

THIS WEEK:

- **Bolstering; Merger**
- **Simple Battery; Corporal Punishment**
- **Judicial Comments; Fatal Variance**
- **Intrinsic Evidence; Collateral Estoppel**

Bolstering; Merger

Hightower v. State, S18A1238 (12/10/18)

Appellant was convicted of malice murder, two counts of aggravated assault, one count of aggravated battery, a firearm offense, and misdemeanor obstruction in connection with the death of Bowers and the permanent injury of Cosby. The transcript showed that the State called a medical examiner as a witness concerning the autopsy of Bowers. The doctor testified concerning her expertise and that she had testified as a forensic pathology expert 184 times. The trial court then stated, “She is an expert. Remember, I told you that experts, in weighing their testimony, you're not required to accept any testimony, expert or otherwise, but the doctor is a frequent witness in Fulton Courts.”

Appellant contended that the trial court's statement that “the doctor is a frequent witness in Fulton Courts” improperly bolstered the credibility of an expert witness in violation of OCGA § 17-8-57. The Court disagreed. First, the trial court's comment indicated nothing about appellant's guilt, and the fact that the doctor “is a frequent witness in Fulton Courts” was not at issue. Appellant did not dispute that fact or the doctor's qualification as an expert in forensic pathology.

Second, even assuming that a jury may consider a particular witness's testimony to be more credible when the judge unnecessarily mentions that the witness frequently testifies as an expert, appellant failed to show how he was harmed. Appellant never disputed the doctor's conclusions about the cause and manner of Bowers' death, which were immaterial to appellant's defense of mistaken identity. In fact, the Court noted, the only question appellant's counsel asked on cross-examination was whether she could identify the person who shot and killed Bowers, and she acknowledged that she could not. Accordingly, even if the trial court's comment made the jury more inclined to believe the doctor's testimony, that comment had no likelihood of affecting the outcome of the trial.

Appellant also argued that the count charging aggravated assault against Cosby should have been merged into his aggravated battery conviction because both counts were based on the same conduct — his shooting at Cosby. The Court again disagreed. The two counts did not clearly charge the same conduct, and the evidence showed that there were two rounds of gunshots which were separated by a distinct interval and caused distinct injuries to Cosby. Therefore, the trial court properly did not merge the aggravated assault and aggravated battery counts.

Simple Battery; Corporal Punishment

Anderson v. State, A18A2133 (12/27/18)

Appellant was convicted of criminal trespass family violence and simple battery family violence. The evidence showed that appellant was visiting at the home his two adult children shared with their mother and sister. An argument occurred between appellant and his eldest son. Although appellant was screaming, he became angry when his youngest son (age 25) raised his voice at appellant and spoke to him in what appellant thought was a disrespectful manner. Appellant threw a glass against a wall and got in his younger son's face. He pushed his son and his son had to extend his arms to keep appellant at bay.

Appellant contended that the evidence was insufficient to convict him of simple battery against his son. Specifically, he contended that any contact with his adult son constituted legal parental discipline. The Court disagreed.

The Court noted that appellant was correct that Georgia law exempts "corporal punishment administered by a parent or guardian to a child" and "reasonable discipline administered by a parent to a child in the form of corporal punishment, restraint, or detention" from the definitions of simple battery and family violence, respectively. OCGA §§ 19-13-1, 16-5-23 (f). Although neither of these statutes define "child" with regard to these exemptions, the General Assembly need not define every word it uses in a statute, and as a cardinal rule of statutory construction, the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter. Thus, the Court found that the ordinary signification of "child," in the context of parental discipline, is a minor. The Court stated that not only is this common sense, but it is also consistent with the treatment of the term in the similar context of the affirmative defense of justification. The defense of justification can be claimed "[w]hen the person's conduct is the reasonable *discipline of a minor by his parent* or a person in loco parentis[.]" (Emphasis supplied.) OCGA § 16-3-20 (3).

Nevertheless, appellant argued, if the parental discipline exemption does not extend to adult children, the family violence statute cannot be applied as between a parent and his adult child. The Court again disagreed. The fact that an exemption is available only to certain parents, those with minor children who the parents can properly and legally discipline, does not mean that the remainder of the statute cannot apply to all parents. Accordingly, the Court found that neither the battery nor family violence statute permit a parent to corporally punish an adult child, and thus the jury was authorized to convict appellant for his contact with his adult son.

Judicial Comments; Fatal Variance

In Re S. B., A18A1851, (1/4/19)

Appellant was adjudicated delinquent for acts that, if committed by an adult, would constitute the offenses of burglary and attempted burglary. He argued that the juvenile court erred by adjudicating him delinquent for acts wholly different and separate than that alleged in the delinquency petitions. Specifically, he contended that the juvenile court made comments at the adjudicatory hearing indicating that she based her adjudications, at least in part, on appellant's admitted presence at both houses at times other than the dates when the burglaries occurred, as alleged in the delinquency petitions. The Court disagreed.

The Court stated that the juvenile court's statements in court were of no legal significance. A trial court's oral pronouncement is not a judgment until it is put in writing and entered as the judgment. Although a trial court's oral pronouncements on the record may provide insight of her subsequent written judgment, discrepancies between the oral and written pronouncements must be resolved in favor of the written judgment. And here, the Court found, in her written orders adjudicating appellant delinquent, the juvenile court stated that she "found that the allegations of the petition [were] true . . . , that the acts attributed to [S. B.] were, in fact, committed by [him], and that such acts constitute[d] acts of delinquency." To the extent that her comments during the hearing reflected a different factual basis for her adjudications, the Court looked to the written judgments, which reflected that the juvenile court based her adjudications on the facts alleged in the delinquency petitions. Accordingly, appellant's argument was meritless.

Intrinsic Evidence; Collateral Estoppel

Johnson v. State, A18A2016 (1/8/18)

Appellant was convicted in DeKalb County for armed robbery, aggravated assault, and possession of a weapon during the commission of a felony. At trial, the State presented evidence that appellant was involved in a five-day crime spree that covered three other counties, with incidents in Cobb County and Fulton County preceding the DeKalb County incident, and additional crimes in Gwinnett County following the DeKalb County incident. Specifically, on November 1, appellant armed robbed a victim and carjacked her black Chevrolet Cobalt. Three days later, in Fulton County, appellant and another man carjacked another woman's blue Honda Civic. The black Cobalt was left at the scene. Less than twelve hours later, appellant committed armed robbery in DeKalb County by approaching a third woman at a gas station and left in the blue Honda Civic. Two days later, appellant was arrested in Gwinnett County. At the time, he was sitting in the blue Honda Civic, which was parked in a cemetery. Evidence linking him to the other crimes was found on his person and in the vehicle.

Appellant contended that the DeKalb court erred in allowing evidence of the crimes that occurred in Cobb and Fulton Counties. The Court disagreed. The Court stated that evidence is intrinsic if it is (1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense. In other words, evidence pertaining to the chain of events explaining the context, motive, and set-up of the crime, is properly admitted if it is linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.

Here, appellant's fingerprints were found in a car stolen in the Cobb incident and abandoned in the Fulton incident. Appellant himself was found in Gwinnett County in a car stolen in the Fulton incident, where the first car was abandoned, and used by assailants in the DeKalb incident. A small handgun was used in all three assaults, and the same gun that was recovered from appellant's person in Gwinnett County was fired in the DeKalb incident. Items belonging to the Cobb and DeKalb victims were found in the car occupied by appellant in Gwinnett. And the Cobb, Fulton, and DeKalb incidents occurred in a three-day span. According, the Court concluded, the Cobb County and Fulton County incidents arose out of the same series of transactions as, and were linked in time and circumstance with, the DeKalb incident and that evidence from those crimes was inextricably intertwined with the evidence from the DeKalb incident; the Cobb and

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Fulton incidents. As such, the evidence was intrinsic to the DeKalb incident and consequently, the trial court did not abuse its discretion by allowing the State to introduce evidence of the Cobb and Fulton incidents in the DeKalb County action.

Nevertheless, appellant contended, the DeKalb trial court erred by admitting evidence "barred by the doctrine of collateral estoppel." Specifically appellant argued, following his arrest in Gwinnett County, he pled guilty in that county to theft by receiving stolen property, i.e., the blue Honda Civic. And thus, he contended, because Georgia law provides that a person cannot be guilty of both stealing property and theft by receiving the same property, the DeKalb trial court was required to exclude any evidence that he stole the blue Honda Civic.

The Court again disagreed. The charges in DeKalb County—armed robbery, aggravated assault, and possession of a weapon during the commission of a crime—did not require proof that appellant stole the Honda Civic. Thus, the DeKalb jury was not asked to re-adjudicate whether appellant stole that vehicle. Accordingly, the DeKalb court was not required to exclude evidence suggesting that appellant stole the blue Honda Civic in Fulton County.