

# Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING FEBRUARY 23, 2018

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Todd Ashley  
Deputy Director

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General Counsel

Lalaine Briones  
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and Crimes Against Children  
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Exploitation Prosecutor

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State Prosecutor

Kenneth Hutcherson  
State Prosecutor

Austin Waldo  
State Prosecutor

## THIS WEEK:

- **Ineffective Assistance of Counsel; Sentencing**
- **Hearsay; Residual Exception**
- **Relevancy; Character Evidence**
- **Prior Sexual Offenses; Rule 413**
- **Marital Privilege; OCGA § 24-5-503 (a)**
- **Theft by Taking; Fiduciaries**
- **Self-Representation; Faretta**
- **Voir Dire; Length of Questioning**

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### Ineffective Assistance of Counsel; Sentencing

*Blackwell v. State, S17A1928, S17A1929 (1/29/18)*

Appellant was convicted of malice murder, two counts of aggravated assault, two counts of cruelty to children in the first degree, and possession of a firearm during the commission of a felony, all in connection with the fatal shooting of Deirdre Smith and the wounding of two children. The evidence, briefly stated, showed that appellant began shooting at another person, who began shooting back across an apartment parking lot. One victim was killed in the crossfire and two children were wounded.

Appellant argued that his trial counsel rendered ineffective assistance by pursuing an all-or-nothing trial strategy and waiving a jury charge on voluntary manslaughter as a lesser included offense without consulting

him. The Court noted that an attorney's decision about which defense to present is a question of trial strategy and the pursuit of an "all or nothing" defense generally is a permissible trial strategy. Furthermore, although attorneys do have an affirmative duty to consult with their clients about what defense to present, an attorney's failure to fulfill the duty to consult regarding trial strategy does not, in and of itself, constitute ineffective assistance. Relying on *Van Alstine v. State*, 263 Ga. 1, 3-4 (1993), the Court found that the failure to consult fully with the accused about whether to pursue an all-or-nothing defense, or request a jury charge on a lesser included offense, should be rigorously scrutinized. However, such failure does not constitute ineffective assistance of counsel in every case as a matter of law.

The Court then scrutinized counsel's "all or nothing" trial strategy. Appellant's trial counsel explained that he requested jury charges on justification and accident, but not voluntary manslaughter, based on his discussions with appellant, the evidence supporting the self-defense charge, and the lack of evidence supporting a charge on voluntary manslaughter. Counsel believed that it would have been inconsistent under the evidence to claim self-defense, but then also to ask for a charge on voluntary manslaughter. The Court also noted that appellant himself consistently

maintained that he acted in self-defense. Therefore, the Court found, the record established that a charge on voluntary manslaughter was declined pursuant to an informed strategic choice by trial counsel, which comported with appellant's strong feelings about the justification defense. It was not patently unreasonable for trial counsel, rather than risk losing credibility, to make the strategic decision not to seek a voluntary manslaughter charge and not to convince appellant that it was the preferable way to proceed.

Moreover, the Court found, even assuming that trial counsel's performance was deficient, appellant failed to show resulting prejudice. To demonstrate prejudice, appellant would have to establish a reasonable probability that, had counsel consulted with him, counsel would have opted to pursue a charge on the lesser included offense of voluntary manslaughter and that such a strategy would in reasonable probability have resulted in a different outcome. But, the Court noted, there was no evidence that counsel would have requested a charge on voluntary manslaughter, a decision that was his to make, even if he had properly consulted appellant. Rather, counsel's testimony showed that he reasonably viewed such a charge as inappropriate and unhelpful. Also, there could be no ineffective assistance if the charge was not supported by even slight evidence that he was seriously provoked, causing him to begin shooting solely as the result of a sudden, violent, and irresistible passion. And here, appellant did not testify at trial, and there was no evidence that he reacted passionately to the other shooter's threat and pistol-wielding. Finally, even assuming slight evidence of voluntary manslaughter was shown, appellant was not prejudiced unless there was a reasonable probability that, absent counsel's alleged error in failing to consult with appellant and request that charge, the jury would have reached a verdict of guilty of voluntary

manslaughter. But, any such slight evidence of voluntary manslaughter was insufficient, especially in light of the strong evidence of appellant's guilt of malice murder, to establish a reasonable probability that the jury would have returned a guilty verdict on voluntary manslaughter rather than murder.

Following trial, a certified copy of appellant's prior felony conviction was admitted for sentencing purposes, and the State argued that a sentence of life imprisonment without the possibility of parole was therefore mandatory for murder under OCGA § 17-10-7 (a). In relevant part, subsection (a) of OCGA § 17-10-7 provides that, after having been convicted of a felony, a person who commits another felony "shall be sentenced to undergo the longest period of time prescribed for the punishment of the subsequent offense of which he or she stands convicted." The State argued that "the longest period of time prescribed for the punishment" of appellant's "subsequent offense" of murder was life without parole under OCGA § 16-5-1 (e) (1) ("A person convicted of the offense of murder shall be punished by death, by imprisonment for life without parole, or by imprisonment for life."). The trial court disagreed and sentenced appellant to life in prison for murder, and entered an order denying the State's subsequent motion to vacate that sentence as void and enter a sentence of life in prison without the possibility of parole. The State appealed.

The State argued that subsection (a) requires the most severe sentence prescribed for punishment of the subsequent offense, i.e., life without parole in the case of murder for which the death penalty is not sought. The Court disagreed. Subsection (a) does not refer to the "maximum" sentence prescribed or to any synonym such as "harshes" or "most severe." Nor does subsection (a) focus on the period of time that the defendant will "serve" or be "eligible" to serve. Instead, the

sentence required by subsection (a) is the *longest* period of time *prescribed* for the subsequent offense. Such language does not encompass parole ineligibility because, although it is a drastic penalty about which a criminal defendant should be informed by his counsel prior to entering a guilty plea, parole ineligibility in no way lengthens the sentence itself. Accordingly, the Court concluded that the trial court properly exercised its discretion to sentence appellant for murder to life in prison with the possibility of parole and that it correctly denied the State's subsequent motion to vacate that sentence as void.

## Hearsay; Residual Exception

*Miller v. State, S17A1578 (2/5/18)*

Appellant was convicted of malice and concealing the death of another relating to the death of Miranda. During trial, Skeens, who had been a close friend of Miranda for 30 years and referred to Miranda as her "aunt," testified she drove Miranda home from a club in January 2005 after Miranda called her for a ride. When Skeens picked Miranda up at the club, she saw that Miranda had a busted lip, a missing tooth, and broken eyeglasses. Miranda told Skeens she "had just got in a fight with [appellant]".

Appellant contended that the statement was hearsay and not admissible under the residual hearsay exception set forth in OCGA § 24-8-807. The Court noted that it was a close question whether appellant postured a specific objection based on OCGA § 24-8-807. Nevertheless, the Court stated that the residual exception to hearsay is to be used very rarely and only in exceptional circumstances, and only when there exists certain exceptional guarantees of trustworthiness and high degrees of probativeness and necessity. Whether there are exceptional guarantees of trustworthiness is a determination that focuses on the

declarant and the circumstances under which the declarant made the statement to the witness. Here, the Court found, Skeens testified that when she went to pick Miranda up from the club, she saw that Miranda had a busted lip, a missing tooth, and broken eyeglasses. Miranda explained her condition to Skeens, whom she had known for three decades and with whom she had maintained a close relationship, by stating she was in a fight with “[appellant].” The Court found that it could not say that such a statement made to a close personal friend in these circumstances, in particular as it relates to incidents of domestic violence, does not, in fact, bear an increased level of trustworthiness.

Additionally, the Court found that the statement lends itself to being highly probative of motive for the crimes at bar. Indeed, the evidence was more probative of the relationship troubles between appellant and Miranda than other evidence in the case because Skeens could describe for the jury the injuries she saw on Miranda at the time the statement was made. The admission of the statement otherwise was not contrary to the rules of evidence or interests of justice. Accordingly, the Court concluded that the trial court did not abuse its discretion when it allowed the statement into evidence.

## Relevancy; Character Evidence

*McClain v. State, S17A1634 (2/5/18)*

Appellant was convicted of murder and other crimes relating to the shooting death of his wife. He contended that the trial court erred when it allowed the State to introduce evidence that, on the date of the victim’s death, appellant received an email notifying him that he had insufficient funds in his bank account. Appellant contended that this evidence was irrelevant and served only to impugn his character. The Court disagreed.

Decisions regarding relevance are committed to the sound discretion of the trial court. Under OCGA § 24-4-401, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The standard for relevant evidence is a “liberal one,” and such evidence is generally admissible even if it has only slight probative value. Here, the Court found, the evidence consisted of a single automated email from Wells Fargo to appellant, stating that “your available balance in your Wells Fargo account . . . was insufficient to cover one or more of your checks (if your account allows check writing), Debit/Prepaid Card purchases, or other transactions.” It was within the discretion of the trial court to conclude that this evidence was relevant to show that appellant was under some degree of financial stress and had some reason to be upset on the day of the killing.

Furthermore, the Court found, although the insufficient-funds evidence may have had little probative value, its prejudicial effect was also minimal. Overdrawing a checking account is a common experience among innocent individuals and does little to demean one’s character. The prejudicial effect of this evidence, if any, was not “unfair” and certainly not strong enough to exclude this evidence under the narrow parameters of Rule 403. Moreover, any error in admitting this evidence was harmless, given the minimal prejudicial effect of the evidence and the other strong evidence of guilt.

## Prior Sexual Offenses; Rule 413

*Benning v. State, A17A1761 (1/31/18)*

Appellant was convicted of two counts of aggravated sodomy and one count each of family violence aggravated assault, family violence

battery, terroristic threats, and family violence simple battery. At trial, the State successfully sought to admit evidence related to appellant’s prior sexual assaults under three provisions of Georgia’s new Evidence Code: OCGA §§ 24-4-413, 24-4-404 (b), and 24-4-403. Appellant argued that the evidence was not necessary to prove an essential element of any charged crime and that the prejudicial effect of the evidence substantially outweighed any probative value.

The Court initially noted that in sexual assault cases, the provisions of OCGA § 24-4-413 (a) supersede the provisions of OCGA § 24-4-404 (b). Accordingly, it only considered whether the trial court clearly abused its discretion in admitting evidence of the prior sexual assaults under OCGA § 24-4-413, and did not address the admissibility of the evidence under OCGA § 24-4-404 (b). The language of OCGA § 24-4-413 (a) was intended to create a “rule of inclusion,” with a strong presumption in favor of admissibility as it provides that such evidence “shall be admissible.” Thus, the State can seek to admit evidence under this provision for any relevant purpose, including propensity. And here, evidence of the prior sexual assaults was relevant to show appellant’s intent, which was put in issue when he entered a plea of not guilty. Consequently, the evidence of the prior sexual assaults, which required the same sort of intent as required to prove the sexual assault crimes charged here, was “relevant” as required by OCGA § 24-4-413 (a).

Nevertheless, relevant evidence introduced under OCGA § 24-4-413 (a) may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” OCGA § 24-4-403. This determination lies within the discretion of the trial court and calls for

a common sense assessment of all the circumstances surrounding the extrinsic offense, including prosecutorial need, overall similarity between the extrinsic act and the charged offense, as well as temporal remoteness. The Court found that the prior sexual assaults were sufficiently similar to the charged sexual assaults and these similarities made the other offenses highly probative with regard to appellant's intent in the charged offenses. As for prosecutorial need, in the face of appellant's claims that the sexual acts were consensual, the State was able to use the evidence to bolster the credibility of the victim by demonstrating that her circumstances were not unique. And any risk of unfair prejudice was mitigated by the trial court's limiting instruction, reminding the jury "to keep in mind the limited use and the prohibitive use of this evidence about the other acts of the defendant." Under the circumstances, the Court found no abuse of the trial court's discretion in admitting evidence of appellant's prior sexual assaults.

### Marital Privilege; OCGA § 24-5-503 (a)

*Underwood v. State, A17A1768 (1/31/18)*

Appellant was convicted of two counts of child molestation. At trial, appellant testified in his own defense, denying the allegations. According to appellant, he suffers from severe medical issues that prevented him from experiencing sexual desire. Specifically, he takes 22 different medicines daily for blood pressure, cholesterol, and depression and as a result, he suffers from erectile dysfunction.

He contended that the trial court improperly advised his estranged wife that she could invoke marital privilege and decline to testify because (a) the privilege does not apply when the crime involved a minor, and (b) he and his wife were separated at the time of the trial. The Court noted that under OCGA § 24-5-503 (a), "[a] husband

and wife shall be competent but shall not be compellable to give evidence in any criminal proceeding for or against each other." However, this privilege does not extend to cases in which "[t]he husband or wife is charged with a crime against the person of a child under the age of 18 . . ." OCGA § 24-5-503 (b) (1). In such cases, the husband or wife shall be compellable to give evidence only on the specific act for which the accused is charged. The privilege belongs to the spouse and not the defendant.

Here, the record showed that the trial court advised appellant's wife, Debra, that she could invoke the privilege and decline to testify, which she elected to do. At the hearing on the motion for new trial, Debra testified that she and appellant had been separated about a year and a half at the time of the trial. She stated that she was aware appellant experienced erectile dysfunction, but she could not attest to his sexual health while the two were separated. The trial court acknowledged that the marital privilege would not apply in cases involving minors, but that any testimony provided would be limited to the "specific act." The trial court then concluded that proof of penetration was not necessary in a molestation case and therefore, testimony regarding appellant's erectile dysfunction was not related to the "specific act." Moreover, the court noted that appellant's defense was that the acts never happened — not that he could not commit them. Thus, testimony about erectile dysfunction was not relevant to his defense. The trial court also concluded that the privilege would continue even if the spouses separated.

The Court found that premitting whether the exception to marital privilege in § 24-5-503 (b) (1) would apply in this case, either due to the parties' separation or because the testimony involved the "specific act" with which appellant was charged, any error in advising Debra that she could

invoke the privilege was harmless. Appellant testified at length about his medical condition, asserting that it left him devoid of any sexual desire and suffering from erectile dysfunction. Had Debra testified, she would have confirmed the erectile dysfunction diagnosis. However, Debra was in no position to testify to appellant's ability to achieve sexual arousal, and her testimony would not have negated an element of the crime. Thus, any error in advising Debra that she could assert marital privilege was harmless.

### Theft by Taking; Fiduciaries

*Scott v. State, A17A1384 (2/1/18)*

Appellant was convicted of criminal attempt to commit theft by taking by a fiduciary, a felony. Appellant was one of two employees responsible for assisting customers who came to the business to sell recyclable metals. His duties included sorting and weighing the metals, and creating an invoice that reflected the weight and price of each metal and the amount owed to the customer. A computer itemized the amount of the payout depending on the type of metal, weight, and the daily per-pound pricing. To receive payment, the customer would present the invoice to the cashier at the main office. Appellant was caught after he created a false invoice for a \$562.60 sale of metals.

Appellant contended that the evidence was insufficient to support his conviction. Specifically, he contended that he did not have a fiduciary relationship with his employer. The Court agreed and reversed.

The Court noted that a person convicted of a violation of Code Sections 16-8-2 through 16-8-9 must be punished as for a misdemeanor except if the property was taken by a fiduciary in breach of a fiduciary obligation, in which case it would be a felony. Fiduciary duties are owed by those in confidential relationships as defined by

OCGA § 23-2-58. This Code section provides that any relationship shall be deemed confidential, whether arising from nature, created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc.

The Court noted that generally, courts do not view the employer-employee relationship as being a “confidential relationship” within the meaning of OCGA § 23-2-58. Here, although appellant was responsible for creating invoices based on the weight of the metals, he did not have authority to act for his employer beyond weighing the metals and assigning to the weight a dollar amount that was fixed by his employer. Also, he could not negotiate with the customers, independently determine how much the metals were worth, or obligate his employer to the customer for anything beyond what his employer had determined it would pay to each customer. Further, the evidence demonstrated that appellant had only worked there approximately six months before the incident occurred, and was initially hired to only “tear down [and] process material,” and “five or six days” later he was trained to weigh materials.

Thus, the Court concluded, given these facts, the evidence was insufficient to demonstrate a “confidential relationship” within the meaning of OCGA § 23-2-58 between appellant and his employer. Instead, the evidence showed that the relationship was nothing more than that of mere employer-employee. Accordingly, although the conviction for criminal attempt to commit theft by taking stands, the felony sentence, having been entered on the basis that appellant was a fiduciary pursuant to OCGA § 16-8-12 (a) (3), was reversed and the case

remanded for resentencing.

## Self-Representation; Faretta

*Kelly v. State, A17A2037 (2/1/18)*

Appellant was convicted of rape, kidnapping, kidnapping with bodily injury, and battery, and two counts of aggravated assault. The record showed that appellant waived his right to counsel and requested that he be allowed to represent himself at trial. After a hearing pursuant to *Faretta v. California*, 422 U. S. 806 (95 SCt 2525, 45 LE2d 562) (1975), the Court granted his request. Appellant argued that after he waived his right to counsel, the trial court erred by informing him that he could not make a post-waiver request for counsel. Specifically, he argued that the trial court's misstatement created harmful error. The Court disagreed.

The Court noted that after a defendant properly waives his Sixth Amendment right to counsel, that right is no longer absolute. However, the right to counsel does not evaporate entirely after a valid waiver, and a defendant may make a post-waiver request for counsel. It is within the trial court's discretion to decide whether to grant a post-waiver request for counsel.

The record showed that during the *Faretta* hearing, the trial court asked appellant, “[d]o you understand that once the trial begins, you cannot change your mind and decide that you want to be represented by a lawyer?” Appellant responded affirmatively “[y]es, ma'am.” Nevertheless, the Court stated, premitting whether the trial court's statement was erroneous or misleading, appellant failed to object to the statement and, thus, waived appellate review of the issue. Furthermore, the Court found, the trial court's statement as to whether appellant could later decide not to represent himself is not part of the *Faretta* colloquy. Moreover, the record showed that appellant never

asked to be represented by counsel during the course of the trial or revisited the issue with the trial court in order to give the court an opportunity to correct its statement. Finally, at the motion for new trial hearing, both appellant and defense counsel testified. Defense counsel testified that “[a]t no time during the trial ... did [appellant] ever ask me any question relating to a witness or anything else.”

Therefore, the Court concluded, based on the record, appellant knowingly, voluntarily, and intelligently waived his right to counsel; he waived any error in the trial court's statement; and he never made a post-waiver request for counsel during trial. Thus, because he failed to show that the trial court erred in accepting his waiver of counsel, trial court did not err in denying his motion for new trial.

## Voir Dire; Length of Questioning

*Taylor v. State, A17A1605 (2/2/18)*

Appellant was convicted of VGCSA. He contended that the trial court abused its discretion in limiting his time for voir dire with certain jurors. The Court disagreed.

Here, the trial court limited appellant's voir dire of five prospective jurors. However, the Court noted, only one of those jurors was seated on the jury. Thus, whether the trial court erred in limiting voir dire as to the four individuals who were not selected for the jury, any error was harmless as it was highly probable that the limitation of voir dire did not contribute to the verdict, given that those individuals did not participate in the verdict.

During the individual voir dire — which was in addition to the general voir dire conducted of the entire panel — both the State and appellant covered multiple topics. When appellant started to question the juror about the number of times he had previously been called for jury service, the trial court

interrupted and told him to move on to the next juror over appellant's objection that he had not completed asking his questions.

After viewing the record, the Court concluded that the voir dire conducted of this juror was sufficient to ascertain the fairness and impartiality of the juror. The Court did not find that inquiry into the number of times an individual was previously called for jury service bears any relevance to the juror's ability to be impartial towards the case to be tried. Other than this one interrupted question, appellant failed to articulate on the record below or on appeal any questions which he was prevented from asking that were necessary to discover the juror's ability to be impartial. For all of these reasons, the Court found no manifest abuse of discretion.