

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 7, 2013

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Jury Charges; Intent

Holloman v. State, S13A0542 (6/3/13)

Appellant was convicted of malice murder, felony murder, aggravated battery, aggravated assault, and cruelty to children when the child victim died from blunt force trauma to his torso. He contended that the trial court gave the jury an incomplete instruction on aggravated assault. Specifically, he contended that the trial court erred because it omitted the definition of simple assault.

The record showed that the trial court charged: “[A] person commits the offense of aggravated assault when the person assaults another person with any object, device, or instrument that when used offensively against a person is likely to or actually does result in serious bodily injury.” Because appellant did not object to the trial court’s charge before the jury retired to deliberate, the Court reviewed his contention for “plain error.” The plain error test authorizes reversal of a conviction if the instruction was erroneous, the error was obvious, the instruction likely affected the outcome of the proceedings, and the error seriously affected the fairness, integrity or public reputation of judicial proceedings.

The Court explained that there is a distinction between aggravated assault cases with injuries that have been intentionally inflicted based upon the evidence and those where, although there may be injuries, intent may be in question. In cases where intent is in question, a charge on simple assault must be given so the jury can see that, although no physical harm may have been done, the defendant could still be found guilty of aggravated assault if

the jury found that the defendant attempted to commit a violent injury or if the defendant performed an act which placed the victim in reasonable apprehension of immediately receiving a violent injury.

Here, the only evidence presented at trial was that the victim's injuries were consistent with a severe beating and blunt force trauma that precipitated his death. Additionally, the jury had been properly instructed on general intent and there was no question regarding the nature of the injuries as being deliberately inflicted and the cause of death being a homicide due to abuse. Therefore, the Court held, there was no need for the trial court to instruct the jury on simple assault in connection with its charge on aggravated assault and thus, appellant's enumeration lacked merit.

Demurrers; Indictments

State v. Grube, S12G1565 (6/3/13)

Grube was indicted on charges of computer pornography, attempted aggravated child molestation and attempted child molestation. The trial court determined all three counts of the indictment were deficient because each failed to identify the victim of the alleged crimes. The State filed a second indictment charging Grube with the same crimes but amended the language used so as to identify the victim as "'Tiffany,' a person believed by the accused to be a child" and "'Tiffany,' a person he believed to be a 14-year-old girl." Grube filed a special demurrer to the second indictment, again asserting the indictment failed to sufficiently identify the victim. The trial court agreed, and the indictment was dismissed. The State appealed and the Court of Appeals affirmed in *State v. Grube*, 315 Ga.App. 885 (2012). The Supreme Court then granted the State's petition for writ of certiorari.

The record showed in Count one, the indictment charged Grube with the crime of computer pornography under O.C.G.A. § 16-12-100.2(d) in that "between the 9th day of October, 2009, and the 25th day of October, 2009, Grube did intentionally utilize a computer Internet service to attempt to lure and entice 'Tiffany,' a person believed by the accused to be a child, to commit child molestation and aggravated child molestation." Count two alleged that Grube attempted to commit the crime of aggravated child molestation "on the 25th day of October, 2009. . . in that he

did knowingly and intentionally perform acts which constituted a substantial step toward the commission of said crime in that he did engage in explicit communications with 'Tiffany,' a person he believed to be a 14-year-old girl, describing his desire to engage in oral sodomy with said 14-year-old girl, arrange a meeting with her, and arrived at said meeting place." Lastly, Count three alleged that Grube committed the crime of attempted child molestation when "on the 25th day of October, 2009, Grube . . . did knowingly and intentionally perform acts which constituted a substantial step toward the commission of said crime in that he did engage in explicit communications with 'Tiffany,' a person he believed to be a 14-year-old girl, describing his desire to engage in sexual intercourse with her, arrange a meeting with her, and arrived at said meeting place with condoms." All three counts followed in large part the language of the statutes that Grube was charged with violating, set forth the dates of the alleged crimes, and set forth with particularity the acts constituting the offenses so that Grube could prepare a defense. The only deficiency Grube alleged was that each of the counts failed to more precisely identify the victim. In response, the State conceded that as a general rule, an indictment for offenses against a particular person should identify the victim by providing the victim's name but argued that identification of the victim as Tiffany, the only name by which Grube knew the victim and by which he could identify a specific set of communications, was sufficient under the facts of this case.

The Court stated that for an indictment to comport with constitutional due process, it must: (1) contain the essential elements of the crimes and apprise a defendant of what he must be prepared to meet at trial; and (2) show with accuracy to what extent the defendant may plead a former acquittal or conviction. Additionally, when a defendant challenges the sufficiency of an indictment by the filing of a special demurrer before going to trial, he is entitled to an indictment perfect in form. However, full identification of a victim is not accomplished in every circumstance, and Georgia precedent allows for identification of the victim by the name by which he or she is generally known.

The Court noted that through the use of an internet "sting" operation, the undercover officer is the person against whom a defen-

dant's conduct is directed, but the defendant knows the officer only by the fictitious persona, alias, or on-line moniker created for purposes of an investigation. Thus, the requirement that the officer's true identity be included in the indictment would do nothing to further the goal of apprising the defendant of what he must be prepared to meet at trial. Rather, meaningful notice of the specific conduct forming the basis of the criminal charges in such cases is provided if the victim is identified by the alias or name by which he or she is known to the defendant.

Here, the indictment identified the victim as "Tiffany, a person believed by the accused to be a child." Because Tiffany was an alias used by undercover officers engaged in the sting operation, the State properly relied upon the partial name by which she was known to Grube to identify her and the set of communications on which the charges were based. The State supplemented this description with language indicating that Tiffany was not an actual child/person, information which explains the absence of a full name and allowed Grube to prepare his defense at trial. While the better practice may have been for the indictment to include both the alias by which Grube knew the victim and the fact that Tiffany was an alias or a fictitious persona created by undercover officers, the indictment as drafted apprised Grube of the essential elements of the charges against him, identified the victim by the only name by which the victim is generally known to him, and informed him that Tiffany is not a 14-year-old girl. Additionally, because the State must prove the victim was a fictitious persona created by an undercover officer at trial, the Court held that its absence from the indictment was not a material defect.

Next, the Court addressed whether the indictment satisfied the second element of the indictment and protected the defendant from double jeopardy in a possible future proceeding. Here, the indictment not only informed Grube that the charges arose out of conduct directed toward Tiffany but also set out the dates on which the alleged conduct took place and with respect to Counts two and three, informed him with some precision of the content of the alleged communications, and therefore, it could not reasonably be argued that he was not protected from the dangers of double jeopardy. Moreover, this was especially true because Grube could use other parts of

the record in this case to distinguish charges brought against him in a potential future proceeding.

Aggravated Assault; Merger

Durden v. State, S13A0026 (6/3/13)

Appellant was convicted of malice murder and other crimes relating to the shooting death of the victim. The evidence showed that after appellant shot the victim, he told the victim's children that the victim shot herself. On the way to the hospital, appellant threw the .380 handgun out the window. Upon arrival to the hospital, appellant told personnel, as well as police officers, that the victim shot herself after their argument had ended, while he was renovating the cabinets in a bathroom in the back of the house. Additionally, appellant volunteered that he had thrown the gun into the woods on the way to the hospital, claiming that he was afraid the victim would get into trouble.

Appellant contended that the evidence was insufficient to support his convictions. The Court disagreed, but took the opportunity to overturn *Hall v. State*, 287 Ga. 755 (2010), which held that the aggravated assault statute, O.C.G.A. § 16-5-21(c) through (k) were “essential element(s)” that the State must prove for conviction. Here, appellant was convicted of aggravated assault with a deadly weapon of persons living in the same household. See O.C.G.A. § 16-5-21(j). The Court concluded that *Hall* was incorrect because O.C.G.A. § 16-5-21 made it clear that the fact that an aggravated assault was committed against a person living in the same household is not an *element* of the offense but merely a *sentencing factor*. Thus, the Court reasoned, the elements of the various forms of aggravated assault are specified in subsection (a)(1)-(3) of § 16-5-21, which begins with the phrase, “A person commits the offense of aggravated assault when he or she assaults . . .” Subsection (b) then says, “Except as provided in subsections (c) through (k) of this Code section, a person convicted of the offense of aggravated assault shall be punished by imprisonment for not less than one nor more than 20 years.” If “the offense of aggravated assault” involves particular exacerbating factors, subsections (c) through (j) provide *mandatory minimum sentences* of either three or five years in prison, instead of the default minimum of one year under subsection (b), although the sentence remains capped

at the same 20 years. Accordingly, the Court held, the language and structure of O.C.G.A. § 16-5-21 demonstrate that the facts which the State must prove beyond a reasonable doubt to convict a defendant of the offense of aggravated assault—the essential elements of that crime—are those set forth in subsection (a). Then, only after a defendant is found guilty of that offense do the factors listed in subsections (c) through (j) come into play, potentially increasing the minimum sentence from one to either three or five years but leaving the maximum sentence at 20 years. The “living in the same household” fact that triggers a three-year mandatory minimum sentence under § 16-5-21(j) is therefore only a sentencing factor, not an essential element of the offense.

Next, the Court merged appellant's aggravated assault offense with his conviction for malice murder. The Court held that the aggravated assault charged—appellant's shooting the victim with a handgun—was the same, rather than distinct from, the aggravated assault that resulted in her death. Additionally, there was no “deliberate interval” to support the separate convictions. Therefore, appellant's aggravated assault conviction merged into his murder conviction, and his separate sentence for aggravated assault was vacated.

Jury Charges; Curative Instructions

Vanstavern v. State, S13A0409 (6/3/13)

Appellant was convicted of murder and two other related offenses. He contended that the trial court committed reversible error by informing the jury at the beginning of the trial of the redacted count of possession of a firearm by a convicted felon and then failing to provide adequate curative instructions to remedy the error. The record revealed that the trial court inadvertently mentioned the redacted count along with the remaining charges, and the misstatement was brought to the trial court's attention by the State. Defense counsel did not object or request corrective measures, but commented “What do [you] think now, though? The jurors have heard it.” The State then asked the trial court to give a curative instruction, and the trial court instructed the jury about the four counts it was to consider.

The Court noted that in order to preserve a point of error, there must be a proper objec-

tion on the record at the earliest possible time, and appellant did not make a contemporaneous objection to the trial court's mistake. However, even if defense counsel's query to the trial court sufficed as a timely objection to preserve the issue for appeal, appellant's complaint did not mandate a new trial. When prejudicial matter is placed before the jury in a criminal case, the trial court is to determine whether a mistrial is warranted as the only corrective measure or whether any prejudicial effect can be remedied by instructing the jury about what it is to properly consider. Additionally, the determination of necessity for a mistrial is in the discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal unless it is essential to preserve the defendant's right to a fair trial.

Here, the Court held that the trial court's mistake of reading the indictment in full was of a vague and de minimus nature and did not have any influence on appellant's trial. Moreover, the Court emphasized, there was only a single mention of the redacted count in an initial reading of the indictment and the trial court gave a curative instruction enumerating for the jury the charges properly before it. Thus, a mistrial was not essential to preserve appellant's right to a fair trial.

Juries; Improper Communications

Hoehn v. State S13A0474 (6/3/13)

Appellant was convicted of malice murder and possession of a firearm during the commission of a crime relating to the shooting death of the victim. Appellant contended that the trial court erred in failing to sustain his objection after a juror directly asked a witness a question. The record showed that an officer testifying for the State was identifying photographs of the crime scene and a juror, without seeking permission from the trial court, asked, “Is that the weapon?” The officer said that it was. The trial court overruled appellant's objection to the juror's asking a question. The officer then testified that the gun was visible in the photograph, but he did not testify further about the gun.

The Court held that the trial court erred by not sustaining defense counsel's objection to the question by the juror and striking the officer's answer. While a trial court may receive written questions from the jury and ask those

questions which the trial court finds proper, or allow counsel for either party to ask a testifying witness the questions found to be proper, jurors may not directly question a witness. However, the Court held, the error was harmless. The point about which the juror asked was undisputed: the murder weapon was plainly visible in the crime scene photograph; another officer who had investigated the crime scene testified that the gun was found in appellant's room; and appellant admitted that the gun belonged to him. In addition, the evidence of appellant's guilt was overwhelming. The test for determining non-constitutional harmless error is whether it is highly probable that the error did not contribute to the verdict and the Court held that test was easily satisfied.

Hearsay; Necessity

Faircloth v. State, S13A0480 (6/3/13)

Appellant was convicted in the murder of his wife. He contended that the trial court erred in allowing the victim's sons and a work colleague to testify as to statements the victim made regarding the state of the victim's relationship with appellant, her intention to leave the marriage once her children were independent, and appellant's threat to kill her if she ever left him. The record showed that the trial court admitted the statements under the necessity exception to the rule against hearsay, which requires the proponent to establish a necessity for the evidence, a circumstantial guaranty of the statement's trustworthiness, and that the hearsay statements are more probative and revealing than other available evidence.

The Court noted that because the victim was deceased and unavailable to testify at trial, it was undisputed that the first prong of the necessity exception had been satisfied. Regarding the second prong, the Court held that a statement is trustworthy when made to someone with whom the declarant enjoys a close personal relationship. Here, the evidence was undisputed that the victim enjoyed close relationships with, and confided in all of her sons. Additionally, the victim's colleague testified that the victim was his supervisor, they worked together closely, and they routinely discussed with one another their personal lives and problems. Therefore, the Court concluded, the statements had sufficient indicia to satisfy the trustworthiness requirement. As to the final prong, the victim's statements to her sons

regarding her longstanding intention to leave her husband were the only available evidence of this intention. Likewise, the victim's most damning statement, regarding appellant's threat to kill her if she ever left him, was the only available evidence of this threat. Accordingly, the Court found no abuse of discretion in the trial court's admission of the hearsay statements.

Finally, in so holding, the Court noted that "[u]nder the new evidence code, the necessity exception is encompassed within O.C.G.A. § 24-8-807. See Paul S. Milich, Georgia Rules of Evidence, § 19:32 (2012)."

Sentencing; Bruton

Billings v. State, S13A0144; S13A0145 (6/3/13)

After a joint trial, appellants Curtis Billings and Matthew Ross were convicted of murder and other crimes related to the shooting death of Joseph Gunn. First, the Court addressed the problems with the sentencing of Ross. The trial court sentenced Ross to life in prison with the possibility of parole on Count 3 of the indictment, which charged felony murder based on entering a motor vehicle with the intent to commit a theft; it then merged Ross's two other felony murder convictions (Count 4 based on burglary and Count 5 based on theft by taking) into Count 3. However, the trial court then merged Count 8 (burglary) into Count 3 (felony murder based on entering a vehicle with the intent to commit a theft) and sentenced Ross to five years in prison on Count 7 (entering a vehicle with the intent to commit a theft). The Court held that the trial court erred because a burglary conviction does not merge into a conviction for felony murder based on entering a vehicle, while a conviction for entering a vehicle does merge into a felony murder conviction based on that same felony. Moreover, the Court speculated that if the trial court meant to sentence Ross on the Count 3 felony murder based on entering a vehicle, it then needed to merge the Count 7 conviction for entering a vehicle and sentence Ross separately for the Count 8 burglary. Alternatively, the trial court may have intended to sentence Ross on the Count 4 felony murder conviction based on burglary, in which case it would be proper to merge the Count 8 burglary conviction into Count 4 and to sentence Ross separately for the Count 7 entering-a-vehicle

conviction. The Court held that either of those sets of sentences would have been lawful, but the set of sentences from the record indicated and imposed was not valid, and the Court vacated Ross's sentences and remanded his case for resentencing.

Appellant Billings contended that the trial court erred in allowing Ross's girlfriend to testify that Ross told her around the time of Gunn's murder that the night before, Billings had shot a man while they were breaking into cars. Billings asserted that the girlfriend's testimony violated his Sixth Amendment right of confrontation as interpreted in *Bruton v. United States*, 391 U.S. 123 (1968). The admission of an out-of-court statement into evidence at a criminal trial comes within the scope of the Confrontation Clause only if the statement was "testimonial." The rule set forth in *Bruton*, which bars the admission at a joint trial of a co-defendant's confession to police that implicates the defendant if the co-defendant does not testify and face cross-examination, does not apply to non-testimonial out-of-court statements made by such a co-defendant. In other words, whether *Bruton* applies depends on whether the co-defendant's statement was "testimonial in nature," and is not limited to statements the co-defendant made to the police while in custody.

Here, the Court noted that the statements by Ross were made to his girlfriend more than two weeks before he was arrested; they were not a product of interrogation by law enforcement officers during an investigation intended to produce evidence for a criminal prosecution. Additionally, Billings did not even argue that Ross's statements were testimonial, and they clearly were not. Thus, the Court held that only the normal rules regarding the admission of hearsay apply, and the hearsay testimony about Ross's statements was admissible under the co-conspirator exception to the hearsay rule.

Discovery; Character

Lewis v. State, S13A0225; S13A0226 (6/6/13)

Appellants Atu Lewis (Lewis) and Jacque Dominique Clark (Clark) were convicted of murder and related crimes stemming from a home invasion. Lewis, Clark, Marcel Brower, and Hilary Ford acted on a plan to steal drugs and money from the victim by staging a private dance with the victim while the others robbed his home.

At trial, Marcel Brower testified Lewis told him that Lewis and Clark had a conversation about killing Ford, purportedly to prevent her from telling police about the murder. Lewis argued he was unaware of Brower's statement about the alleged conversation because the State failed to produce it during discovery. The transcript showed prosecutors learned of this alleged conversation between Lewis and Clark when they interviewed Brower during their trial preparation a few weeks prior to trial. Rather than precluding Brower's testimony or granting a mistrial, the trial court allowed counsel for Lewis and Clark to interview Brower about the alleged conversation between Lewis and Clark. After interviewing Brower, counsel did not posit any further objections concerning the testimony.

Lewis contended he was entitled to a mistrial because the State failed to provide Brower's statement about Lewis's and Clark's alleged conversation during discovery in violation of O.C.G.A. § 17-16-6. The Court noted that Brower was available to the parties for interview through his attorney prior to trial. The testimony Brower provided at trial had not been reduced to writing or otherwise recorded, but rather had been revealed during an interview the State conducted for the purposes of trial preparation. Thus, there was nothing tangible for the State to produce during discovery. As such, there was no discovery violation that would warrant any sanction, including a mistrial. The Court held that the trial court acted in keeping with the dictates of O.C.G.A. § 17-16-6 when it remedied any lapse of information or perceived lack of fairness by allowing Lewis and Clark to interview Brower about this issue. Therefore, there was no reversible error.

Lewis also contended that the statement was inadmissible because it placed his character into evidence. The Court disagreed. Any statement or conduct of a person, indicating a consciousness of guilt, where such person is, at the time or thereafter, charged with or suspected of crime, is admissible against him upon his trial for committing it. Brower's testimony showed Lewis's consciousness of guilt for the death of the victim and was admissible on that basis. The incidental placement of Lewis's character into evidence did not render Brower's relevant testimony inadmissible. Accordingly, the Court held, the trial court did not err when it allowed Brower's testimony over Lewis's

objection that his character was impermissibly placed into evidence.

Venue; Motive

Goodman v. State, S13A0571 (5/6/13)

Appellant was convicted of murder and theft by taking. The evidence showed that appellant, Rose, and Dressler were involved in the murder of Dressler's husband in Virginia. After the homicide, the three fled the state by driving south. On the trip, both appellant and Rose became "aggravated" by Dressler's behavior and sought an opportunity to "get rid of her." When passing through Morgan County, Georgia, the two attempted to drug Dressler to death. However, the plan failed and both ended up using physical force to kill Dressler. They left the body in Morgan County and fled west where they were eventually apprehended.

Appellant contended that the trial court erred when it failed to grant a new trial because she never consented to have her trial at the Morgan County Senior Center and the State failed to comply with former O.C.G.A. § 15-6-18(c)(1). The record showed that at the time of trial, the Morgan County Courthouse was under renovation, so appellant's trial could not be held there. Instead, it was held at the Morgan County Senior Center. Former O.C.G.A. § 15-6-18(c)(1) required essentially two things for a criminal trial in a county the size of Morgan County to be held in a location other than the County Courthouse: (1) provision for such a location by the proper governing authority of the county, and (2) the consent of the accused. It was uncontroverted that the Morgan County Board of Commissioners properly designated the Morgan County Senior Center as a place in which the superior court could conduct trials, but at no time did the trial court, or the parties, address any question of Goodman's consent to conducting the trial in the designated location.

The Court stated that holding the trial at a location other than the county courthouse without appellant's consent violated former O.C.G.A. § 15-6-18(c)(1). The mere absence of objection is insufficient to show proper compliance with the statute. Moreover, an accused's consent to having his or her criminal jury trial conducted in an alternate or additional facility must be established by the record. The Court noted that although it was error to conduct the trial without securing appellant's consent, this fact alone did not require reversal of the judg-

ment because reversible error requires harm as well as error. Here, appellant failed to allege harm, or even attempt to support a finding of such by evidence. Therefore, the Court held, the failure to comply with former O.C.G.A. § 15-6-18(c)(1) was harmless error.

Next, appellant contended that testimony from an out-of-state detective violated Uniform Superior Court Rule(s) ("USCR") 31.1 and 31.3 when the testimony introduced allegedly similar transaction evidence of the murder of Dressler's husband. The Court noted that even though the notice requirements had not been met in this case, it is well established that on the trial of one charged with murder, evidence of the defendant's motive for the homicide is always relevant. Here, the State asserted that the independent crime against Dressler's husband, and appellant's fear of being held culpable for it, provided her motive for killing Dressler. Because the evidence was relevant to establish appellant's motive, notice and a hearing under USCR 31.1 and 31.3 were not necessary. Moreover, the fact that appellant was a suspect in the other transaction did not render the transaction evidence inadmissible, and even though it may have incidentally placed the defendant's character into evidence. Therefore, the Court held that the transaction evidence elicited from the detective was admissible.

Character Evidence

Rucker v. State, S13A0402 (6/3/13)

Appellant was convicted of aggravated assault and felony murder. He contended that the trial court erred in denying his motion for a mistrial on the ground that the prosecutor improperly injected his character into the trial as a result of the prosecutor's cross-examination of a defense witness. The record showed that the prosecution presented the testimony of appellant's former girlfriend, Brandi Warren, who testified that she was afraid to leave the car with appellant after the crime because she was "terrified" that he would hurt her. On cross-examination, Warren admitted she regularly wrote to appellant for a period of time while he was incarcerated and that in such letters she repeatedly stated she knew he did not commit the crime and professed her love for him. She explained, again, that she made these comments out of fear of retribution by appellant or his associates, even though he

was incarcerated. To impeach Warren's credibility, appellant's counsel called Mr. Johnson. Johnson was home when appellant and Warren visited that residence between the time they left the scene of the crime and appellant's arrest. Johnson testified Warren did not appear upset or afraid nor did she say anything that would indicate she was being held captive. On cross-examination, the prosecutor established that Johnson knew appellant and then asked, "Would you be surprised to hear that Ms. Warren thinks he's violent? Do you know him to be violent?" No objection to this question was raised. When Johnson answered in the negative, the prosecutor attempted to impeach this testimony by commencing to question Johnson about whether he had filed a police report attesting that appellant had come after him with a sword and broken the windows of Johnson's car. The witness denied he had filed a police report but stated he had given testimony. When the prosecutor asked whether Johnson considered somebody who would come after him with a sword to be violent, the witness denied appellant had come after him with a sword. The prosecutor then asked: "That's not what you said in your police report?" At that point, appellant's trial counsel objected on the ground that the police report was hearsay and could not be placed into evidence. Outside the presence of the jury, defense counsel objected on the ground the prosecution had improperly introduced appellant's character into evidence and also objected that the prosecutor misconstrued the witness's statements on the ground that the credibility of the witness had been improperly impeached because the prosecutor created the impression to the jury that Johnson had lied about filing a police report when, in fact, the report was filed by the police, not Johnson. Counsel then moved for a mistrial and the trial court issued curative instructions.

The Court noted that appellant's character and propensity for violent behavior had already been placed into evidence by Warren's testimony on cross-examination by appellant's trial counsel. Warren explained that, even though the arresting officer testified she did not appear to be under duress at the time she and appellant were stopped, she was "scared to death" of him because he had previously beaten her. Even if this testimony about appellant's alleged propensity for violence had been presented by the prosecutor, it would not have been inadmissible as placing appellant's

character in issue because it explained the witness's prior behavior and statements that were inconsistent with her testimony against him. Thus, the Court held that appellant could not now assert it was reversible error for the trial court to deny his motion for a mistrial as a result of the prosecutor's line of questioning and alleged prosecutorial misconduct because testimony relating to appellant's general character for violence had already been introduced into evidence by his trial counsel, presumably as a trial strategy to impeach Warren's credibility.

Additionally, the Court noted that given the substantial evidence of guilt in this case, the nature of the statement at issue, and the fact that evidence had already been admitted relating to appellant's character and propensity for violence, the Court found no abuse of discretion by the trial court's denial of appellant's motion for mistrial with respect to the prosecutor's questions relating to his propensity for violence. With respect to the motion for mistrial regarding the reference to Johnson having allegedly lied about the filing of a police report, the Court deemed the curative instructions given by the trial court sufficient to correct any error. Thus, under the circumstances presented, the Court found no reversible error as a result of the trial court's denial of appellant's motion for a mistrial.

Rape; Motions for Continuance

Wynn v. State, A13A0176 (5/30/13)

Appellant was convicted of rape, child molestation, and incest. Appellant contended that the evidence was insufficient to sustain his rape conviction because the State failed to prove the element of force. Under O.C.G.A. § 16-6-1(a)(1), "A person commits the offense of rape when he has carnal knowledge of . . . [a] female forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ." In the statute, the term "against her will" means without consent; the term "forcibly" means acts of physical force, threats of death or physical bodily harm, or mental coercion, such as intimidation. The fact that a victim is under the age of consent may supply the "against her will" element in a forcible rape case since it shows that the victim is incapable of giving legal consent. Importantly, only minimal evidence of force is

required in order to prove rape of a child, and intimidation may substitute for force. Further, force may be proved by direct or circumstantial evidence. Lack of resistance, induced by fear, is force, and may be shown by the victim's state of mind from her prior experience with the defendant and subjective apprehension of danger from him.

Here, the victim testified that she pretended to be asleep during the assault because she was scared. When she failed to obey appellant's command that she open her legs, he pushed them open. As appellant spoke to her, the victim did not reply and continued to pretend to be asleep. When he went into the bathroom during the repeated acts of sexual intercourse, the victim remained motionless in the bed because she was scared to move. Therefore, the Court held that the testimony provided evidence of force necessary to support appellant's conviction.

Appellant also contended that the trial court abused its discretion by denying his motion for continuance made on the morning of trial. The record showed that after testing of evidentiary DNA, appellant filed a motion for continuance for additional discovery. Specifically, he requested that he be able to obtain new "reference" DNA samples to be tested by an independent laboratory. The trial court heard argument on appellant's motion for continuance on the morning of the first day of the trial beginning April 21, 2008. Appellant's trial counsel argued that he had just obtained the DNA swabs of the victim and the defendant two weeks previously, which did not give the laboratory enough time to perform additional testing. The State objected to a continuance, pointing out that the case had appeared on 14 calendars, including every available trial calendar beginning in February 2007, with a single exception. Additionally, the State argued that the defense did not need a swab from the victim to determine whether the DNA matter obtained from the victim's cervical swab contained semen or was some other bodily fluid of appellant. The trial court denied the motion.

The Court found no abuse of discretion in denying the continuance. The State's experts testified that the DNA recovered from the victim's cervical swab was identical to appellant's DNA. To show harm, appellant was required to specifically identify what evidence or witnesses he would have put forth in his defense if his counsel had been given more time to

prepare; speculation and conjecture are not enough. Because appellant relied heavily on speculation to support his motion, the Court held that the trial court did not err in denying the motion for continuance.

Search & Seizure

Adkinson v. State, A13A0504 (5/23/13)

Appellant was charged with possession of cocaine, possession of less than an ounce of marijuana, giving false information to a police officer, and driving with a suspended license. He contended that the trial court erred in denying his motion to suppress. The evidence showed that an officer was conducting a business check at a motel located off an area known for heavy drug activity. While the officer was at the motel, the officer observed appellant park his vehicle in the motel parking lot, get out, and look around as he walked to the motel's stairwell. After he climbed the stairs, the officer lost sight of him. About two to three minutes later, the officer saw appellant descending the stairwell and return to his vehicle. As appellant drove away, the officer stopped his vehicle. According to the officer, he stopped appellant because the motel was located in a high drug area and appellant's actions—visiting the motel for a few minutes—were consistent with someone buying drugs. The officer admitted that he did not see appellant purchase any drugs, enter a room where a transaction could have occurred, or commit any traffic violation.

The Court stated that an officer may conduct a brief investigative stop of a vehicle, but such a stop must be justified by specific, articulable facts sufficient to give rise to a reasonable suspicion of criminal conduct. Investigative stops of vehicles are analogous to *Terry* stops and are invalid if based upon only an unparticularized suspicion or hunch. An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. This suspicion need not meet the standard of probable cause, but must be more than mere caprice or a hunch or an inclination.

Here, the Court noted, the officer testified that he believed appellant was involved in a criminal activity because he briefly visited a motel located in a high drug area. Although appellant's brief visit was consistent with drug activity, a person's mere presence in a high crime area does not give rise to reasonable suspicion

of criminal activity, even if police observe conduct which they believe consistent with a general pattern of such activity. Moreover, the officer did not observe appellant attempt to avoid police detection, act erratically, engage in any drug transaction at the motel, talk to anyone who was a known drug dealer, or commit a traffic violation as he left the motel. From the record, the Court concluded that the officer likely inferred that because appellant fit a "pattern" of behavior by briefly stopping at a motel in a high drug area, he likely bought drugs inside. Therefore, the Court held, the stop was not based on particularized suspicion but rather based on appellant's conformity to a general pattern of behavior. Accordingly, the trial court erred in denying appellants motion to suppress.

Merger

Haynes v. State A13A0556 (5/29/13)

Appellant was found guilty of armed robbery, aggravated assault, burglary, and possession of a firearm during the commission of a felony based on his participation in a home invasion. He contended that the trial court erred in failing to merge his aggravated assault conviction into his armed robbery conviction for purposes of sentencing. The indictment alleged that appellant committed the offense of armed robbery under O.C.G.A. § 16-8-41(a) in that, with the intent to commit a theft, he took certain electronic equipment from the immediate presence of the victim husband and wife "by use of an offensive weapon, to wit: a handgun." Further, the indictment alleged that appellant committed the offense of aggravated assault under O.C.G.A. § 16-5-21(a)(2) in that he assaulted the husband "with an object, to wit: a handgun, which, when used offensively against another person is likely to result in serious bodily injury, by striking [him] in the back of the head with the handgun."

The evidence showed that when two gunmen entered the home of the victims, they repeatedly demanded money and to know the whereabouts of the tenant who lived in the basement. When the husband began wrestling with one of the gunmen, the second gunman hit him in the head with a pistol to regain control of the victim. When the gunmen could not find the tenant or money they demanded, they eventually grabbed electronics off of a computer table and fled the scene.

Georgia law bars conviction for a crime that arises from the same criminal conduct included as a matter of fact or as a matter of law in another crime for which the defendant has been convicted. Under the "required evidence" test, the important question is whether, looking at the evidence required to prove each crime, one of the crimes was established by proof of the same or less than all the facts required to establish the commission of the other crime charged. Moreover, the Supreme Court of Georgia has held that there is no element of aggravated assault with a deadly or offensive weapon that is not contained in armed robbery. Thus, the Court held that the offenses will merge as long as the crimes are part of the same act or transaction.

To determine if the striking of the husband with the handgun, which formed the basis for the aggravated assault conviction, was a separate act or transaction from the armed robbery, the inquiry turned on when the robbery began and when it concluded. Moreover, if the underlying facts showed that the aggravated assault was completed prior to the armed robbery, or vice versa, there was no merger. Here, the evidence showed that the gunmen repeatedly demanded to know "where the money was" during the home invasion, and the husband was struck in the head with the handgun as the gunmen were attempting to subdue the family so that the money and tenant could be located in the home, before any of the family's property had been taken. Under the circumstances, the Court decided, the striking of the husband with the handgun and the armed robbery were not separate and distinct acts committed in sequential order but rather were one uninterrupted criminal transaction. Therefore, the Court held that the aggravated assault conviction merged into the armed robbery conviction.

The State attempted to differentiate the gunmen's search for money in the home and subsequent taking of the electronics into separate transactions. Moreover, the State suggested that the gunmen's effort to subdue the family and hold them at gunpoint so that they could search for money in the home was a separate act or transaction from the ultimate taking of the electronics. The Court rejected this contention and held that even though the gunmen did not obtain the money they originally sought, appellant's "afterthought" to take the family's electronics was predicated

on the same conduct by using a weapon to overpower and intimidate the victims for the purpose of robbing them.

Accusations; Right to Grand Jury Indictment

Martinez v. State, A13A0564 (5/29/13)

Appellant was convicted of aggravated assault, simple battery and hindering an officer. The evidence, in part, showed that appellant stabbed the victim in the stomach. At trial, the prosecutor informed the court that the State intended to try appellant by accusation because the language of the assault charge in the indictment was based on the use of a knife and the victim could not identify the solid object that was used in the assault. After speaking with trial counsel, appellant verbally waived his right to re-indictment and agreed to proceed on the accusation. Appellant contended that the trial court erred in accepting his waiver of his right to a grand jury presentment and an indictment perfect in form because his waiver was not in writing.

The Court noted that O.C.G.A. § 17-7-71(a) provides that “[i]n all misdemeanor cases, the defendant may be tried upon an accusation framed and signed by the prosecuting attorney of the court.” The other accusations charging appellant with simple battery and hindering an officer met the requirements of O.C.G.A. § 17-7-71(a). Thus, appellant had no right to grand jury indictment on those charges. However, because appellant was charged with aggravated assault, the State had to comply with the requirements of O.C.G.A. § 17-7-70(a) in order to try him by accusation rather than by grand jury indictment. O.C.G.A. § 17-7-70 establishes the procedure for trials and guilty pleas on accusations. Moreover, subsection (a) gives the district attorney authority to file accusations against defendants in felony cases, other than capital felonies, when the defendant waives indictment by the grand jury in writing. Aggravated assault is not one of the felony crimes for which a defendant may be tried without an indictment or a written waiver under O.C.G.A. § 17-7-70.1(a)(1). Accordingly, the State was only authorized to try appellant by accusation on the aggravated assault charge if he waived indictment by the grand jury in writing. Here, the record showed that appellant verbally waived his right to grand jury indictment at the start of his trial. The Court

held that this was insufficient because a written waiver was a necessary prerequisite to the trial court’s jurisdiction and nothing in the record showed that appellant waived his right to indictment in writing. Therefore, the Court reversed the aggravated assault conviction for lack of jurisdiction.

Evidence; Competency

State v. Chapman, A13A0661 (5/30/13)

After a jury found Chapman competent to stand trial and another jury found Chapman guilty of two counts of aggravated child molestation and one count of child molestation, the trial court, acting sua sponte, declared a mistrial in the trial of Chapman’s guilt or innocence and ordered a new trial on the issue of his competency. On appeal, the State contended that the mistrial order was void because it was entered after the jury returned its verdict and that the trial court abused its discretion in ordering a new trial on the issue of Chapman’s competency.

The record showed that Chapman was indicted on two counts of aggravated child molestation and one count of child molestation. Chapman entered a special plea of incompetency to stand trial and demanded that the issue of his competency be resolved by a jury as set forth in O.C.G.A. § 17-7-130(b)(2). After a jury found Chapman to be competent, another jury found him guilty on all counts in the criminal trial. At the conclusion of the criminal trial, the trial court stated, among other things, that “[j]ustice was not done in this courtroom this week,” and that the “process by which we reached the decision today . . . is hanging in my craw.” Approximately two weeks later, the trial court, acting sua sponte, entered contemporaneous orders granting a new trial on the issue of Chapman’s competency to stand trial and declaring a mistrial on the criminal charges.

The State argued that the trial court’s declaration of a mistrial after the return of the jury’s verdict was without authority and void. The Court agreed with the State that it was too late for the trial court to declare a mistrial after the verdict. However, the trial court found that it committed error in admitting a physician’s testimony that Chapman had sought to exclude through a motion in limine, stating that “the resulting jury verdict

must be set aside” and “[d]efendant is entitled to a new trial.” Here, the Court noted that pleadings, motions, and orders are construed according to their substance and function and not merely by nomenclature. Notwithstanding the nomenclature, the Court held that the trial court’s order was in “substance” a sua sponte grant of a new trial.

Nevertheless, the State argued, even if considered a grant of a new trial, the trial court’s order should still have been vacated because the trial court abused its discretion in ordering the new trial. Generally, the Court stated, the grant or denial of a motion for new trial is a matter within the sound discretion of the trial court and questions of law are reviewed de novo. Here, the reasons cited by the trial court for requiring a new trial did not go to the general grounds, but to the erroneous admission of evidence. Chapman was charged for conduct allegedly occurring in September and October 2011. In November 2011, the seven-year-old victim complained to her grandmother of a burning sensation during urination and, in connection with this complaint, she indicated that Chapman had sexually abused her. The victim was treated with medication for her urinary tract infection. In May 2012, the victim was again diagnosed with a urinary tract infection and given an antibiotic. Dr. Duke, an OB/GYN physician, testified that the cause of the victim’s abscess was pelvic inflammatory disease, and pelvic inflammatory disease is almost always caused by prior exposure to a sexually transmitted disease. The trial court noted that the victim’s grandmother testified that during a pelvic examination in November 2011 the victim’s hymen was intact while Dr. Duke testified that in May 2012, her pelvic examination of the victim showed that the victim’s hymen was not intact. Moreover, the trial court noted that Chapman was arrested in November 2011 and remained in custody through the date of trial, and that there was no evidence that Chapman had ever had a sexually transmitted disease. Thus, the trial court found Dr. Duke’s testimony to be “highly indicative that the victim was sexually abused by someone other than the defendant after his arrest.”

The Court stated that the law favors the admission of relevant evidence, no matter how slight its probative value, unless the potential for prejudice substantially outweighs its probative value. After reviewing the evidence

concerning Dr. Duke in some detail, the Court noted that although it could not be said that Dr. Duke's testimony was irrelevant, the trial court could conclude that the testimony's probative value was outweighed by its tendency to unduly arouse the jury's emotions of prejudice, hostility or sympathy. And in weighing the probative value of evidence against the potential for such undue prejudice, it was for the trial court to exercise its discretion in determining admissibility. Therefore, the Court concluded that the trial court did not abuse its discretion in finding that Dr. Duke's testimony was "highly prejudicial to defendant without a sufficient nexus to his alleged conduct," or that it erred in granting Chapman a new trial on the ground that such material and prejudicial evidence was improperly admitted.

Finally, the State contended that the trial court erred in granting Chapman a new trial on the issue of his competency to stand trial. The Court held that premitting whether this order was appealable by the State, the issue of Chapman's competency to stand trial at the criminal proceedings in August of 2012 was moot, and he was entitled to again raise the issue of his competency upon retrial of the criminal charges. Therefore, the Court did not address the State's claims of error as they pertained to the trial court's grant of a new trial on the issue of Chapman's competency.

O.C.G.A. § 17-8-54; Victim Advocates

Ford v. State, A13A0204 (5/29/13)

Appellant was convicted of three counts of child molestation. He contended that the trial court erred in allowing a victim advocate to accompany the first victim to the witness stand and sit by her in front of the jury while she testified. The record showed that when the first victim, who was eleven years old at trial, took the stand to testify at appellant's trial, the trial court cleared the courtroom of all spectators, pursuant to O.C.G.A. § 17-8-54, with the exception of a victim advocate who accompanied the first victim to the witness stand and sat on the floor next to the first victim while she testified. The trial court carefully observed the advocate's presence and demeanor during the first victim's testimony and saw no inappropriate or prejudicial conduct or behavior.

The Court stated that the trial court has

broad discretion in controlling the trial of a case, and has a great deal of latitude in the examination of young witnesses. Moreover, a trial court does not abuse its discretion in allowing a victim-witness advocate to sit with the victim during testimony. Nevertheless, appellant contended that the victim advocate was not within the group of people authorized to remain in the courtroom under O.C.G.A. § 17-8-54. The Court noted that the statute provides as follows: "[i]n the trial of any criminal case, when any person under the age of 16 is testifying concerning any sex offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, and court reporters." The Court found that contrary to appellant's contention, O.C.G.A. § 17-8-54 protects the interest of the child witness, not the defendant, and a trial court's failure to follow the statute does not violate a defendant's rights. Moreover, no evidence in the record showed that the victim advocate improperly influenced the first victim's testimony. Therefore, appellant did not show that the trial court abused its discretion in allowing the advocate to sit with the first victim during her testimony.

Bolstering; Plain Error

Heard v. State, A13A0292 (5/29/13)

Appellant was convicted of child molestation, aggravated child molestation, and incest. He contended that testimony by a police investigator and the victim's mother improperly bolstered the victim's testimony and went to the ultimate issue in the case. The transcript showed that the State was questioning the mother regarding her initial failure to report her daughter's outcry to the police, and the mother testified, "I just, in the back of my mind, I didn't want to believe it. I couldn't believe it because of the relationship they had." Asked why she ultimately did call the police, the mother testified to her observations and then added, "also this how I knew that she was telling the truth because she said that they were." At this point, appellant objected on the basis of speculation and ultimate issue, but raised no objection on the basis of bolstering. The objection was overruled, but the witness did not return to that line of testimony.

During the police investigator's testimony, she was asked a question regarding her interview techniques and why she represented to appellant that the victim had undergone a medical examination, although no such examination had taken place. The investigator responded that she used this technique "whenever we work these types of cases and it is such a close family member that is the one that is perpetrating the abuse," in order to encourage admissions, and "oftentimes when we interview child molesters, we allow them an out so that they can be honest about what they've done without having to feel so bad about what they've done." Again, appellant did not object to this testimony on any ground, but contended that the investigator's general references to "child molesters" during a description of her interview technique constituted bolstering and went to the ultimate issue in the case.

Appellant argued that the alleged errors may be considered under a "plain error" analysis. In appeals of criminal cases, the Court stated, plain error review is limited to alleged error in three circumstances: The sentencing phase of a trial resulting in the death penalty; a trial judge's expression of opinion; and a jury charge affecting substantial rights of the parties. Here, the Court noted, the new Evidence Code changed this rule in cases tried after January 1, 2013. Under the new Code, a trial court may consider plain errors affecting substantial rights although such errors were not brought to the attention of the trial court. However, appellant was tried in 2011; thus, plain error review did not apply to allegations regarding the improper admission of evidence and appellant's failure to object. Therefore, the Court held that the claims of "plain error" were not proper. With respect to appellant's remaining claim that the mother's testimony went to the ultimate issue in the case, the Court noted that the victim's mother was not an expert witness, but, a presumptively-biased parent. Thus, her testimony merely showed that she believed her child, and it did not impermissibly intrude upon the jury's fact-finding function.

Venue; Circumstantial Evidence

Erick v. State, A13A0294 (5/30/13)

Appellant was convicted in Gwinnett County of theft by taking based on evidence that he had misappropriated \$20,000 owed

to his employer. The evidence showed that appellant worked for a glass company and in his scope of employment, he negotiated contracts to install glasswork. In June 2007, he represented to a Fulton County client that he worked for the glass company, took them to the company's Cobb County location, and negotiated a contract to install glass on behalf of the company. However, unbeknownst to the employer, client, and the client's general contractor, appellant sought to start his own glass company from the proceeds of the deposit negotiated in the contract. Appellant received the \$20,000 check from the general contractor, persuaded the general contractor to name appellant's start-up company as a payee of the check, and deposited it in an ATM at a Gwinnett County bank. At his bench trial, appellant did not present a defense and moved for a directed verdict of acquittal after the State presented its case.

Appellant contended that the State failed to prove that venue was proper in Gwinnett County and therefore, the trial court erred in denying his motion for a directed verdict of acquittal. Moreover, appellant asserted that the State failed to prove that he was the person who deposited the \$20,000 check into the ATM in Gwinnett County and thus, failed to establish that he ever exercised control over the money in that county.

The Court stated that venue is a jurisdictional fact and is an essential element in proving that one is guilty of the crime charged. Like every other material allegation in the indictment, venue must be proved by the prosecution beyond a reasonable doubt. Venue can be proven through direct or circumstantial evidence. The question of venue is normally for the trier of fact, and the fact finder's decision will not be set aside if there is any evidence to support it. When the crime at issue is a theft by taking under O.C.G.A. § 16-8-2, "the crime shall be considered as having been committed in any county in which the accused exercised control over the property which was the subject of the theft." See O.C.G.A. § 16-8-11. In a prosecution for theft by taking, venue is proper in either county when a check is taken in one county and deposited in another. Moreover, venue is proper in the county where a defendant's agent exercised control over the property.

Here, the Court found there was evidence that the \$20,000 check at issue was deposited

into a Bank of America ATM in Gwinnett County on the same day that appellant had been provided the check by the general contractor of the client. And while the State did not present direct evidence that appellant deposited the check, there was circumstantial evidence from which the trial court was entitled to infer that the deposit had been made by him or someone acting on his behalf. Specifically, the \$20,000 check was deposited into a business account for appellant's wife d/b/a "Erick's Glass Consultants," he had convinced the general contractor to sign a work proposal for the glass installation that listed "Erick's Glass, Co." as the installer rather than his employer, and he had persuaded the general contractor to name "Erick's Glass" as the payee on the \$20,000 deposit check. Furthermore, appellant admitted to the homeowner and general contractor that he had used the \$20,000 to buy a truck and trailer for his new glass installation company. The Court held that the combined circumstantial evidence authorized the trial court to find that appellant or someone acting on his behalf exercised control over the \$20,000 check in Gwinnett County by depositing the check into an ATM there. Therefore, there was no error in finding that the venue was proper in Gwinnett County.

Accomplice Testimony; Slight Evidence

Vann v. State, A13A0686 (5/23/13)

Appellant was found guilty of armed robbery, aggravated assault, possession of a firearm during a crime, and possession of a firearm by a convicted felon. He contended that his conviction should be reversed because it was based on the uncorroborated testimony of his accomplice. The evidence showed that the victim arrived for her job at a fast food restaurant around 7:15 a.m. A gunman, in a ski mask and carrying a gun, approached her from nearby shrubs, but she was able to run inside and lock the door behind her. The gunman shot the door, entered the restaurant, and told her to open the safe and cash box. The gunman robbed the restaurant and was described by the victim as about 5'10", 160-170 pounds, with "dark, kind of brownish shade [skin]" that "wasn't dark, but . . . a little on the tannish side." As the gunman ran from the store, the victim saw another man, who was slightly taller than the gunman, run

across the street and behind another building with the gunman. She described that second man as being familiar to her and as wearing khaki pants and a multi-striped shirt, and who put his baseball cap over his face when he saw her looking at him. About three and a half hours after the robbery, the accomplice was found walking along the street within a mile of the restaurant, carrying a book bag, which contained a CB&T money bag, rolled coins, and a ski mask.

In court, the accomplice testified that appellant had approached him about robbing the restaurant, but the accomplice was opposed to the robbery because his girlfriend at the time worked at the restaurant. The accomplice testified that appellant brandished the weapon and committed the robbery while he was outside the building, and the men dumped the bag with the proceeds and split up after the robbery. The accomplice went back to his house and later returned to the place where the two had put the bag, when he was apprehended by an officer. Additionally, the victim of the robbery identified appellant in the courtroom solely by his general physical description.

Appellant argued that there was insufficient evidence to corroborate the accomplice's testimony. Generally, testimony of a single witness is enough to establish a fact, unless the witness is an accomplice to crime, in which case such testimony must be corroborated. Although a defendant may not be convicted on the uncorroborated testimony of an accomplice, only slight evidence of a defendant's identity and participation from an extraneous source is required to corroborate the accomplice's testimony and support the verdict. Sufficient corroboration may consist of either direct or circumstantial evidence which connects the defendant with the crime, tends to show his participation therein, and would justify an inference of the guilt of the accused independently of the testimony of the accomplice. Whether the State presented sufficient corroboration of the accomplice's testimony is peculiarly a matter for the fact-finder to determine.

Here, the Court noted that the evidence presented at trial, however weak, was enough to corroborate the accomplice's testimony as slight enough to support the conviction. The victim admitted on cross-examination that she was not able to positively identify appellant as the robber because the robber had worn the ski

mask the entire time and because a number of people in the city fit the same physical description as the man who robbed her. The victim also admitted that only an employee or someone affiliated with an employee would have known about the location of the change box or the safe because both were camouflaged from plain sight, and the individual who robbed her knew of the existence and location of both the cashbox and the safe. Additionally, the accomplice's girlfriend was also an employee at the restaurant. Moreover, the victim's in-court description of the clothing worn by the robber did not match the description she provided to officers on the day of the robbery, which described the gunman as being of a heavier build, with a red and white striped long-sleeved shirt and the second man as having worn an orange and yellow shirt and also wearing a ski mask. Both of these descriptions varied from the accomplice's description of appellant's clothing, which consisted of shorts, which he thought were green, and brown shoes. Nevertheless, the victim did identify appellant as the robber brandishing the weapon based on his build and skin tone. Although appellant's counsel highlighted the weaknesses of the State's case throughout trial, the Court held that the weaknesses, credibility, and weight of the evidence were matters for the fact finder and the trial court did not err by denying appellant's motion for new trial on the issue.

Hearsay; Necessity Exception

Jones v. State, A13A0472 (5/23/13)

Appellant was charged with murder, felony murder, and aggravated assault of his wife. A jury found him guilty of aggravated assault, but was unable to reach a verdict as to murder and felony murder. He appealed his aggravated assault conviction and argued that the trial court abused its discretion by admitting hearsay testimony regarding prior difficulties between the victim and appellant. The sister of the deceased victim testified that the victim told her "basically her marriage had come to an end" and that she was considering filing for divorce. The trial court admitted the sister's statement under the necessity exception to the hearsay rule.

The Court stated that there are three basic requirements for non-testimonial hearsay evidence to be admissible under the necessity

exception: (1) the declarant is unavailable; (2) the declarant's statement is relevant to a material fact and is more probative as to that fact than other evidence that may be procured and offered; and (3) the statement exhibits particularized guarantees of trustworthiness. Appellant did not challenge the first two prongs, but argued that the trial court erred by admitting the statement because it did not exhibit particularized guarantees of trustworthiness. The Court noted that the sister testified that she moved into her sister's subdivision so that they could be close to each other, and that they confided in each other. According to the sister, she and the victim discussed personal matters with each other "[a]ll the time," and they sought guidance from one another. Moreover, a trial court does not abuse its discretion by finding guarantees of trustworthiness when the declarant made statements to a close family member, who placed confidence in the witness, and turned to the witness for help with personal problems. Therefore, the Court held that the trial court did not abuse its discretion by admitting the sister's testimony concerning the deceased victim's out-of-court statements.

Sentencing; Recidivist

Harris v. State, A13A0809 (5/30/13)

Appellant was convicted of armed robbery, aggravated assault, possession of a firearm by a convicted felon, possession of a firearm during the commission of a felony, and carrying a concealed weapon. He argued that the trial court erred in sentencing him as a recidivist. The record revealed that the trial court considered appellant's 1999 conviction for armed robbery, and on the armed robbery counts here sentenced him "to life in prison without parole under [O.C.G.A. §] 17-10-7(b)(2)." That Code section provides in part: "Any person who has been convicted of a serious violent felony . . . and who after such first conviction subsequently commits and is convicted of a serious violent felony for which such person is not sentenced to death shall be sentenced to imprisonment for life without parole." Armed robbery is listed as a "serious violent felony" under O.C.G.A. § 17-10-6.1(a)(2).

Appellant argued that the State "used up" the prior 1999 armed robbery conviction when it used that conviction as the basis for the charges of possession of a firearm by a convicted felon, and could not thereafter also use

the prior conviction for recidivist sentencing. In support of his argument, he cited *Arkwright v. State*, 275 Ga.App. 375 (2005). But, the en banc Court noted, *Arkwright* was inapplicable because it involves the application of O.C.G.A. § 17-10-7(a), rather than subsection (b)(2) at issue here. In *King v. State*, 169 Ga.App. 444 (1984), it was held that the State cannot use "the prior felony conviction required to convict a convicted felon for being in possession of a firearm, and then use the same prior conviction to enhance the sentence to the maximum punishment for the offense under the repeat offender statute." The rationale for that holding was that the application of O.C.G.A. § 17-10-7(a)(2) eviscerates the sentencing range of one to five years set forth in O.C.G.A. § 16-11-131 (possession of a firearm by a convicted felon) because the trial court is forced to impose a five-year sentence. In other words, the sentencing range of one to five years is eliminated by the requirement of O.C.G.A. § 17-10-7(a) that a defendant "shall be sentenced to undergo the longest period of time prescribed for the punishment of the subsequent offense." (Emphasis supplied.) Therefore, a prior felony conviction cannot be used by the prosecution to convict for possession of a firearm by a convicted felon and to enhance a sentence for that crime under O.C.G.A. § 17-10-7(a).

However, contrary to appellant's argument that the prior armed robbery conviction was "used up," the rule set out in *King* is not founded on the idea that the defendant's possession of a firearm is "used up" by its consideration under one statute and therefore not available under the other. Rather, the reason for this narrow rule is that to hold otherwise would eviscerate the sentencing range prescribed by the legislature for possession of a firearm by a convicted felon. Here, the trial court sentenced appellant pursuant to O.C.G.A. § 17-10-7(b)(2) which allows for sentence enhancement based upon a second conviction for a *serious violent felony* following a prior conviction for a *serious violent felony*. The court sentenced appellant as a recidivist for his convictions for armed robbery based upon his prior conviction for armed robbery. The application of O.C.G.A. § 17-10-7(b)(2) therefore could not eviscerate the sentencing range for appellant's conviction for possession of a firearm by a convicted felon, because subsection (b)(2) applies only to enhance the sentence for a subsequent conviction for a seri-

ous violent felony, and possession of a firearm by a convicted felon is not a “serious violent felony” as defined in O.C.G.A. § 17-10-6.1.

Nevertheless, appellant relied upon *Wyche v. State*, 291 Ga.App. 165 (2008) to support his arguments. The Court noted that in *Wyche*, the defendant was convicted of armed robbery, kidnapping, and possession of a firearm by a convicted felon. Wyche complained, as appellant did, that the State “used up” his prior felony conviction to prove the charge of possession of a firearm by a convicted felon. In support of the prior conviction, the State relied upon a nolo contendere plea to a charge of robbery with a deadly weapon. And, as here, the trial court sentenced Wyche to life without parole on the armed robbery count pursuant to O.C.G.A. § 17-10-7(b)(2). In reversing Wyche’s conviction for possession of a firearm by a convicted felon, the Court, citing *King*, held that a prior conviction cannot be used to support both Wyche’s recidivist sentencing and his conviction for possession of a firearm by a convicted felon, and that moreover, a nolo contendere plea could not serve as proof of a prior conviction.

But, the en banc Court said, “Our conclusion in *Wyche* was incorrect.” The rationale for the *King* holding was not that the prior conviction was “used up” to prove the charge of possession of a firearm by a convicted felon and therefore cannot be used again for recidivist sentencing generally. Rather, the rationale is that a prior conviction used to prove possession of a firearm by a convicted felon cannot also be used to enhance the sentence for possession of a firearm by a convicted felon under O.C.G.A. § 17-10-7(a), because to do so would eviscerate the sentencing range prescribed for that crime. “The narrow holding in *King* simply does not apply to the separate provision of O.C.G.A. § 17-10-7(b)(2). And we therefore disapprove of *Wyche* to the extent it holds to the contrary.” Accordingly, the Court affirmed the sentence of life without parole.

Judicial Comment; O.C.G.A. § 17-8-57

Graves v. State, A13A0798 (5/24/13)

Appellant was convicted of aggravated assault. The evidence showed that the victim was shot with a shotgun that appellant had purchased three months prior to the incident. Appellant alleged the shotgun had been stolen.

At trial, one of the detectives testified that during his investigation of the crime, he spoke to appellant’s girlfriend. The detective stated that the girlfriend had indicated that appellant owned a shotgun and that the shotgun had been reported as having been stolen. Appellant did not initially object to this testimony on hearsay grounds, but interposed such an objection when the State asked the detective whether the girlfriend had reported the gun as having been stolen from appellant’s residence. Thereafter, appellant elicited additional testimony about the girlfriend’s statement during cross-examination of the detective. On redirect, the State asked the detective whether he took a written statement from the girlfriend, and the detective responded in the affirmative. During re-cross, appellant asked the detective whether appellant’s girlfriend ever told the detective that one of appellant’s roommates used the shotgun to shoot the victim. The State objected on hearsay grounds, and the trial court sustained the objection. Following the detective’s testimony, the trial court informed the parties that it allowed the detective to testify about the girlfriend’s statement only to the extent that she had told officers the shotgun had been stolen, and it only allowed this testimony because it pertained to appellant’s defense. The trial court subsequently instructed the jury that the detective’s testimony with respect to the girlfriend’s statement was hearsay and was not to be considered with one exception—it could consider the detective’s testimony about obtaining a statement from the girlfriend about the shotgun allegedly being stolen.

Appellant argued that the trial court violated O.C.G.A. § 17-8-57 when it instructed the jury that it may consider only a portion of the detective’s testimony regarding the girlfriend’s statement. Under O.C.G.A. § 17-8-57, “[i]t is error for any judge in any criminal case, during its progress or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused. Should any judge violate this Code section, the violation shall be held . . . to be error and the decision in the case reversed, and a new trial granted in the court below[.]” However, to constitute an improper comment under O.C.G.A. § 17-8-57, the trial court’s statement must express an opinion about whether the evidence has proven a material issue in the case, whether a witness was credible, or whether the defendant was guilty. Here, the

Court noted, the trial court did not instruct the jury to conclude, as a matter of fact, that his girlfriend made a statement to police or that she informed police about the gun being stolen. Rather, the trial court instructed the jury that it could consider only a limited portion of the detective’s testimony regarding the girlfriend’s statement. Thus, the trial judge’s instructions did not express or intimate its opinion with regard to the defendant’s guilt or innocence or make a statement with respect to what had been proven. Moreover, pertinent remarks made by a trial court in discussing the admissibility of evidence or explaining its rulings do not constitute prohibited expressions of opinion. Accordingly, the trial court’s instructions did not violate O.C.G.A. § 17-8-57, and the argument presented no basis for reversal.

Judicial Comment; Recidivist Sentencing

Tanksley v. State, A13A0036 (5/29/13)

Appellant was convicted of burglary, armed robbery, aggravated assault, and possession of a firearm during the commission of a crime. The evidence showed that appellant and several individuals broke into a clothing store and fired shots at the owner during the commission of the crime. At appellant’s trial, his accomplices gave testimony which implicated appellant in the crimes.

Appellant argued that the trial court erred in instructing one of the accomplices that he had to repeat his previous trial testimony or be charged with perjury. The record showed that during proceedings outside the presence of the jury, the prosecutor informed the trial court of its intention to call the accomplice as a witness for the State and that she anticipated eliciting the same responses from the accomplice that he had given in his previous trial. Because the accomplice had been granted immunity by the prosecution, the accomplice’s attorney warned him about the prospects of prosecution for perjury if he testified untruthfully. Then, the trial court warned the accomplice that if he gave testimony “that’s not true to the transcript from the last trial, if you say something opposite and the district attorney shows it to you so you can read it and refresh your memory—if you lie—that’s what we’re talking about—if you lie today in your testimony, you’ll be in trouble.” As the trial court further explained, “[t]his immunity does not

mean you can come in here and lie and say anything you want.” When asked if he had an objection, appellant’s counsel responded that “it sounds like” the trial court had just told the accomplice that “if you say anything other than what you said before you’ll be in trouble.” The trial court responded that, “[i]f he told a lie last time and today he says my story[] [is] different and I lied last time, then he’s in trouble for last time.” The State subsequently called the accomplice as a witness.

Appellant contended that the trial court improperly threatened and intimidated the accomplice in testifying against appellant by admonishing the accomplice to repeat his previous trial testimony or face a perjury charge. The Court disagreed. First, the trial court’s instruction was that the accomplice not “lie today in [his] testimony” and not that he was required to repeat his previous testimony. Second, the transcript did not show that the trial court abused the accomplice or treated him in an improper manner. Although the accomplice had been granted immunity for his testimony under O.C.G.A. § 24-9-28, he could “nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing, or contempt committed in testifying or failing to testify.” Thus, the Court held, the trial court warned the accomplice against lying in the context of properly informing him that the grant of immunity did not extend to giving false testimony. However, the Court noted, the trial court’s statement that the accomplice would be in “trouble for last time” if he had given false testimony in the first trial may have gone a little too far in that it implied, perhaps, that the accomplice’s truthful testimony in appellant’s trial could be used against him notwithstanding the grant of immunity, but the trial court’s statement fell short of the threatening remarks to a witness which were found to violate the defendant’s right to due process. Further, the Court emphasized that appellant was free to cross-examine appellant about whether he felt pressured by the trial court’s comments to give testimony consistent with his testimony in the first trial. Additionally, the accomplice was in court with his own counsel, who voiced no concern that he was being threatened or bullied.

The Court also noted that judicial or prosecutorial intimidation that dissuades a potential defense witness from testifying for the defense can, under certain circumstances,

violate the defendant’s right to present a defense. Here, however, the alleged intimidation did not dissuade a defense witness from testifying. Therefore, appellant was not denied the right to present his own witnesses to establish a defense.

Finally, there was no showing by appellant that his right to due process was denied by the trial court’s statements. Due process guarantees that a criminal defendant will be treated with that fundamental fairness essential to the very concept of justice. In order to declare a denial of due process, a court must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. Again, the Court noted, appellant was free to explore on cross-examination the possibility that the accomplice interpreted the trial court’s statements as directing him not to change his previous testimony, and he did so. Thus, there was no error found by the Court.

Appellant also contended that he should not have been sentenced as a recidivist because the State did not provide certified copies of his prior convictions. The record showed that appellant was sentenced as a recidivist under O.C.G.A. § 17-10-7(c) to serve a total of life plus 45 years. At the sentencing hearing, the prosecutor represented that the State had filed a notice seeking recidivist punishment and that she was in possession of certified copies of appellant’s three prior convictions. The prosecutor then notified the trial court that “based on the indictment there may have been only two convictions,” but then indicated that, as to the third, “the Clerk’s office has advised that a certified copy is on the way down to the courtroom.” Defense counsel acknowledged the maximum sentences the trial court was required to impose if appellant was a recidivist but asserted that this was only “assuming there is a hard copy of that third conviction.” The prosecutor then purported to tender certified copies of two of the prior convictions into evidence as Exhibits 1 and 2, “and as soon as it comes down [Exhibit] 3 for purposes of sentencing.” The trial court did not admit the tendered convictions into evidence, but asked the clerk, court reporter, and appellant to be “held back here until we get the certified copy.” There was nothing else on the record about the matter and the State did not dispute that certified copies of appellant’s three alleged convictions were never entered in the record.

The Court stated that the burden was on the state to produce competent evidence of a prior conviction for purposes of sentencing. A trial court cannot rely upon the hearsay statement of a prosecutor to establish a fact for purposes of sentencing. The State argued that the prosecution, defense counsel, and judge were all proceeding “on the assumption” that there were three convictions and therefore, the Court should presume that the sentencing was valid. But, the Court found, defense counsel did not waive the requirement that the convictions be proven by the State and the State failed to carry its burden of showing by competent evidence that appellant was a recidivist. Accordingly, appellant’s sentence was vacated and the case remanded to the trial court for resentencing.