

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING APRIL 26, 2013

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## THIS WEEK:

- **Jury Charges; Right to be Present**
- **Voir Dire; Ex Post Facto Laws**
- **Forfeitures; O.C.G.A. § 16-13-49**
- **Sentencing; Merger**
- **Verdict Form; Jury Charges**

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### **Jury Charges; Right to be Present**

*Campbell v. State, S12A1804 (3/18/12)*

Appellant was convicted of malice murder and related charges. The evidence showed that appellant was living with Frances, the victim, and Smith, the victim's girlfriend. Frances and Smith wanted appellant to move out. An argument occurred at a neighbor's house between the three of them. Approximately 20 minutes later, Frances and Smith were walking down the street, saw appellant again at the neighbor's house and called out to him and threatened him. Appellant left, telling the neighbor he had to leave before somebody got hurt. He drove past the victim and his girlfriend; the three exchanged words, then appellant drove past them. But appellant backed up and as Frances approached the car, appellant shot him. At trial, appellant presented an alibi defense, showing that he was at a friend's house the night Frances was shot.

Appellant first contended that the trial court erred in refusing to instruct the jury on voluntary manslaughter as a lesser included offense of malice murder. The trial court found appellant was not entitled to the instruction because he relied on an alibi defense and the evidence did not support the giving of the charge. The Court stated that a person com-

mits voluntary manslaughter when he causes the death of another person under circumstances that would otherwise be murder and "acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person." O.C.G.A. § 16-5-2(a). The fact that a defendant relies on an alibi defense does not automatically prohibit a charge on voluntary manslaughter. The trial court is required to instruct the jury on voluntary manslaughter on request when there is some evidence that the defendant committed the lesser included offense. Words alone, regardless of the degree of their insulting nature, will not in any case justify the excitement of passion so as to reduce the crime from murder to manslaughter, where the killing is done solely on account of the indignation aroused by the use of opprobrious words.

Here, the Court found, the evidence presented at trial did not warrant a jury instruction on voluntary manslaughter. The initial confrontation at the neighbor's house ended when Francis and Smith returned to their house and appellant left. Shortly after returning, appellant was standing on the neighbor's porch when Francis and Smith threatened him from the sidewalk. They continued walking down the street and appellant left in his car, driving in the opposite direction from them. As Francis and Smith walked around the corner, appellant drove up slowly beside them and they argued. He either drove past them and then backed up or drove off and came back around the corner before pulling up beside them a second time. Francis approached the car alone and was talking with appellant when appellant pulled out a gun and shot Francis. Contrary to appellant's description of events, there was no

evidence that Francis was armed with any type of weapon when he approached appellant's car or exchanged words with him immediately prior to the shooting. Because there was no serious provocation that would elicit a violent and irresistible passion in a reasonable person, the trial court properly denied the request for a jury instruction on the lesser included offense of voluntary manslaughter.

Appellant also contended that the trial court committed reversible error in instructing the jury to consider any statement by appellant with "great care and caution." He argued that the jury charge applied solely to admissions or confessions made to police and not to appellant's exculpatory pre-trial statement to police. The Court noted that after appellant's trial, the Court of Appeals cautioned against giving such an instruction, and thereafter, the charge was omitted from the pattern jury instructions as unnecessary. See Suggested Pattern Jury Instructions, Vol. II: Criminal Cases (Jan. 2013) § 1.32.60. Nonetheless, the Court found, even assuming the giving of the "great care and caution" instruction was error, it was highly probable that the charge did not contribute to the jury's verdict. Here, the jury was unlikely to apply the challenged instruction to the testimony of the alibi witness, as appellant argued, given that the instruction referred only to the defendant's statement. Moreover, the trial court instructed the jury on how to determine the credibility of witnesses and resolve conflicts in evidence and, further, that it should apply these general rules on credibility in deciding what weight to give appellant's statement. Finally, the evidence of appellant's guilt was overwhelming, irrespective of any statement he made.

Last, appellant argued that his constitutional right to be present at his trial was violated because he was not present at pre-trial matters. The Court noted that the constitutional right to be present is not violated when the defendant's absence occurs during conferences addressing legal matters to which the defendant cannot make a meaningful contribution. Here, the pre-trial discussion of legal motions was not a critical stage of trial requiring appellant's presence to ensure a fair hearing. Prior to the selection of the jury, the trial court addressed the State's motion in limine to exclude cross examination of a witness about an issue of which appellant's attorney was unaware, denied in part the State's mo-

tion in limine to exclude appellant's attorney from mentioning that he was a former law enforcement officer, and began considering the defendant's motion to suppress his videotaped statement, which was subsequently played at trial. Since there was not a reasonably substantial relationship between appellant's presence during the discussion of these legal matters and his opportunity to defend against the charges, the Court concluded that his right to be present during critical stages of his criminal trial was not violated.

### ***Voir Dire; Ex Post Facto Laws***

*Heywood v. State, S12A1925 (3/28/13)*

Appellant was convicted of murder. He contended that the trial court erred in denying his request to postpone the trial to empanel a new set of prospective jurors after one prospective juror made an allegedly prejudicial remark during voir dire. The record showed that during voir dire, the State asked whether appellant looked like anyone the prospective jurors knew. One juror answered yes, and she then related a story about being assaulted outside a bank by a man brandishing a gun. At the end of the story, the juror said that appellant reminded her of the assailant. Appellant objected, and the attorneys for both sides approached the bench to discuss the matter with the trial judge. At the conclusion of the bench conference, the judge announced in open court the topic of the discussion and said that both parties agreed that appellant was not, in fact, the person who assaulted the juror outside the bank. The court instructed the prospective jurors to disregard the juror's statement and asked for a show of hands from any jurors who felt that her statement "might affect their decision in this case" or prevent them from being "fair and impartial." No hands were raised. At the end of voir dire, the juror was struck for cause.

Citing *Cotton v. State*, 279 Ga. 358 (2005), as instructive, the Court stated that the juror merely said that appellant reminded her of the man who had assaulted her, but she did not suggest even implicitly that appellant was in fact that man. The trial court made certain that the prospective jurors were not confused about this point, instructing them explicitly that both parties agreed that appellant was not, in fact, the perpetrator of the assault. Moreover, the prospective juror

who made the potentially prejudicial remark was excused, and the trial court took the additional corrective action of asking whether the excused juror's remark would prevent the remaining jurors from being fair and impartial, and no prospective juror gave any affirmative response. Accordingly, the Court concluded that the trial court did not abuse its discretion by denying appellant's request to postpone the trial to empanel a new set of prospective jurors.

Appellant also argued that his sentence of life without the possibility of parole violates the ban on ex post facto laws. The Court stated that because appellant did not raise this claim at trial, he could not raise it for the first time on appeal. But in any event, the claim lacked merit. In 1993, the General Assembly authorized life without parole as an alternative to a death sentence, but only where the State filed a notice of intent to seek the death penalty and the factfinder found at least one statutory aggravating circumstance. In 2009, the General Assembly amended the murder statute, O.C.G.A. § 16-5-1, to authorize life without parole as a sentence in all murder cases. See Ga. L. 2009, p. 223, § 1. The 2009 Act explicitly provided in § 10, "A person may be sentenced to life without parole without the prosecutor seeking the death penalty under the laws of this state." Moreover, §§ 6 and 7 of the 2009 Act repealed O.C.G.A. §§ 17-10-31.1 and 17-10-32.1, which required the finding of a statutory aggravating circumstance before a sentence of life without parole could be imposed. The 2009 Act provided that the effective date of these sections was April 29, 2009. Appellant killed the victim on April 28, 2010, almost exactly one year after the law was changed to allow a sentence of life without the possibility of parole in all murder cases.

The Court stated that appellant correctly noted that in 2011, the year after he killed the victim, the General Assembly expressly required the *codification* of § 10 of the 2009 Act in the Official Code of Georgia Annotated as O.C.G.A. § 17-10-16.1. See Ga. L. 2011, p. 752, § 17 (3) (effective May 13, 2011). But, the Court stated, it could find no authority supporting appellant's claim that a validly enacted law takes effect for ex post facto purposes only after it has been added to the compilation of Georgia laws contained in the Georgia Code. Our current Constitution contains a general publication requirement for new laws, but the Code now specifies that laws become effective

on July 1 or January 1, whichever comes first after the legislation is approved by the Governor or becomes law without his approval, “[u]nless a different effective date is specified in an Act.” O.C.G.A. § 1-3-4. The Code also provides that, “[a]fter they take effect, the laws of this state are obligatory upon all the inhabitants thereof. Ignorance of the law excuses no one.” O.C.G.A. § 1-3-6. Thus, neither case law nor the effective-date view treats codification of a new law as the trigger point for ex post facto analysis. Therefore, the Court stated, it need not decide in this case whether publication is the trigger point, because the statutory amendment at issue here took effect and was published well before appellant killed the victim.

### **Forfeitures; O.C.G.A. § 16-13-49**

*Goodwin v. State of Georgia, A12A2100 (3/14/13)*

The trial court ordered the forfeiture of \$14,350 to the State on the ground that it was used to facilitate the possession, sale, and distribution of marijuana. Appellant contended that the trial court erred in finding the hearing was timely held pursuant to O.C.G.A. § 16-13-49(o)(5). The Court agreed and reversed the judgment in favor of the State.

The record showed that on August 19, 2011, the State filed, pursuant to O.C.G.A. § 16-13-49, an in rem complaint for forfeiture. Service of the complaint was then perfected on appellant on August 24, 2011. She timely answered, and a notice of hearing was issued on September 26, 2011, setting the forfeiture hearing for October 26, 2011—63 days after the service of the complaint. The Court noted that for reasons not contained in the record, the hearing was continued on October 26 and two additional times before eventually being conducted on March 21, 2012. Following the March 21 hearing, the trial court issued an order and judgment forfeiting appellant’s money to the State.

Appellant argued that the trial court’s judgment of forfeiture must be reversed because the trial court failed to conduct a hearing, or continue the hearing for good cause, within 60 days of the service of the State’s forfeiture complaint as required by O.C.G.A. § 16-13-49(o)(5). The Court stated that the 60-day hearing requirement is mandatory, not

permissive. The burden is on the State to have the case heard or obtain a continuance within the required time. The result of a failure to conduct a hearing within 60 days, or to obtain a good-cause continuance, is a dismissal of the State’s complaint. Here, the Court found, it was undisputed that the initial hearing on the State’s forfeiture complaint was not scheduled until 63 days after appellant was served with the complaint, and the State neither moved for, nor did the trial court grant, a continuance within the statutorily imposed 60-day time period. Thus, because the mandatory statutory time limitations contained within O.C.G.A. § 16-13-49(o)(5) were not met, the Court held that it was “constrained to reverse the trial court’s judgment of forfeiture.”

### **Sentencing; Merger**

*McGlasker v. State, A12A2079 (3/19/13)*

Appellant was convicted of three counts of armed robbery and four counts of aggravated assault. She contended that the trial court erred in failing to merge one of the aggravated assault charges into the armed robbery charge. The evidence showed that appellant and her two co-defendants committed three separate armed robberies against four individuals within a twenty minute time span. Appellant acted as the “getaway” driver. In the second armed robbery, the evidence showed that victim 2, a plumber, was working on a water main break at an apartment complex located near the first robbery when he saw two men approach his assistant who had gone to his truck to retrieve a tool. When victim 2 went to the truck, one of the men held a gun to his head and told him that “this [is] a robbery.” The second man started hitting the victim’s assistant with his gun, and when victim 2 attempted to stop him, the first man hit him in his head with the gun. The robbers took victim 2’s wallet and tool bag and his assistant’s wallet and cell phone. One robber also ordered victim 2 to the ground and kicked him several times.

Appellant argued that that the trial court erred in not merging the aggravated assault and armed robbery counts of victim 2 for sentencing purposes. She maintained that because the aggravated assault was committed to accomplish the armed robbery, the counts should have merged. The Court agreed. The “required evidence” test is used to determine

if the aggravated assault was a lesser included offense of the armed robbery. Under this test, a court must determine whether each offense requires proof of a fact which the other does not. And, the Court stated, it has held that there is no element of aggravated assault with a deadly weapon that is not contained in armed robbery.

Here, the pistol whipping of victim 2 was a separate crime—as were the attack on his assistant, which victim 2 was trying to stop, and the subsequent kicking of victim 2 after one assailant had ordered him to the ground. But, the Court noted, that separate crime was either battery (O.C.G.A. § 16-5-23.1) or aggravated battery (O.C.G.A. § 16-5-24) and neither species of battery was charged. In order to determine whether the pistol whipping can be deemed a separate act or transaction from the robbery, the Court looked to when the robbery began and when it concluded. Relying on *Thomas v. State*, 289 Ga. 877, 880-881 (3) (2011), the Court stated that the issue was whether charges of aggravated assault founded on acts of gratuitous violence incidental to an armed robbery merged into charges of robbery. The *Thomas* Court found merger as to an aggravated assault charge founded on acts of violence that “did arise from the same ‘act or transaction,’ that is, [a]ppellant’s taking money from [one victim] at gunpoint [in one room],” but did not find merger as to an aggravated assault charge founded on acts of violence that appellant inflicted “later in [another] room” on another victim and “[a]fter taking money from [both victims].” Here, the Court found, the pistol whipping of victim 2 occurred after an assailant pulled a gun on victim 2 and announced a robbery but before the assailants took victim 2’s property, ordered both victims to the ground, and fled. And the pistol whipping was part of the assailants’ effort to control victim 2 during the robbery. Consequently the aggravated assault conviction merged into the armed robbery conviction.

### **Verdict Form; Jury Charges**

*State v. Nicholson, A12A2494, A12A2495 (3/26/13)*

The State charged Nicholson with robbery, two counts of aggravated assault, aggravated battery, and terroristic threats. It charged Jones with the same crimes, plus an additional count of aggravated assault. The record showed

that the charges against Nicholson and Jones arose out of Nicholson's methamphetamine transactions with a male victim, allegations of theft against the male victim by Nicholson, and a subsequent physical altercation between Nicholson, Jones, and the male victim and his girlfriend, the second victim. At the conclusion of the State's case, the trial court granted a directed verdict in Nicholson's favor on the aggravated battery charge. The jury convicted Nicholson of robbery and two counts of aggravated assault; it found him not guilty of terroristic threats. The jury convicted Jones of robbery, two counts of aggravated assault, a lesser included offense of simple assault, and a lesser included offense of simple battery; it found her not guilty of terroristic threats and aggravated battery. The trial court granted a new trial to both of them because of alleged errors in the written instructions and verdict form provided to the jury, and the court's instructions on lesser-included offenses. The State appealed.

The record showed that a part of the written instructions provided to the jury stated as follows: "Verdict Form: If, after considering the testimony and evidence presented to you, together with the charge of the court, you should find and believe beyond a reasonable doubt that the defendants ... did commit the offenses of *statutory rape, child molestation, and enticing a child for indecent purposes*, as alleged in the indictment, you would be authorized to find the defendants guilty. (Emphasis supplied.) The trial court's oral charge and the verdict form provided to the jury did not list the same inapplicable offenses against children.

The Court first noted that since the defendants did not object to the written instructions, the Court's review was limited to whether there was plain error. Here, the Court found, the error did not affect the substantial rights of the defendants. While the written instructions to the jury made a passing reference to inapplicable charges in one isolated instance, the remainder of the written charge accurately stated the offenses for which the defendants were actually indicted, the definition and elements of each indicted offense, and the appropriate lesser included offenses. Additionally, the court's oral charge to the jury made no reference to any inapplicable offenses, and the verdict form accurately stated the offenses to be considered by the jury. Based upon the charge as a whole and the lack of any evidence

in the trial raising issues concerning the two defendants' conduct toward any children, the Court concluded that the isolated reference to inapplicable charges did not affect the outcome of their trial. Accordingly, the trial court erred in granting a new trial on this ground.

The State contended that the trial court also erred by granting the motion for new trial based upon alleged errors in its charge on lesser-included offenses. Specifically, the State argued that the trial court was incorrect in finding that it gave an improper sequential unanimity charge regarding the consideration of lesser-included offenses. Citing *Cantrell v. State*, 266 Ga. 700 (1996), the Court stated that where, as here, a jury deliberates a greater offense and an included offense, unanimity is not required for the greater offense before the jury can vote on the included offense. It is necessary for the jury to consider the indicted charge, so long as the trial court does not insist upon unanimity and is willing to accept a verdict on the lesser-included offense. After reviewing the relevant charge as given by the trial court, the Court found that that it was not an improper sequential unanimity charge. The trial court did not instruct the jury that it had to reach a unanimous verdict on the greater offense before it could consider or address the lesser offense, and it did not insist upon unanimity or compel the jury to do so. Instead, the instructions merely required a unanimous verdict as a whole. Therefore, because the trial court erred by concluding that it gave an improper sequential unanimity charge, the Court reversed the grant of a new trial to the defendants on this ground as well.