

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 22, 2013

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Executive Director

Todd Ashley
Deputy Director

Chuck Olson
General Counsel

Joe Burford
State Prosecution Support Director

Laura Murphree
Capital Litigation Resource Prosecutor

Sharla Jackson
Domestic Violence, Sexual Assault,
and Crimes Against Children
Resource Prosecutor

Todd Hayes
Traffic Safety Resource Prosecutor

Gary Bergman
State Prosecutor

Lalaine Briones
State Prosecutor

THIS WEEK:

- **Ineffective Assistance of Counsel; Right to Remain Silent**
- **Search & Seizure; Inventory and Impoundment**
- **Void Sentences; Appellate Jurisdiction**
- **Indictments; O.C.G.A. § 17-7-53.1**
- **Character; Evidence of Motive**
- **Voir Dire; Judicial Comments**
- **Voir Dire; Batson**
- **Habeas Corpus; Ineffective Assistance of Counsel**
- **Prior Consistent Statements; Improper Bolstering**
- **Jury Instructions; Involuntary Manslaughter**
- **Double Jeopardy; Collateral Estoppel**

Ineffective Assistance of Counsel; Right to Remain Silent

Cheeks v. State, A13A1527 (11/13/13)

Appellant was convicted of rape and false imprisonment. He contended that his trial counsel rendered ineffective assistance by failing to object to argument by the State regarding his silence and failure to come forward to police. The Court agreed and reversed his convictions.

The record showed that the State argued during its opening statement that appellant refused to talk to investigating officers. The prosecutor then called appellant's mother as a witness and questioned her extensively regarding appellant's failure to turn himself in. During its closing, the State again contended, repeatedly, that appellant refused to speak

with and "evade[d]" the police and that he did so because he was guilty: "You didn't do anything wrong? Go down and talk to the police. Tell them what happened." At the hearing on appellant's motion for new trial, appellant's trial counsel testified that she was "extremely nervous" because it was her first trial as lead counsel and her first appearance in the trial judge's courtroom and thus it was nerves, rather than strategy that caused her failure to object.

The Court stated that "Georgia law is abundantly clear that arguments commenting on a defendant's silence are impermissible." And, since defense counsel's failure to object was not for a strategic reason, her performance in this regard was deficient.

In determining whether the State's unchallenged comments or questions about a defendant's right to remain silent have prejudiced that defendant, factors to be considered include 1) whether the error was an isolated incident, or instead consisted of several questions or comments; 2) whether the error was inadvertent, rather than a deliberate attempt by the State to use the defendant's silence against him; 3) the "trial context" of the error, particularly if the State argued during closing that evidence of the defendant's silence should be viewed as evidence of his guilt; and 4) whether, in light of the evidence presented, there was a possibility that the State's improper comments contributed to the guilty verdict, i.e., whether the evidence of the defendant's guilt was overwhelming or whether the evidence was conflicting.

Here, the Court found, the State's use of appellant's silence was egregious and pervasive: not only did the prosecutor aggressively question appellant's mother regarding his failure to turn himself in to

the police, the prosecutor repeatedly and explicitly argued during opening and closing that appellant's silence was evidence of guilt. The victim contended that she was raped, but appellant contended that the intercourse was consensual. There were no other witnesses to the encounter and no physical evidence establishing force. The outcome of the trial depended on whether or not the jury found the intercourse to be consensual. Although the State reinforced the victim's testimony that she had not consented to intercourse with testimony from outcry witnesses, and an unprosecuted similar transaction, the jury's determination of the credibility of appellant and the victim was critical to its verdict. Relying on *State v. Moore*, 318 Ga.App. 118, 123(3) (2012), the Court concluded that trial counsel's failure to object to the State's repeated questions and comments regarding appellant's silence was harmful in light of the evidence before the jury. Therefore, a reasonable probability existed that trial counsel's deficient performance affected the outcome of the trial, and appellant's convictions were reversed.

Search & Seizure; Inventory and Impoundment

Shaw v. State, A13A1332 (11/13/13)

Appellant was charged with VGCSA. He contended that the trial court erred in denying his motion to suppress. The Court agreed and reversed. The evidence showed that while on patrol an officer stopped appellant because he knew that appellant had an outstanding warrant against him. The officer arrested appellant and placed him in the back of his patrol car. Upon determining that appellant's passenger also had a contempt warrant pending against him, the passenger was arrested as well. The officer then immediately searched appellant's vehicle incident to their arrests and found marijuana and drug-related objects in the glove box. The officer listed such items as taken from the vehicle on a department inventory form pursuant to departmental policy and procedure.

However, the Court noted, the officer testified that the stop occurred at 10:38 p.m.; that appellant was compliant and aware of the warrant which was related to a family violence issue; that he did not expect to find anything related to appellant's warrant in the vehicle; and that he had no reason to believe that a

criminal act had been committed or was about to be committed in the car. At 10:45 p.m., a department dispatcher advised the officer by radio that appellant's mother was en route to get the car; and at 10:55 p.m. and 11:02 p.m., respectively, the officers left the scene. It was undisputed that the vehicle was towed at some point following the incident and picked up the next day by members of appellant's family.

The trial court denied appellant's motion to suppress citing *Humphreys v. State*, 287 Ga. 63, 77(7) (694 S.E.2d 316) (2010). Apparently persuaded that the inevitable discovery rule was applicable, the trial court found as fact that "the police officer took custody of the vehicle, called to have it towed and[,] for his and the department's protection, he inventoried the vehicle which is standard procedure so that they don't get accused of stealing something or misplacing something."

The Court stated that officers may inventory the contents of a car that has been lawfully impounded. The test is whether, under the circumstances, the officer's conduct in impounding the vehicle was reasonable within the meaning of the Fourth Amendment. Here, the Court found, nothing of record showed that the police impounded and inventoried appellant's vehicle for his protection or that of the department. Rather, the evidence showed only that the officer searched the vehicle incident to appellant's arrest, not incident to its impoundment, which the State conceded was improper under *Arizona v. Gant*, 556 U. S. 332 (2009). There was no evidence that appellant's vehicle was parked in a manner which might have presented a hazard to traffic or that he was given an opportunity to make alternative arrangements for the disposition of his vehicle. Moreover, no evidence showed that the officer completed his department's standard inventory form listing the items he seized from the vehicle in connection with the impoundment of the vehicle.

The Court further found that the evidence showed the officer and his backup officer left the scene at 10:55 p.m. and 11:02 p.m., respectively, in effect, impounding appellant's vehicle within 17 minutes of the time they were notified by radio that his mother was en route. The Court noted that while it has approved as reasonable impoundments occurring in comparably short time periods, in those cases, the Court could not determine as a matter of law that departmental policies to such effect

were unreasonable. Here, however, there was no evidence of a departmental towing policy, nor was there any evidence showing that appellant's mother's estimated time of arrival was other than she stated. Accordingly, the Court held, the State failed to establish that impoundment of appellant's vehicle was reasonably necessary as a matter of fact, and the trial court's finding to the contrary was clearly erroneous.

Void Sentences; Appellate Jurisdiction

State v. King, A13A1127 (11/14/13)

Pursuant to a negotiated plea agreement, King pled guilty to charges of robbery and aggravated assault, and the State recommended concurrent 20-year sentences, with 15 years to be served in prison. The superior court accepted King's guilty plea, but announced that it was not going to follow the recommended sentence. The court then imposed concurrent sentences of 15 years, with 5 years to be served in prison and the remainder on probation. The State directly appealed from the denial of its motion to set aside the sentence as void.

Without deciding the merits of the appeal, the Court dismissed the appeal for lack of jurisdiction. The State argued that it had the right to file a direct appeal pursuant to O.C.G.A. § 5-7-1(a)(6) because the trial court's sentence was void. The Court disagreed. A sentence is void if the court imposes a punishment that the law does not allow. Motions to vacate a void sentence generally are limited to claims that, even assuming the existence and validity of the conviction for which the sentence was imposed, the law does not authorize that sentence, most typically because it exceeds the most severe punishment for which the applicable penal statute provides. Here, the Court found, the State made no claim that the sentences imposed by the trial court were not within the statutorily-prescribed range of punishments. Indeed, the 15-year sentences imposed by the trial court were well within the 20-year statutory range of punishments for robbery and aggravated assault and therefore the sentences were not void. Instead, the Court noted, the State's argument that the trial court erred by imposing sentences different from the negotiated plea recommendations

amounted to an allegation that the sentences are voidable, not an allegation that they are void. Thus, the Court held, the appeal must be dismissed for lack of jurisdiction.

In so holding, the Court noted that in *State v. Harper*, 279 Ga.App. 620 (2006), under similar circumstances to the instant case, the State directly appealed from a trial court's allegedly erroneous sentence entered in complete disregard of the plea agreement without first notifying the State of its intent to reject the agreement. The *Harper* Court ruled that the appeal was authorized because the State may directly appeal from an allegedly void sentence. Since this ruling was in conflict with the ruling here, the Court stated that "[t]o the extent that *Harper* conflicts with the instant opinion and holds that the [S]tate may directly appeal from a sentence on the ground that the trial court allegedly erred in disregarding a recommended sentence pursuant to a plea agreement, without first notifying the [S]tate and giving it the opportunity to withdraw, *Harper* is hereby overruled."

Indictments; O.C.G.A. § 17-7-53.1

Blanton v. State, A13A1200 (11/12/13)

Appellant appealed from the denial of his plea in bar. The record showed that the State indicted him for multiple counts of incest and child molestation. Appellant filed a special demurrer as to this indictment ("first indictment") alleging that the State failed to sufficiently narrow the range of dates as to the charges. Although the court denied the demurrer, the State decided to obtain a new indictment in order to narrow the range of dates alleged in the child molestation counts ("second indictment"). Again, appellant filed a demurrer alleging that the dates were not narrowly drawn and that the indictment was defective because the range of dates identified in each count did not include the word "between," for example, "between the 1st day of May, 2008 and the 30th day of April, 2010." The trial court found that appellant's latter argument had merit, so it gave the State two options as to how to proceed: the court could dismiss the indictment and the State could re-indict him, or the court could overrule the special demurrer and the State could proceed to trial with the risk that the indictment could

later be deemed defective. The State decided to re-indict appellant ("third indictment") in which it added the word "between" to each of the counts in reference to the range of dates, which was the only difference between the second and third indictments. The State then nolle prossed the first indictment and the trial court granted the demurrer as to the second indictment.

Appellant contended that pursuant to O.C.G.A. § 17-7-53.1, the trial court was required to grant his plea of former jeopardy and motion for judgment of acquittal as to the third indictment. The Court disagreed. This statute provides that if, upon the return of two "true bills" of indictments or presentments by a grand jury on the same offense, charge, or allegation, the indictments or presentments are quashed for the second time, whether by ruling on a motion, demurrer, special plea or exception, or other pleading of the defendant or by the court's own motion, such actions shall be a bar to any future prosecution of such defendant for the offense, charge, or allegation.

The Court noted that the statute specifies that the bar to further prosecution intervenes after a second quashing and refers only to action on a matter initiated by the defendant or the court, but not the State. Unlike a court's order quashing an indictment, a motion to enter a "nolle prosequi" is a formal action made by the State based upon its decision not to further prosecute that indictment. It is the prerogative only of the State, which may enter it with court approval, pursuant to O.C.G.A. § 17-8-3. To disregard the plain language of O.C.G.A. § 17-7-53.1 that limits its application to cases in which two previous indictments have been "quashed" as a result of some action initiated by the defendant or the court would render such language meaningless.

Nevertheless, appellant argued, the trial court abused its discretion in allowing the State to enter a nolle prosequi to the first indictment, because he had moved to quash the indictment and, more importantly, because the entry of a nolle prosequi (instead of an order quashing the first indictment) rendered O.C.G.A. § 17-7-53.1 inapplicable and disabled the statute's bar to his prosecution on the third indictment. The Court again disagreed. Relying on *Layman v. State*, 280 Ga. 794 (2006) the Court stated that under

O.C.G.A. § 17-8-3, the State does not need a defendant's consent to obtain an order of nolle prosequi before the case has been submitted to a jury and that the entry of such orders renders the motions to quash moot. Moreover, the trial court has discretion to order the entry of a nolle prosequi, instead of quashing the indictment, to avoid the application of O.C.G.A. § 17-7-53.1. Accordingly, the trial court did not abuse its discretion in granting the nolle prosequi as to the first indictment, nor did the court err in denying appellant's plea of former jeopardy and motion to dismiss the third indictment.

Character; Evidence of Motive

Crowder v. State, S13A0961 (11/18/13)

Appellant was convicted of murder and related crimes against his estranged wife. The evidence showed that in the early morning hours, someone broke into the home of the victim and shot her twice in the head. Appellant and the victim had been exchanging heated texts prior to the murder, including a text from the victim accusing appellant of being a child molester as result of an allegation against appellant that surfaced a couple of days prior to the murder.

Appellant argued that the trial court erred when it allowed the admission of the child molestation allegation at trial. The Court noted that before trial commenced, the trial court held a hearing on appellant's motion in limine to exclude evidence of the molestation allegation against appellant. The State argued and the trial court agreed that the evidence was relevant and admissible to show motive, *res gestae*, and course of conduct despite the fact that the evidence incidentally placed appellant's character into issue. The Court stated that evidence of motive is always relevant in a murder trial and here, the evidence regarding the molestation allegation explained the escalating tension between appellant and the victim, including the exchange of heated text messages between them on the day of the crime. Of particular relevance was the text message the victim sent calling appellant a "child molester" just minutes before her death. Since the evidence was admissible to show motive, there was no error.

Voir Dire; Judicial Comments

Alexander v. State, S13A1562 (11/18/13)

Appellant was convicted of the felony murder of a two-year-old child. The evidence showed that the victim lived with appellant and Daniels, a female relative of the victim's mother. The victim died of severe blunt force trauma to her head after being left alone with appellant.

Appellant argued that the trial court erred by limiting the scope of voir dire. The record showed that during voir dire, the State inquired whether any member of the venire did not believe in corporal or physical punishment of children. Defense counsel later asked a particular venire member whether "the fact that there are allegations in this case of corpor[al] punishment being used towards a child, would that in any way prevent you from being fair and impartial towards my client....?" The venire member answered no, and when defense counsel attempted to ask a more specific question regarding corporal punishment with a belt, the State objected. The trial court sustained the State's objection. Appellant argued that by doing so, the trial court improperly restricted voir dire.

The Court disagreed. After reviewing the record, it concluded the voir dire was sufficient in scope to both comport with appellant's rights under O.C.G.A. § 15-12-133 and to ascertain the fairness and impartiality of the prospective jurors. The State's theory was that the child died as a result of an extreme blunt force trauma to the head inflicted immediately or almost immediately prior to her incapacitation. Therefore, corporal punishment with a belt was not the cause of death alleged by the State and any potential bias respecting the use of a belt to inflict corporal punishment was not a potentially critical factor which required disclosure. Additionally, although defense counsel was prohibited from questioning panel members about a specific method of corporal punishment which was likely to come up at trial, the trial court did not preclude questioning about the entire subject matter. Venire members were asked about any potential bias they may have had regarding corporal punishment of a child and defense counsel was permitted to inquire of specific members whether allegations of corporal punishment of a child would affect their ability to be fair and impartial. Thus,

the Court concluded, these inquiries were sufficiently specific to focus panel members on the facts that the victim was a child whom the State alleged died as a result of physical injuries and allowed them to answer the questions with these facts in mind. Because the trial court permitted questions about the use of corporal punishment against children and any bias on the subject, the trial court's decision to restrict the scope of voir dire in the limited manner it did was not an abuse of discretion.

Appellant also contended the trial court violated O.C.G.A. § 17-8-57 when it questioned Daniels at trial about her prior statement to police. More specifically, appellant argued the judge commented on the credibility of Daniels' testimony when he asked Daniels about her use of the term "we" as she discussed her prior statement that "we" had disciplined the victim. The Court found no error, however, because the trial court's questions were posed for the purpose of clarifying the witness' testimony concerning her prior statement and did not express or intimate an opinion regarding the credibility of the evidence being offered or the guilt of the accused. Moreover, the Court found, the record did not support appellant's assertion that the trial court prevented the witness from further explaining her statements. Instead, the record showed that defense counsel was free to continue his cross-examination on the subject but chose to move on.

Voir Dire; Batson

Bester v. State, S13A1192 (11/18/13)

Appellant was convicted of malice murder. He contended that the trial court erred in denying his claim that the prosecutor violated his equal protection rights by using one of her peremptory challenges to exclude a juror solely because of his race in violation of *Batson v. Kentucky*, 476 U. S. 79 (1986). The Court disagreed.

Batson provides a three-step process for adjudicating a claim that a peremptory challenge was based on race: 1) the opponent of a peremptory challenge must make a prima facie showing of racial discrimination; 2) the proponent of the strike must then provide a race-neutral explanation for the strike; and 3) the court must decide whether the opponent of the strike has proven discriminatory intent.

A trial court's finding as to whether the opponent of a strike has proven discriminatory intent is entitled to great deference and will not be disturbed unless clearly erroneous.

The record showed that the prosecutor used six of her nine peremptory strikes against African-Americans. She said that she struck one of the jurors because he was a bondsman on a large drug case in the county. Appellant contended that this reason was not race neutral and that the strike was racially motivated. The trial court disagreed, ruling that the prosecutor's reason for the strike was race neutral and that she did not act with discriminatory intent. Relying on step three of the *Batson* process, appellant argued that the prosecutor's strike of that juror was racially motivated.

The Court found that the trial court did not clearly err in finding that appellant failed to carry his burden to show purposeful discrimination. First, the prosecutor's stated reason for striking the juror was not one that would lead to the disproportionate exclusion of African-Americans. The reason also did not apply to similarly situated nonblacks who were permitted to serve, i.e., if a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step. Moreover, the prosecutor's concern that a bondsman who works closely with defendants might harbor a bias in a defendant's favor or against the State is not an implausible or fantastic justification which could be found to be a pretext for purposeful discrimination. Therefore, considering these factors and the great deference that must be accorded the trial court's finding on discriminatory intent, the Court concluded that appellant failed to show that the trial court erred in rejecting his *Batson* claim.

Habeas Corpus; Ineffective Assistance of Counsel

O'Donnell v. Smith, S13A0783 (11/18/13)

Smith was convicted of malice murder based on a 2002 stabbing in Fulton County and his conviction was affirmed in *Smith v. Georgia*, 277 Ga. 213 (2003), cert. denied, 541 U.S. 1032 (2004). Thereafter, a habeas court found Smith's counsel rendered

ineffective assistance of counsel by failing to challenge the State's proof of venue, allowing an un-redacted indictment to go out with the jury, and for failing to challenge the seating of an alternate juror.

The Warden first contended that the habeas court erred when it admitted into the habeas record the affidavit of an alternate juror who replaced another juror during deliberations. The record showed that juror Mahan was one of two alternate jurors selected to serve during trial. Mr. Mahan sat through the entire trial and heard the trial court's charge to the jury. Once the jury began to deliberate, he and the other alternate juror were allowed to go home. A few days later, the trial court called Mr. Mahan back to replace a juror who had a scheduling conflict. No objection was made to the seating of Mr. Mahan and Smith's counsel did not request additional voir dire of Mr. Mahan. The only further instruction the trial court gave upon Mr. Mahan being seated was that the jury was to begin its deliberations anew. In his habeas petition, Smith argued that counsel was ineffective for failing to request additional voir dire of Mr. Mahan and that he was prejudiced thereby because during his time at home, Mr. Mahan improperly discussed and researched the case. In support of that assertion, Smith proffered Mahan's affidavit and the habeas court considered it. The Warden argued Mahan's affidavit has been used improperly to impeach the jury's verdict. The Court agreed.

In Georgia, the general rule is that jurors are not allowed to impeach their own verdict. A jury verdict may not be challenged based on an affidavit from one or more jurors. This general rule, however, cannot trump a defendant's right to a fair trial. The rule may be excepted in instances where a juror communicates sufficiently prejudicial extra-judicial evidence to other jurors such that there is a reasonable probability that the extra-judicial evidence contributed to the conviction. But, to allow a jury verdict to be upset solely because of such extra-record statements goes very far toward impugning the sanctity of jury deliberations, undermining the finality of jury verdicts, and subjecting jurors to post-trial harassment. Therefore, a jury verdict may not be upset solely because of such statements unless the statements are so prejudicial that the verdict must be deemed inherently lacking in due process.

Here, the Court found, Mahan stated in his affidavit that after the trial court sent him home, he discussed his jury service with his wife, children, and colleagues; that he searched the internet for information on the case but did not recall much that he learned except that the jury had not yet reached a verdict; and that he searched on the internet for and found information about trial counsel and his other cases. The affidavit was silent as to whether Mahan shared any of his internet research with the other jurors. The remainder of Mahan's affidavit was a series of impressions about the jury's deliberations, including, for example, what jurors thought about certain witnesses. The Court concluded that the internet research Mahan engaged in was not the kind of conduct that was so prejudicial as to violate Smith's due process rights especially where, as here, there was no showing that Mahan communicated any of what he discovered on the internet with his fellow jurors and no showing that the information obtained otherwise affected the verdict. As such, the affidavit could not be used as evidentiary support of Smith's claim of ineffective assistance of counsel.

Nevertheless, Smith further argued that the affidavit showed Mahan shared his own experiences of being stabbed with his fellow jurors and that this conduct also justified the habeas court's grant of relief. But, the Court noted, this issue of Mahan's having previously been the victim of a stabbing was raised during the initial voir dire and, upon further questioning, Mahan stated he could keep an open mind and listen to the evidence in spite of his prior experience of being a stabbing victim. At the time Mahan was seated as a replacement juror, there was no reason for trial counsel to doubt Mahan's continued ability to follow instructions and participate in the jury deliberations. In fact, the Court stated, Smith's procurement of such a broad and sweeping affidavit which included information wholly unrelated to the internet research Mahan conducted while he was at home illustrates the very reason why the general rule prohibits invading the jury's deliberations via a post-conviction juror affidavit. The habeas court therefore erred in considering Mahan's affidavit as to any of appellee's ineffective assistance of counsel claims.

Next, the Warden argued that the habeas court erred when it determined that counsel

rendered constitutionally ineffective assistance for failing to raise on appeal a challenge to the State's proof of venue. The habeas court found that at trial the State proved the body was found in Fulton County but did not prove the stabbing occurred in Fulton County. The habeas court then concluded that Smith would have prevailed on appeal had counsel raised the venue issue. The Court noted Smith conceded that the entire area in question, including the area where the victim was stabbed, was in Fulton County, but contended the jury may not have necessarily been so aware. But, the Court found, the jury heard testimony that the victim was found lying down and injured in Fulton County; the jury heard testimony that, based on blood stains discovered in a nearby parking lot, the victim staggered 75-100 yards from where he was stabbed to the place he was found when the ambulance arrived; and the jury saw a police-drawn sketch of the area as well as diagrams, including street names and locations of where the blood stains were found and where the victim was found by emergency services. Although the City of Atlanta does extend into DeKalb County, there was no evidence presented that any incident related to the crime took place outside of Fulton County. Therefore, the evidence was sufficient for the jury to conclude beyond a reasonable doubt that venue for the stabbing was in Fulton County. Accordingly, defense counsel was not deficient for failing to challenge the State's proof of venue on appeal because such a challenge would have lacked merit.

Finally, the Court found that the habeas court erred in granting relief based on an un-redacted indictment being allowed to go out with the jury. The original indictment listed two charges, armed robbery and aggravated assault, which were not contained in the body of the indictment. The trial court placed the two extra charges on a dead-docket, but the indictment itself was not amended or redacted and so the two extra charges remained on the face of the indictment when it was sent out with the jury for its deliberations. The Court stated that premitting whether counsel was deficient for failing to review the indictment and failing to ensure that a redacted copy of the indictment was sent out with the jury, the habeas court erred in concluding Smith was prejudiced thereby. On direct appeal, Smith's counsel raised the issue as to whether the trial court erred when it placed the two extra charges

on the dead docket and this Court ultimately concluded Smith had not shown how he was harmed by the trial court's actions. *Smith v. State*, 277 Ga. at 214-215. Since this Court concluded appellant could not show harm in the context of his direct appeal regarding the flawed indictment, Smith likewise could not show prejudice on a theory of ineffective assistance of counsel.

Prior Consistent Statements; Improper Bolstering

Cowart v. State, S13A1295, S13A1296 (11/18/13)

Appellants Cowart and Adams were convicted of felony murder and other crimes related to the armed robbery of four victims in which two of the victims were shot and one died as a result. Briefly stated, Cowart and a third co-defendant, Izzo, went to the victims' house to rob them at gunpoint of money and drugs. As they ran to the getaway car, pursued by their victims, Izzo lost a shoe and was caught by a victim. A fight ensued in which two of the victims were shot by Cowart. Cowart and Izzo got in the getaway car and drove off, but not before the victims got the license plate number. They were caught the next day in a hotel room in another city after the car was spotted. With them at the time, was Adams. The getaway vehicle was registered to Adams' girlfriend's mother.

Appellants argued that they were entitled to a new trial because the trial court erred in admitting the proffer statement given by Izzo. After being arrested with Cowart and Adams, Izzo was interviewed by the police. Among other things, Izzo said that at least one of the men who chased him and Cowart after they left the victims' house had a knife. Izzo also told the police that Adams did not know about the plan to rob the victims; Adams believed they were going to the house to buy marijuana; and that Adams did not participate in the armed robbery. Izzo later began plea negotiations with the State, and four months after his police interview, he provided a lengthy proffer of what he would say if called as a State's witness; the proffer statement was recorded and transcribed. In the proffer, Izzo said that Adams was aware of and participated in the armed robbery and indeed that it was Adams's idea. Izzo also said that he did not get a clear look at the victims as he and Cowart

were being chased and did not see if they had knives. The State then offered Izzo a plea bargain, and he pled guilty only to voluntary manslaughter, armed robbery, burglary, and aggravated assault. The State told Izzo that it would recommend a sentence of 15 years to serve on the voluntary manslaughter charge and 12 years to serve on the armed robbery charge, but his sentencing was postponed until after he testified at the trial of Cowart and Adams.

At trial, Izzo's testimony on direct examination essentially tracked his proffer statement. On cross-examination, both Cowart and Adams attacked Izzo's credibility by highlighting his plea bargain and his motive to fabricate his testimony to curry favor with the State. They also introduced under former O.C.G.A. 24-9-83 Izzo's post-arrest statement, which contradicted much of his trial testimony, as a prior inconsistent statement. The defense lawyers referred to the fact that Izzo had made a proffer before entering his plea deal, but the specific content of the proffer statement was not discussed. When the cross-examination of Izzo ended, the State sought to introduce his proffer statement as part of its re-direct examination. Cowart and Adams objected on the grounds that the proffer was not an admissible prior consistent statement and would be improper bolstering of Izzo's testimony. The trial court overruled the objections and allowed a redacted transcript of the proffer statement to be read into evidence.

The Court found that the trial court's admission of Izzo's proffer statement was error. Since 1985, Georgia law has allowed certain prior consistent statements of a witness to be admitted as substantive evidence. In 1998, the Court clarified that a witness's prior consistent statement is admissible only where (1) the veracity of a witness's trial testimony has been placed in issue at trial; (2) the witness is present at trial; and (3) the witness is available for cross-examination. But, a witness's veracity is placed in issue so as to permit the introduction of a prior consistent statement only if affirmative charges of recent fabrication, improper influence, or improper motive are raised during cross examination. In other words, to be admissible to refute the allegation of recent fabrication, improper influence, or improper motive, the prior statement must predate the alleged fabrication, influence, or motive.

If the statement was made later, proof of the statement does not assist the jury to evaluate the witness's testimony because the reliability of the statement is subject to the same doubt as the trial testimony.

Applying this principle, the Court noted, it has held that a co-defendant's prior statement made with the alleged motive of currying favor with the State to obtain a plea agreement is not admissible as a prior consistent statement when the co-defendant testifies for the State at trial. The only motive to fabricate that Cowart and Adams alleged Izzo to have when he testified at trial was the desire to tell a story that the State would reward with reduced charges and a shorter sentence, which arose no later than the time Izzo made his proffer during plea negotiations. Indeed, the State failed to identify any motive Izzo had when testifying at trial that he did not also have when making his proffer statement. The fact that the State apparently had not yet offered a specific plea bargain to Izzo when he made his proffer did not change this; if anything, it made his motivation to please the State when giving the proffer even greater than if he had the plea deal in hand. Accordingly, the trial court erred in admitting Izzo's proffer statement, which did not qualify as a prior consistent statement and was instead improperly used to bolster the witness's credibility.

Nevertheless, the Court stated, to reverse Cowart's convictions, this error must have been harmful. Because the improper admission of bolstering evidence is a non-constitutional, evidentiary error, it is harmless only if it is highly probable that the error did not contribute to the jury's guilty verdict. Here, the Court found, two victims identified Cowart as one of the armed robbers, and one victim identified him as the shooter, and testified that he, and the other victims were all unarmed. Additionally, Cowart was found in the hotel room with Izzo, Adams, cash, and marijuana on the morning after the shootings, having driven there in the getaway vehicle. Because of the strong evidence supporting Cowart's convictions, beyond any evidence from Izzo, the Court concluded that the trial court's erroneous admission of Izzo's proffer statement was harmless as to Cowart.

However, the same could not be said for Adams. Without Izzo's testimony, there was no evidence whatsoever indicating that Adams had knowledge of the armed robbery

before it happened. Adams did have access to the getaway vehicle, which belonged to his girlfriend's mother, who testified that her daughter was using the car at the time of the crimes. But no one except Izzo identified Adams at the crime scene or placed him with Izzo and Cowart until after the crimes were complete. Adams was found with Cowart and Izzo in the hotel room in Atlanta the next morning. But he did not use a false name to rent the room (that was Izzo); he was not in actual possession of marijuana (that was also Izzo); and while Izzo testified that the cash each man had was a split of the robbery proceeds, there was no other evidence linking the money found on Adams at the time to the robbery; indeed, there was no evidence of what amount of money was taken during the robbery. Thus, due to the lack of substantial evidence against Adams apart from Izzo's testimony, the Court found it likely that the improper bolstering of that testimony contributed to the jury's guilty verdict and therefore was harmful error as to Adams. Accordingly, Adams was entitled to a new trial.

Jury Instructions; Involuntary Manslaughter

Browder v. State, S13A1187 (11/18/13)

Appellant was convicted of the murder of one victim and aggravated assault of two other victims. The evidence showed that appellant and his co-defendants drove to a neighborhood in response to a report by female relatives of one co-defendant that they had been involved in a physical altercation. Appellant placed a gun on his lap to be "ready." They drove twice through the neighborhood and through a gathering crowd, some of whom were carrying sticks and bats. One of the assault victims appeared to rush toward the car in which appellant was a passenger in an aggressive manner and to yell at them. Appellant fired two shots into the crowd. A bullet struck one of the victims in the neck; she died a few days later after being taken off of life support.

Appellant argued that the trial court erred in refusing to give a jury instruction on involuntary manslaughter as a lesser included offense. Under O.C.G.A. § 16-5-3(a), "[a] person commits the offense of involuntary manslaughter in the commission of an unlawful act when he causes the death of

another human being without any intention to do so by the commission of an unlawful act other than a felony." The record showed that at the charge conference, appellant's counsel argued a jury could conclude that appellant caused the victim's death by engaging in reckless conduct, an unlawful act that is not a felony, and thus could convict for involuntary manslaughter. But, the Court found, appellant testified that he intentionally fired his gun from the vehicle in order to scare away the victims. One of the victims of the aggravated assault testified she was in fear for her life when she heard the first shot and turned and ran. The definition of simple assault is "an act which places another in reasonable apprehension of immediately receiving a violent injury," O.C.G.A. § 16-5-20(a)(2), and the evidence was sufficient to support a finding of assault which is a requisite element of the felony of which appellant was charged: assault "without legal justification by discharging a firearm from within a motor vehicle toward a person or persons." O.C.G.A. § 16-5-21(a)(3). Thus, if appellant's act was criminal, and the evidence supported the jury's finding that it was, then the act clearly established the felony of aggravated assault and not mere reckless conduct. Therefore, the Court agreed with the trial court that the evidence did not support a charge for involuntary manslaughter.

Double Jeopardy; Collateral Estoppel

Roesser v. State, S12G1846 (11/18/13)

Appellant appealed from the denial of his plea in bar. The record showed that he was acquitted by a jury of malice murder, felony murder, and aggravated assault, but the jury was unable to reach a verdict on the lesser included offense of voluntary manslaughter. When the State sought to retry him for voluntary manslaughter, he filed a plea in bar asserting double jeopardy based on collateral estoppel. The trial court denied the plea and the Court of Appeals affirmed in *Roesser v. State*, 316 Ga.App. 850 (1) (2012).

Appellant argued that collateral estoppel barred retrial for voluntary manslaughter because he was acquitted of charges that share the same critical issue of ultimate fact as voluntary manslaughter. Specifically, he contended that a review of the entire record showed that the sole issue for the jury was

whether he acted in self-defense in shooting and killing Price. The Court agreed and reversed.

The Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial. To determine what a jury has necessarily decided, a court should examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The rule of collateral estoppel in criminal cases requires courts to engage in a practical inquiry based on all the circumstances of the proceeding. To conduct an issue-preclusion analysis, courts examine the verdict and trial record to determine the facts that the jury necessarily decided in returning its verdict of acquittal and then determine whether the previously determined facts constituted an essential element of the second offense. The doctrine of collateral estoppel will not bar a retrial unless the record of the prior proceeding affirmatively demonstrates that an issue involved in the second trial was definitely determined in the former trial; the possibility that it may have been does not prevent the relitigation of that issue.

Here, the Court found, after reviewing the entire record, including opening statements, trial testimony, closing statements, the charge conference and questions posed by the jury once deliberations had begun, the record supported appellant's argument that the jury necessarily determined that he acted in self-defense when it acquitted him of malice murder, felony murder, and aggravated assault in connection with the victim's death. In so holding, the Court disagreed with the Court of Appeals to the extent it concluded that the jury could have determined whether the element of malice was established without having to decide whether his conduct was justified as self-defense. The Court found that the jury was properly instructed that it needed to consider appellant's self-defense claim in deciding whether he had the malice required to convict of murder. Even assuming the jury acquitted appellant of malice murder because it found the State failed to prove that he acted with the required express or implied intent,

that reason did not explain the basis for the jury's acquittal on the aggravated assault count and the felony murder count premised on the aggravated assault count, which do not require specific intent.

Moreover, the Court found, the jury's failure to reach an agreement on the voluntary manslaughter count as a lesser include offense of the malice and felony murder counts was a "nonevent." The State conceded that no witness was questioned about whether appellant acted with sudden, violent, and irresistible passion, and the Court found nothing in the record related to voluntary manslaughter, other than the jury charge and a brief reference to it by each side during closing arguments. Appellant's attorney requested the instruction because he had found the instruction "to be a good thing" from experience, and the trial court agreed to give the instruction without any discussion on whether the evidence at trial supported giving the charge. Appellant did not request the jury to return a verdict based on voluntary manslaughter but instead asked it to avoid a compromise and return a verdict of not guilty of voluntary manslaughter based on self-defense. The State also argued that the killing was not voluntary manslaughter. Therefore, the record did not support the State's argument that the jury could have determined that appellant acted under an irresistible passion in acquitting him of murder and aggravated assault.

Accordingly, the Court held, the jury in acquitting appellant of malice murder, felony murder, and aggravated assault necessarily determined that he acted in self-defense and that this issue of ultimate fact constituted a critical element of voluntary manslaughter. Therefore, double jeopardy barred the State from prosecuting appellant again for voluntary manslaughter.