding in part that his motion to suppress incriminating evidence found in a briefcase had been properly denied pursuant to the independent source exception to the exclusionary rule. The Georgia Supreme Court reversed that decision on the ground that the independent source doctrine did not apply. The Supreme Court remanded the case for consideration of the possible applicability of the inevitable discovery and third-party consent doctrines. On remand, the trial court found that both doctrines did apply and that the motion to suppress had thus been properly denied.

Appellant claimed that the trial court erred in concluding that the motion to suppress was properly denied under the inevitable discovery doctrine. The facts showed that the victim and another woman told an investigating officer that appellant had a briefcase containing evidence of the victim and appellant engaged in sexual acts. They informed the officer that the briefcase was at a home belonging to a friend of the appellant. The briefcase was at the home for “several months” before the officer had contacted appellant’s friend to turn it over to him. The officer then sent a 3rd party to retrieve the briefcase from appellant’s friend. The 3rd party testified that the officer gave her twenty dollars for gas to fill up her car when she delivered the briefcase. Once the officer had

possession of the briefcase, he obtained a search warrant to search its contents and discovered the evidence containing photographic images and videos of appellant and the victim.

Under the inevitable discovery doctrine, if the State can prove by a preponderance of the evidence that evidence derived from police error or illegality would have been ultimately or inevitably discovered by lawful means, then the evidence is not suppressed as fruit of an impermissible search or seizure. There must be reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued prior to the occurrence of the illegal conduct. Here, the Court held that even if the briefcase was seized illegally, the information possessed by the investigating officer would have been enough to confirm its location at the friend’s home to establish probable cause for a warrant. Furthermore, in the affidavit, the officer included the information that he had obtained prior to the seizure of the briefcase, including information provided by the victim as well as two other witnesses in the investigation. Therefore, the Court held, the trial court did not err in ruling that the contents of the briefcase would have been inevitably discovered as part of the lawful investigation of appellant.

Prosecutorial Misconduct; Discovery

Fuller v. State, A12A2116 (3/21/13)

Appellant was convicted of two counts of armed robbery and two counts of possession of a weapon during the commission of a crime arising from two separate incidents. Appellant contended that the State commented on the veracity of the officer witnesses by stating that the police department was overloaded with work. The record showed that the closing arguments were not transcribed. When appellant objected to the prosecutor’s statement, the prosecutor responded that he was merely pointing out that police officers have enough work and are not going to falsely accuse someone.

The Court stated that as a general rule, prosecutors are granted wide latitude in conducting closing argument, and defining the bounds of such argument is within the

trial court's discretion. This wide latitude encompasses the prosecutor's ability to argue reasonable inferences raised by the evidence. The prosecutor cannot state his or her personal belief as to the veracity of a witness. However, the prosecutor can urge the jury to draw such a conclusion from the evidence. Here, the State's closing comments that the officers would not falsely accuse someone were merely comments urging the jury to make a deduction about the officers' veracity from the facts, and the comments did not constitute an opinion about the officers' veracity.

Appellant also argued that the trial court erred in failing to issue curative instructions or declare a mistrial *sua sponte* based on this argument. The Court noted that it was within the purview of the trial court to issue a curative instruction *sua sponte*. Moreover, in the absence of a request for a mistrial, the trial court is required to act *sua sponte* only if there is a manifest necessity for a mistrial. And manifest necessity requires urgent circumstances. The Court determined there was no finding of "urgent circumstances" that required a "manifest necessity" for the trial court to declare a mistrial and that appellant failed to show any evidence that the trial court failed to comply with O.C.G.A. § 17-8-75.

Appellant also contended that the trial court erred in allowing the State to elicit testimony concerning his videotaped confession after the trial court ruled that the videotape was inadmissible under the discovery statute. At trial, Fuller objected to the admission into evidence of his videotaped interview based on the State's failure to produce a copy of the recording ten days before trial as required by O.C.G.A. § 17-16-4(a)(1). Although the trial court excluded the videotape from evidence due to the discovery violation, the trial court did not rule that appellant's statements were inadmissible. Thus, the Court found, contrary to appellant's argument, the State did not elicit testimony concerning the contents of the videotape in violation of the trial court's ruling under the discovery statute.

Right to Counsel

Hatcher v. State, A12A2039 (3/14/13)

Appellant was convicted on three counts of child molestation and one count of incest. Appellant contended that the trial court erred

in allowing him to represent himself, and argued that admission of hearsay statements violated his rights under the Confrontation Clause. The record showed that up until trial, the appellant had several occasions to discuss with the State and the trial court about his ability to retain counsel. On October 11, 2005 appellant assured the court that he was going to retain a specific counsel and had the financial ability to do so. Appellant was told calendar call for his jury trial was on December 5, 2005. On November 17, 2005 appellant stood before a different judge, appeared *pro se* again, but stated he had counsel. The court suggested that appellant had better make some effort to contact him. The State noted to the trial court that appellant had made the same representation during his last appearance. On December 5, 2005 appellant appeared *pro se* and the trial court inquired again as to why he didn't have an attorney present. Appellant then suggested that "I don't got no choice but to go with... a public defender." The trial court suggested appellant act urgently, stating "you know, the public defender... they don't like getting a case in one day before jury selection." Appellant then declined to work with the prosecutor about "working this matter out." The next day, appellant appeared for jury selection and again without an attorney. Appellant represented himself and after the jury was selected, the trial court urged him to retain counsel because his trial was not set to commence for another eight days. Appellant stated that he planned on doing so. Nevertheless, appellant showed up for trial without counsel. He then tried his case *pro se* and was convicted.

Appellant first contended that the trial court erred when it required that he represent himself without appointing counsel and failed to make a determination on the record that he had validly waived his constitutional right to counsel. The Court disagreed. For a non-indigent defender, the constitutional right to counsel only entitles him to be defended by counsel of his own selection whenever he is able and willing to employ an attorney and uses reasonable diligence to obtain his services. Since a non-indigent defendant's right to counsel is predicated upon his own diligence, a failure on his part to retain counsel may constitute a waiver of the right to counsel. Whether a particular defendant exercised "reasonable" diligence in obtaining counsel is question of fact to be determined by the trial court.

Here, the record showed that the appellant claimed over a period of three months that he was in the process of retaining counsel and was advised by the court to do so. Even following jury selection, the court reminded appellant that he was told at every appearance to hire counsel, after which he still insisted that he was planning to retain counsel for trial set to begin the following week. Thus, the Court held that the trial court correctly concluded that appellant did not exercise reasonable diligence in procuring counsel. Additionally, the Court found that appellant was not required to have received warnings of proceeding *pro se* because such warnings apply "only in the context of a waiver of the right to counsel by election of the countervailing right of self-representation."

The Court also held that appellant's statement that he had "no choice but to go with . . . a public defender" did not require the trial court to inquire as to whether he was indigent. The record firmly established that appellant claimed to be seeking counsel throughout the three month period. He first raised the issue of a public defender on the day of jury selection; he made no effort to apply for appointed counsel even after having another week before trial to do so; and then insisted, after suggesting a public defender, that he still planned to hire counsel for trial. Therefore, the Court found no error in the trial court allowing the appellant to represent himself during trial.

Sufficiency of Evidence; Merger

Smith v. State, A12A1726 (3/15/13)

Appellant was convicted of aggravated child molestation, child molestation, and two counts of cruelty to children in the first degree. The crimes occurred when the 7 year old victim and her mother moved in with appellant. Appellant first challenged the evidence sustaining his convictions of child molestation and aggravated child molestation. A victim of child molestation or aggravated child molestation need not be corroborated and the testimony of one witness is generally sufficient to establish a fact. Furthermore, witnesses are not required to utilize technical language to prove the commission of the acts. Rather, such testimony may be considered in context to provide meaning, and jurors can be presumed to have some knowledge of slang expressions in common vernacular. Here, the

victim's testimony, use of anatomical drawings, and use of the term "private parts" to describe the touching that occurred, authorized the jury to infer sexual contact between appellant and victim establishing the child molestation and aggravated child molestation charges as alleged in the indictment. Thus, the Court held that the victim's testimony was sufficient to support appellant's convictions for child molestation and aggravated child molestation.

Next, appellant challenged the evidence of his charge of cruelty to children in the first degree. The determination of what is cruel or excessive physical or mental pain is to be made by the jury. "Cruel" and "excessive" are adjectives which inherently require a consideration of degree; the law does not set a bright line but leaves to the trier of fact, taking into account societal norms generally accepted, whether certain behavior inflicts "cruel" or "excessive" pain. Here, the evidence focused on the mental pain of the child. During the time period in which appellant was accused of the crime, the victim began to have behavioral problems in school, she reverted to "wetting the bed" at night, required a night light to go to bed, and had to attend counseling sessions. Therefore, the Court held, the evidence was sufficient to support the jury's finding that appellant's acts caused the victim mental pain.

Appellant also contended that his convictions for child molestation and cruelty to children must be vacated because they merged with the crime of aggravated child molestation. Using the "required evidence" test to determine whether one offense is included in another, the Court held that appellant's arguments were without merit. Here, the crimes of child molestation and aggravated child molestation did not merge because differing facts supported each conviction. The evidence showed that appellant touched both the vaginal and anal areas of the victim. Next, the offense of aggravated child molestation required appellant perform an immoral or indecent act upon the victim with the intent to arouse or satisfy his sexual desires while the offense of cruelty to children required proof that the victim was caused cruel mental pain. Each crime required proof of at least one additional element that the other did not. Thus, the Court held that the crimes did not merge.

Prior Inconsistent Statements; Double Jeopardy

Riddick v. State, A12A2133 (3/19/13)

After his third trial, appellant was convicted of child molestation of his daughter. He contended that the trial court erred in its charge to the jury on prior inconsistent statements. In a 2005 statement, the victim gave a detailed statement to the police that her father had molested her. At trial, the victim stated that she remembered writing the statement, but did not want to be there or testify against her father, and that she didn't recall the events. The trial court then admitted the written statement. The Court stated that if a reluctant witness testifies that she does not remember whether she made a prior statement, the State is then entitled to introduce the prior statement as inconsistent with the in-court testimony of the witness. Here, the victim's reluctance allowed that State to introduce the prior statement as substantive evidence of appellant's actions. Thus, the Court held, the trial court did not err in instructing the jury that it could consider the prior statement for impeachment purposes and also as substantive evidence.

Appellant also contended that the trial court erred by declaring a mistrial after the first trial, and thus, his retrial was barred based on double jeopardy grounds. O.C.G.A. § 16-1-8(a)(2) provides that, a prosecution is barred if the accused was formerly prosecuted for the same crime based upon the same material facts, if such former prosecution was terminated improperly after the jury was impaneled and sworn. Appellant claimed that the trial court improperly terminated the first trial because it erroneously concluded that his trial counsel had violated the Rape Shield Statute. However, the Court noted, as a general rule, a defendant's failure to file a written plea in bar prior to a second trial waives the right to subsequently raise a challenge on procedural double jeopardy grounds. Here, appellant did not show that he raised the doctrine of procedural double jeopardy prior to his second trial. As a result, the Court held, he cannot raise the issue in this issue on appeal after his third trial.

Venue; Expert Witnesses

Carter v. State, A12A2115 (3/18/13)

Appellant was convicted of three counts of child molestation and two counts of aggravated sexual battery. The evidence showed that the victim's parents were separated, and appellant was the boyfriend of the victim's mother. Beginning in the summer of 2009, appellant began touching the victim's private part with his hand and putting his finger inside her private part. The victim testified that this touching occurred "a lot," between 50 and 75 times. Sometimes it happened at her mother's house and sometimes it happened at appellant's house. One school night in May 2010, appellant came into the victim's bedroom and touched her private part with his penis (Count V, charging child molestation). This incident prompted the victim to notify her mother before she went to school the next day.

First, appellant contended that the State failed to prove beyond reasonable doubt the venue of the crimes. To establish venue, the State may use both direct and circumstantial evidence. Here, the record showed that the victim's mother had moved approximately three times within the prior year. After the last incident, (Count V) the victim moved in with her father. At trial, the county investigator who interviewed the mother provided testimony that the location of the mother's townhome, where the acts giving rise to Count V occurred, was located in the county in which the trial occurred. However, there was no evidence offered by the State to demonstrate the locations of the mother's two prior addresses. As to appellant, he listed his address as being within the city limits during his recorded interview with police. However, the State presented no evidence establishing that the entire city lied within the county. The Court noted that proof of a crime within a city does not establish venue and the mere fact that the responding officers were employed by a particular police department can't serve as exclusive proof that the crimes occurred in that county. Therefore, the Court held that the State was only able to establish the location of the mother's last residence, the townhome, as the last place that the victim had lived before moving in with her father. Thus, the Count V conviction was upheld and the others were reversed on the basis of venue.

Next, appellant contended that the trial court erred in qualifying the forensic interviewer, as an expert in the field of child forensic interviews. An expert witness is anyone who, through training, education, skill, or experience, has particular knowledge that the average juror would not possess concerning questions of science, skill, trade, or the like. An expert witness may render an opinion within his area of expertise after the proper qualifications have been proven to the trial court. Generally, nothing more is required to qualify an expert than that she has been educated in a particular trade or profession. This special knowledge may be derived from experience as well as study. Here, the Court found that the expert witness was qualified to testify in the area of forensic interviews. She was the program manager at a non-profit “emergency shelter for children, a runaway and homeless youth program and a child advocacy center.” In her ten years of experience, she had conducted almost 350 forensic interviews. At the beginning of her career, she underwent 40 hours of training in the field of forensic interviews. To maintain accreditation, she was required to undergo monthly peer reviews, which involved additional training and required her to read journals and publications in the field; she was also required to complete 24 hours of additional training per year. Although she had not earned a college degree, no degree or board certification is required for forensic interviewers in Georgia. Lastly, at the time of appellant’s trial, she had been qualified as an expert witness in five prior trials. Therefore, the Court found no error in qualifying the forensic interviewer as an expert.