

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING MAY 4, 2012

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## THIS WEEK:

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- **Confrontation Right; Crawford**
- **Sentencing; Cruel and Unusual Punishment**
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### **Batson; Jury Selection**

*Jackson v. State, S12A0784 (4/24/2012)*

Appellant was convicted of felony murder and other related offenses in connection with the shooting death of Joshua "Caleb" Burroughs. On appeal, he claimed that the trial court erred in denying his *Batson* challenge to the State's peremptory strikes during jury selection and violated his Fourteenth Amendment Equal Protection rights relating to jury selection.

After jury selection, appellant challenged the make-up of the petit jury under *Batson v. Kentucky*, 476 U.S. 79 (1986), asserting that the State improperly used its strikes to remove two of the four African-American members of the jury venire. Appellant himself struck a third African-American juror, and the fourth was not reached. The trial court did not make

an express finding that a prima facie showing of racial discrimination had been made, but required the State to provide an explanation for its strikes. The State noted generally that as the defense had used all of its strikes early in the selection process, the State was free to choose from among the remaining jurors. The State then explained that it struck Juror 24 because he "was somewhat combative [and] reluctant to answer the [State's] questions"; and it struck Juror 30 because she had "a teenage son or daughter at home," and the next juror in line did not and so was more favorable to the State. Without making any express findings, the trial court granted appellant's *Batson* challenge in part, seating Juror 30 but not Juror 24. Further, during a colloquy after the *Batson* exchange, the trial court stated it was not making a finding that the State's strikes were racially motivated. At the close of jury selection, the trial court asked whether the jury seated was the jury selected and both sides responded that it was. The trial court then asked whether there was anything else before the jury was sworn and appellant replied "not on behalf of the defense."

The Court noted that the appellant correctly pointed out that because the trial court directed the State to explain its strikes, the preliminary question of whether he had established a prima facie case of discrimination was moot and the State was required to articulate a racially neutral explanation. Appellant asserted that the State's explanation that it struck Juror 24 because he was combative and reluctant to answer the State's question was unsupported by the record and he argued that the trial court merely acted as a "rubber stamp" when it failed to find this explanation to be pre-textual. However, a trial court's finding as to whether the opponent of a strike has proven discrimina-

tory intent is entitled to great deference and will not be disturbed unless clearly erroneous. Applying this standard, the Court held that appellant's contention that the State failed to give an adequate nondiscriminatory reason for striking Juror 24 was unpersuasive.

## **Confrontation Right; Crawford**

*Jackson v. State, S12A0623 (4/24/2012)*

Appellant was convicted of malice murder, aggravated assault, and possession of a firearm during the commission of a crime. The record showed that, on the evening of November 14, 1998, appellant was spending time at the home of Formosa Bell, his friend. A party was going on at a house across the street, and Bell informed appellant that she was going to walk over. Appellant did not want to go, and, instead, started to walk to his home. On his way there, he ran into co-defendant Tyrone Frazier, another friend of his. Frazier informed appellant that he wanted to "crash" the party, and appellant accompanied him. Both Frazier and appellant were carrying guns. When appellant and Frazier approached the home where the party was being held, John Tucker, who was sitting on the front porch, told them not to bring their guns into the party. Instead, Frazier simply gave his gun to appellant, who was now carrying two weapons. Frazier then attempted to enter the party, but the woman who was in charge of the festivities told him that he was not welcome. Tucker and Frazier then exchanged angry words, and appellant and Frazier began to walk away. At this point, appellant had become very angry. As appellant and Frazier walked away, Tucker said something to them which further upset appellant. Appellant then turned around, moved towards Tucker, and opened fire. Tucker died from three gunshot wounds, including two to the head.

In a taped interview, appellant admitted that he shot Tucker after arguing with him. Appellant, however, maintained that he shot Tucker after he thought he saw Tucker reaching into his coat for a weapon. Although Frazier died prior to trial, his statement to police was admitted into evidence pursuant to the necessity exception to the rule against hearsay.

Appellant contended that the admission of Frazier's testimonial statement violated *Crawford v. Washington*. 541 U.S. 36 (2004). Appellant's case was conducted before *Craw-*

*ford* was decided; however, as *Crawford* set forth a new rule for the conduct of criminal trials, it must be retroactively applied to cases pending on direct review or not yet final. The confrontation clause imposes an absolute bar to admitting out-of-court statements in evidence when they are testimonial in nature, and when the defendant does not have an opportunity to cross-examine the declarant. The State correctly conceded that Frazier's statement to police during the investigation of Tucker's murder was testimonial in nature and that it was improperly admitted because Jackson could not confront Frazier, who died before the trial commenced. Under the facts of this case, however, this *Crawford* violation was harmless. Frazier's statement was cumulative of other properly admitted evidence. Accordingly, the Court held that under *Crawford*, although the trial court erred by admitting Frazier's statement, that error was harmless.

## **Sentencing; Cruel and Unusual Punishment**

*Williams v. State, S12A0594 (4/24/2012)*

Appellant fatally shot the victim during an attempted armed robbery of a restaurant. He was indicted for malice murder, felony murder, and possession of a firearm during the commission of a crime. He pled guilty to all crimes charged and a sentencing hearing was held that same day. During the hearing, appellant proffered a social worker as an expert on trauma and she testified that appellant experienced childhood trauma which was largely left untreated during his life and that this past trauma would have likely factored into appellant panicking during the robbery attempt and shooting the victim. The State proffered appellant's prior juvenile record into evidence and the trial court allowed family and friends of the victim to make statements. The trial court sentenced appellant to life without the possibility of parole for malice murder and five years consecutive for possession of a firearm during the commission of a crime.

Prior to April 29, 2009, a person who was convicted of murder could either be sentenced to death or life in prison with the possibility of parole. Life sentences without the possibility of parole were only imposed in those cases in which the State sought the death penalty. In 2009, the General Assembly passed Ga. L. 2009, p.223, § 1 (or Senate Bill

13) which amended OCGA § 16-5-1(d) to add the sentence of life in prison without the possibility of parole as one of the punishments for murder. The bill also repealed OCGA §§ 17-10-31.1 and 17-10-32.1, thereby removing requirements that a jury find an aggravating circumstance before imposing the sentence of life without parole (OCGA 17-10-31.1) and removing the sentencing duties of a judge regarding a person who pled guilty to an offense for which the death penalty or life without parole could be imposed (OCGA 17-10-32.1).<sup>2</sup> See 2009 Ga. Laws Act 62, § 5. Appellant, who murdered the victim in May 2009 after the change to OCGA § 16-5-1 became effective, contended that OCGA § 16-5-1 (d) in its current form was unconstitutional as applied to him because the statute provided no mechanism or guidance for the imposition of the sentence or for the provision of mitigating evidence and, as such, may be applied arbitrarily and capriciously in violation of the tenets of due process. The Court disagreed.

The Supreme Court of the United States has determined that, outside the context of a death penalty case, there is no constitutional requirement for an individualized determination that a criminal punishment is appropriate. Here, despite the fact that no individual determination was required for the purposes of sentencing appellant in a non-death penalty case, the trial court nevertheless allowed appellant to submit mitigating evidence at his sentencing hearing. Therefore, the argument that appellant's sentencing lacked the trappings of constitutional due process, under either the state or federal constitutions, was unavailing. Appellant also contended that the sentence he received pursuant to OCGA § 16-5-1 (d) constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments because he had just turned 20 years old when he committed the crime. This contention was found to be without merit. The Court found that there is no state or federal constitutional prohibition against sentencing an adult, albeit a young adult, to a term of life in prison without parole for the commission of a homicide.

## **Venue; Post-Conviction Motions**

*Thomas v. State, S12A0528 (4/24/2012)*

Appellant was convicted of malice murder and was sentenced to life in prison. His conviction

was affirmed on appeal in *Thomas v. State*, 274 Ga. 479 (2001). On August 12, 2011, appellant filed an extraordinary motion in arrest of judgment in the Superior Court of Mitchell County, arguing his indictment was defective in that it failed to charge the critical element of venue, and additionally asserting that his conviction was void because the State failed to charge an underlying felony to support his murder conviction. The trial court denied appellant's motion and he filed a direct appeal.

The Court found that in order to challenge a conviction after it has been affirmed on direct appeal, criminal defendants are required to file an extraordinary motion for new trial, OCGA § 5-5-41, a motion in arrest of judgment, OCGA § 17-9-61, or a petition for habeas corpus, OCGA § 9-14-40. Under Georgia law, motions in arrest of judgment must be filed within the same term of court as the judgment. OCGA § 17-9-61 (b). Accordingly, although appellant's first claim would have been cognizable under OCGA § 17-9-61, his motion in arrest of judgment, filed over 11 years after his conviction, was untimely.

Additionally, the Court stated that it may not construe appellant's claim as a petition for writ of habeas corpus. Although a petition for habeas corpus would not be untimely, such a petition was required to have been filed in Hancock County, the county in which appellant was incarcerated, not Mitchell County, the county of the convicting court. OCGA § 9-14-43. Finally, appellant's claim was not preserved by construing it as an extraordinary motion for new trial as he failed to file an application for discretionary appeal. OCGA § 5-6-35 (a) (7). Accordingly, regardless of the nomenclature, the Court held that appellant's motion was improperly or untimely filed.

### **Similar Transactions; Standard of Review**

*Reed v. State*, S12A0443 (4/24/2012)

Appellant was indicted for malice murder, an alternative count of felony murder during the commission of aggravated assault, and aggravated assault and aggravated battery. Appellant was acquitted of malice murder and found guilty of the remaining counts.

Appellant contended that the trial court erred in admitting evidence of a similar transaction from 2000 showing that appellant, who was breaking up with his girlfriend, got into

an argument with her, picked up a stick from a yard, and hit her with it, injuring her lips and face. Under *Williams v. State*, 261 Ga. 640, 642 (2) (b) (1991), before such evidence is admissible, "the trial court must determine that the State has affirmatively shown that: (1) the State seeks to admit evidence of the independent offenses or acts for an appropriate purpose; (2) there is sufficient evidence that the accused committed the independent offenses or acts; and (3) there is sufficient connection or similarity between the independent offenses or acts and the crimes charged so that proof of the former tends to prove the latter." Because the parties stated the standard of appellate review in unclear or conflicting ways, the Court examined what standard of review was applicable to the trial court's admission of similar transaction evidence. The Court noted that the standard of review has not been stated consistently by either it or the Court of Appeals. Specifically, the precedent was inconsistent because the "abuse of discretion" standard is not identical to the "clearly erroneous" standard. In Georgia, it is well-settled that the "clearly erroneous" standard for reviewing findings of fact is equivalent to the highly deferential "any evidence" test. However, where a determination by the trial court involves an exercise of discretion, the standard of review is "abuse of discretion," which is at least slightly less deferential than the "any evidence" test. By deduction, therefore, the "abuse of discretion" standard is different from and not quite as deferential as the "clearly erroneous" test.

The Court noted, however, that sometimes the appellate courts find it necessary to use more than one standard of review to evaluate a single trial-court ruling. Thus, in various contexts, the Court accepted factual findings unless they are clearly erroneous and reviewed a trial court's ultimate decision on the particular issue for abuse of discretion. This use of two standards of review for the admission of similar transaction evidence was thereby approved for several reasons. To the extent that *Payne v. State*, *Smith v. State*, or any other case rejected the use of two standards of review as set forth above, they were thereby overruled.

Further, the Court found that while there were several dissimilarities between this case and the prior offense, it must focus on the similarities between the two acts rather than the dissimilarities. While there must be proof of a sufficient similarity between the independent

offense and the instant crime charged, the two crimes need not be carbon copies of one another to be admissible. In both instances, when someone tried to break up a heated argument, appellant repeatedly struck his victims in the face with objects of considerable size which he obtained at the location of the argument and which could and did cause substantial visible bodily harm. This evidence reflected a sufficient connection between the two incidents such that proof of the former tends to prove the latter. Thus, the trial court's finding of similarity is "not clearly erroneous and will not be disturbed on appeal. The Court held that when considering the record, the court's factual findings were not clearly erroneous and the court did not abuse its discretion in ruling that the evidence was admissible.

### **Murder; Aggravated Assault; Merger**

*Ortiz v. State*, S12A0433 (4/24/2012)

Appellant was convicted of two counts of murder and related crimes in connection with the shooting deaths of Deryll and Linda Bruce. Appellant contended that the trial court erred in failing to merge the two aggravated assault convictions as lesser included offenses of malice murder. The State asserted that the sequence of events leading to Deryll's death consisted of three independent assaults: the non-fatal first shooting through the open front door; the second, also non-fatal, shooting in the street while the men stood face to face; and the third, fatal shooting, once Deryll had fallen to the ground. Only the last of these three assaults, the State argued, should merge into the malice murder conviction.

The Court stated that when a victim suffers multiple wounds inflicted in quick succession, each infliction of injury does not constitute a separate assault. However, a separate judgment of conviction and sentence is authorized if a defendant commits an aggravated assault independent of the act which caused the victim's death. When a series of shots are separated by a "deliberate interval" and a non-fatal injury is sustained prior to the interval and a fatal injury is sustained after the interval, the earlier, non-fatal infliction of injury can serve to support a conviction for aggravated assault.

Construed to support the verdicts, the Court held that the evidence dictated the

finding of two distinct assaults against Deryll, separated by a “deliberate interval” during which appellant fatally shot Linda. The medical examiner testified that Deryll sustained a total of three gunshots, two to the arm and one fatal shot to the back of the head. Eyewitness testimony established that Appellant first shot Deryll in the arm through the open front door, after which Deryll fled and Appellant turned his gun on Linda. At this point, Appellant’s first aggravated assault was complete. Contrary to the State’s argument, the evidence did not authorize the finding of an additional “deliberate interval” between the second shot to the arm and the shot to the head, both having been inflicted in close succession as appellant confronted Deryll in the street. Accordingly, the Court held the conviction and sentence on the second aggravated assault should have merged into the malice murder, and must be vacated.

### **Similar Transactions; Hearsay**

*McNaughton v. State, S12A0322 (4/24/2012)*

Appellant was convicted of the malice murder and aggravated assault of his wife, Cathy McNaughton. Appellant contended the trial court erred by admitting similar transaction evidence which, he argued, was inadmissible because the incidents were not sufficiently similar or were too remote in time to be admissible at trial. The trial court determined the challenged evidence was admissible for the purpose of showing appellant’s course of conduct and bent of mind. Three of the challenged similar transactions involved incidents in which appellant perpetrated acts of violence against his then-wives. As in the present case, each of these similar transactions involved unprovoked acts of violence by appellant against his spouse during times of marital difficulty and at times when the women sought to separate or divorce. Based on the evidence establishing the similarity between the crimes charged and the violent acts perpetrated by appellant against his former spouses, the Court found no abuse of the trial court’s discretion by admitting evidence of these similar transactions.

Further, the Court was not persuaded by appellant’s argument that the lapse in time between the similar transactions and the charged crimes required exclusion of this evidence. As a general rule, the lapse in time

goes to the weight and credibility of the evidence, not to its admissibility at trial. Given the strong similarities in this case between the charged crimes and the incidents at issue, the purpose for which the evidence was offered, the fact that there was no break in the course of conduct which the State argued the evidence established, and the presence of sufficient evidence corroborating the similar transactions, including police reports, 911 audiotapes, and appellant’s own admissions, the Court concluded that any prejudice from the age of these similar transactions was outweighed by the probative value of the evidence.

Additionally, during trial, the court permitted several witnesses to testify about statements the victim made pertaining to prior difficulties between appellant and the victim. Appellant argued this hearsay evidence was inadmissible both because its admission violated his rights under the Confrontation Clause and because it did not fall within Georgia’s necessity exception to the hearsay rule. The Court found that none of the hearsay statements challenged by appellant were testimonial in nature in that they were made by the victim to a family member, friend, or co-worker before the commission of the crimes with no expectation that they would be used in a trial. Because the challenged evidence was non-testimonial, appellant’s right to confrontation was not implicated. Furthermore, the Court found the victim’s statements were properly admitted under the necessity exception to the hearsay rule. See OCGA § 24-3-1 (b). The first and second requirements for admissibility, unavailability of the declarant and materiality and probativeness, were met with respect to the hearsay testimony of each of the challenged witnesses. Unavailability was met because the declarant, the victim, was deceased. Materiality and probativeness were met because the statements were relevant to show appellant’s motive, intent, and bent of mind, as well as the relationship between appellant and the victim. Whether a trial court abused its discretion by finding the third requirement, particularized guarantees of trustworthiness, had been met demanded consideration of the totality of the circumstances surrounding the making of the statement. The Court noted that the trial court found guarantees of trustworthiness in the statements the victim made to her daughters, sister, friend, counselor, work supervisor, and a co-worker and found that all of the hearsay

testimony challenged was either admissible under the necessity exception to the hearsay rule or its admission constituted harmless error.

### **Continuing Witness Rule**

*Scott v. State, S12A0193 (4/24/2012)*

Appellant was convicted for malice murder and possession of a firearm during the commission of a felony in connection with the fatal shooting of Edward Nurse. He challenged his convictions on multiple grounds including that a witness’s immunity agreement was improperly sent to the jury during deliberations. For the reasons which follow, the Court found the challenges to be without merit and affirmed.

On the morning of July 20, 2007, Nurse stopped at a gas station and convenience store on Martin Luther King, Jr. Drive in southwest Atlanta. Appellant and his cousin Deonta Scott (“Deonta”) were already at the location. Before Nurse could exit his vehicle, appellant shot him in the head through the passenger’s side window. In exchange for a grant of immunity, Deonta testified for the State. Appellant maintained that the trial court violated the “continuing witness rule” by allowing a copy of Deonta’s immunity agreement to go out to the jury room during deliberations. But, the Court noted, the record did not show with certainty that the immunity agreement did go out with the jury. Nevertheless, assuming arguendo that it did and that the continuing witness rule would be applicable to such situation, appellant failed to demonstrate reversible error.

Under the continuing witness rule, it is not reversible error for a writing to go into the jury room if that writing is consistent with the theory of the defense. Whether the document is consistent with the theory of the defense is a function of the advantageousness of the writing to the defense and whether and how defense counsel utilizes that evidence. The immunity agreement at issue arguably was advantageous to appellant in that he raised in cross-examination of Deonta that the agreement was the incentive for him to testify favorably for the prosecution. Also significantly, though the agreement was entered into evidence by the State, it was done so upon the request of the defense in the context of a “best evidence” objection, and defense counsel later used the agreement in an attempt to attack the credibility of the witness in the manner

described above. In the situation in which defense counsel introduced written testimony into evidence or acquiesces in its admission, and further used it to impeach a key witness for the State, such writing is considered to be consistent with the theory of the defense.

## **Malice Murder; Similar Transaction**

*Muhammad v. State, S12A0180 (4/24/2012)*

Appellant was convicted of malice murder, felony murder, aggravated assault, and tampering with evidence. On appeal, he contended that the evidence was insufficient to support the verdict and that the trial court erred by admitting similar transaction evidence.

The evidence showed that, on at least two prior occasions, there had been domestic violence between appellant and his wife. In one such instance, appellant grabbed his wife by the throat prior to pushing her backwards. Also, similar transaction evidence was admitted showing that appellant had a prior romantic involvement with Alvinice Muhammad. Alvinice purchased a home in Marietta that she shared with two female housemates. Alvinice allowed appellant to stay at that home for a few weeks. Appellant began acting violently toward Alvinice, however, and Alvinice asked appellant to move out. Appellant refused. Alvinice then decided to obtain a restraining order against appellant. On the morning she planned to do so, Alvinice woke to find appellant straddling her body and choking her with both hands on her throat. Appellant released Alvinice only after one of her roommates ran into the room. Thereafter, Alvinice obtained the restraining order. In retaliation, appellant burned down Alvinice's house, telling her: "I told you I could get into the house anytime I got ready, and if I can't live in the house, nobody can live in the house."

Appellant contended that the trial court erred by admitting evidence regarding his prior conviction for arson, arguing that it was not sufficiently similar to his wife's murder to constitute a similar transaction. The Court disagreed and stated that evidence that a defendant has committed an independent offense or bad act is admissible if the State shows and the trial court rules that there is a sufficient connection or similarity between the independent offenses or acts and the crime charged so proof of the former tends to prove the latter.

When considering the admissibility of similar transaction evidence, the proper focus is on the similarities, not the differences, between the separate crime and the crime in question. In the present case, the State offered the evidence of the prior arson to show appellant's bent of mind or course of conduct in using escalating degrees of violence toward women. Appellant pushed and shoved both Alvinice and his wife. Appellant choked both Alvinice and his wife. With both women, there was the development of a romantic relationship, a separation, and a resulting escalation of domestic violence including choking. The similarities were apparent. As such, the Court held that the trial court did not err in its determination that appellant's crime against Alvinice was sufficiently similar to the murder of his wife to constitute an admissible similar transaction.

## **Officer Statement**

*Brown v. State, S11G1082 (4/24/2012)*

The Court addressed whether a criminal suspect who is told by police officers that he will be able to return home after questioning regardless of what he says received a "hope of benefit" that rendered his subsequent confession inadmissible at trial under OCGA § 24-3-50. The Court held it does not as long as the officers' statements do not amount to a promise that the suspect will never be charged or will face reduced charges or a reduced sentence based on what he tells the officers during the interview. In this case, appellant could not reasonably have construed the officers' statements as such a promise.

The Court stated that a promise to a suspect that he can go home after police questioning may fall within the colloquial understanding of the phrase "slightest hope of benefit" used in OCGA § 24-3-50. However, words often gain meaning from context, including here the code section that immediately follows, OCGA § 24-3-51, which says that a promise of a "collateral benefit" does not render a confession inadmissible. Here, the Court found, the officers' statements to appellant that he would go home after the interview no matter what he told them (short of confessing to killing someone) clearly referred to what would supposedly happen to him after the interview that day, not what might happen to appellant later on; they therefore offered at most a collateral benefit. Indeed, after appellant finally

confessed —half an hour after the officers' statements about going home, and after numerous intervening denials of misconduct and other police exhortations to tell the truth, the legality of which appellant did not challenge —appellant was immediately advised that he would not be allowed to leave. Rather than protest that he had been promised otherwise, appellant repeatedly acknowledged that he was "screwed," had further discussion about going to jail and the officers' inability to make promises as to his bond or ultimate sentence, and waived his *Miranda* rights and continued to make incriminating statements. Thus, the police officers did not induce appellant's confession with a "hope of benefit" within the meaning of OCGA § 24-3-50, and the Court of Appeals therefore correctly reversed the trial court's order excluding his statements.

The Court added a cautionary note, that it may be a salutary practice for law enforcement officers in appropriate cases to let suspects leave an interview even after they provide somewhat incriminating statements, where that allows the officers to consider the suspect's story along with other evidence gathered in the investigation before making a charging decision. However, officers make promises about their intention to arrest or release suspects after questioning —particularly false promises —with some peril. As the Court held here, a police officer's promise to let a suspect leave after questioning does not, without more, constitute a "hope of benefit" related to potential punishment that may render the suspect's subsequent confession involuntary and inadmissible under OCGA § 24-3-50. But such a promise, particularly if it is broken, could be one of the totality of circumstances that renders a confession involuntary and inadmissible as a violation of constitutional due process.

## **Restitution**

*Austin v. State, A12A0464 (4/27/2012)*

Appellant pled guilty to felony theft by taking another person's property, including several pieces of jewelry, a camera, an iPod shuffle, a scuba knife, a rifle, a pistol, and various precious rare coins. He was given a probated sentence, a condition of which required him to pay restitution in an amount to be determined. After a restitution hearing, the court entered an order setting restitution at

\$20,500 in connection with those stolen items that were not recovered by the owner. Appellant contended that the amount of restitution was not supported by sufficient evidence. The Court agreed and therefore vacated the restitution order and remanded the case.

At the restitution hearing, the owner of the stolen property was the State's sole witness regarding damages. He testified that, of the stolen property, only his pistol and coin collection had not been recovered. He described his pistol and testified that to replace it would cost approximately \$500. He also provided information about his coin collection, then gave a range of its worth at approximately \$20,000 to \$30,000. At the end of the hearing, the court remarked that it was accepting the low end of that range to reach a total restitution amount of \$20,500.

Appellant challenged the restitution amount, asserting that the State failed to provide sufficient evidence as to the fair market value of the items at issue. In evaluating the evidence presented to the trier of fact, the Court considers whether the evidence shows the fair market value of these items, the condition of the items, or an appropriate method of discounting the items from their replacement value to their fair market value. Without any such evidence on the record, the Court noted that it cannot say that the State shouldered its burden of proving the fair market value of the [stolen] items upon which an order of restitution may be based. The Court considered first the evidence pertaining to the gun — a “.25 caliber automatic pistol, [with] cherry wood grips.” The owner testified that he had purchased the gun about 20 years earlier for \$125 and that he had never used the weapon. He acknowledged that he had not asked any gun dealer about the current value of such a gun; however, he claimed that to replace his pistol would cost “probably \$500.” While it appeared that the trial court accepted the replacement cost as the fair market value of the gun, “[t]he correct determination for the amount of restitution is the fair market value of the property rather than the replacement cost.” Moreover, “[i]t is not sufficient for a victim merely to provide either the original price or the replacement costs of any item. Rather, the fair market value may be established by testimony regarding the original price, coupled with the age of the item and its condition at the time of the crime.” The Court noted that

although the owner testified that he had never used the pistol, that particular aspect of the property — even coupled with its original price and replacement cost — did not provide for any meaningful method of arriving at the fair market value of the 20-year-old gun. Because the State therefore failed to adduce sufficient evidence to support an amount of \$500 in damages for the pistol that portion of the restitution amount was unauthorized.

Then the Court turned to the \$20,000 figure used for the coin collection, and found again an evidentiary deficiency. The Court found that the owner's opinion lacked the requisite foundation because there was no showing that he had some knowledge, experience or familiarity with the value of his coins. Absent this foundation, the owner's opinion was nothing more than conjecture, an unsupported conclusion, or a guess. Thus, the Court held that the State failed to adduce sufficient evidence to determine the fair market value of the coin collection, the \$20,000 portion of the restitution amount was also unauthorized.

### **Right to Counsel; Custodial Statement**

*Anthony v. State, A12A0367 (4/26/2012)*

Appellant was convicted of hijacking a motor vehicle, armed robbery, and possession of a firearm during the commission of a crime. Appellant argued that the trial court erred by admitting into evidence his custodial statement after he invoked his right to counsel. The Court affirmed.

Following appellant's arrest, an officer checked appellant out of jail and transported him to police headquarters. In a room at headquarters, the officer advised appellant of his constitutional rights, and appellant signed an acknowledgment-of-rights form. After appellant invoked his right to counsel, the officer took him to a patrol car to return him to jail. As they approached the gate to the jail, appellant said, “[O]kay, I'll tell you what you need to know. . . .” He said, “let's go back to the office.” They then returned to police headquarters, where appellant told the detective that he “was a part of it” and that he took the victim's car to “get some cash.” Appellant also told the detective that “the other guy had the gun” and that they left the victim's car at the park, where it was found following the robbery. Appellant did not give a written statement and

his verbal statement was not recorded. The officer testified that he did not advise appellant of his rights a second time because his statement was made approximately ten minutes after they left police headquarters.

The officer testified that he did not force, coerce, or threaten appellant to make a statement, nor did he promise appellant any benefit, hope, or reward, and appellant's statement was made freely and voluntarily. At the hearing, appellant conceded that he admitted his involvement in the robbery. According to appellant, he made the statement after the officer told him that he could possibly receive a reduced sentence if he cooperated and that if the officer believed that appellant's girlfriend was lying about appellant's whereabouts at the time of the incident, the officer “was going to take her to jail and possibly get [appellant's] little girl put into foster care or whatever.” The Court found that although appellant testified that he made his statement after the officer continued to interrogate him after he invoked his right to counsel, the Court would defer to the trial court on credibility determinations and factual findings. Thus, given the officer's testimony that appellant spontaneously initiated further conversation with him, the trial court did not err by admitting appellant's statement at trial.

### **Guilty Plea**

*Williams v. State, A12A0205 (4/27/2012)*

Appellant appealed from the denial of his motion to withdraw a plea of guilty on two counts of aggravated assault. He contended he entered his plea under a misapprehension of facts and that withdrawal of his plea was necessary to correct a manifest injustice. The record showed that appellant was indicted on one count of rape and the two counts of aggravated assault. The court held a plea hearing, at which the State explained that it agreed to a nolle prosequi on the count of rape and that appellant would plead guilty to the other two counts. In addition, the State made a “cap recommendation,” in which it recommended that appellant be sentenced on the first assault count to 20 years to be served entirely in custody and that he be sentenced on the second assault count to an additional 20-year sentence consecutive to the first to be served on probation, so that combined, appellant's sentence would be capped at 40 years to serve 20. Appellant took the plea and argued for a lighter

sentence. As a part of the sentencing hearing, the victim stated (not under oath) that if there were a trial, she would testify to the facts asserted by the State, including that appellant had sexual intercourse with her against her will on the night in question. The judge followed the State's recommendation as to the sentence.

Shortly after the plea, appellant moved to withdraw his plea, and a hearing was later held on the issue. Following the hearing, the court denied the motion. Appellant contended there was a manifest injustice because, as he testified at the hearing, he was induced to plead guilty by his counsel's representation that the alleged victim would testify that he raped her, whereas, at the hearing on the motion to withdraw, the victim recanted her testimony.

The Court found no abuse of discretion or manifest injustice. First, the Court noted that there was no dispute that the transcript of the original plea hearing showed that appellant was thoroughly questioned about the plea, fully informed and cognizant of the rights he was waiving, and fully aware of the consequences of the plea based on the information available at the time. Second, the Court stated that the purported recantation evidence proffered at the hearing on the motion to withdraw was very weak. Third, the victim's additional testimony pertained only to the rape charge, which was nolle prossed, and not to the two counts of aggravated assault. And at the plea hearing, appellant admitted under oath that he committed the two acts of aggravated assault. Fourth, appellant admitted that he would not have moved to withdraw his plea if he had been given a lighter sentence, thereby undermining his claim that he would have elected to go to trial if he knew of the victim's additional testimony, and instead indicating that appellant simply had what the trial court referred to as "buyer's remorse" regarding his sentence.

### **Forgery; Hearsay**

*Holmes v. State, A12A0184 (4/25/2012)*

Appellant was convicted of seven counts of forgery in the first degree. Appellant argued that the trial court erred in admitting evidence that constituted hearsay and violated his right to confrontation under the Sixth Amendment to the United States Constitution, and that the evidence was insufficient to support his convictions. For the reasons set forth the Court agreed and reversed his convictions.

Specifically, appellant contended that the trial court erred in admitting into evidence the U.S. Postal Service money orders, which bore the "Apparent Counterfeit" stamp, arguing that such evidence constituted hearsay and violated his right to confrontation under the Sixth Amendment to the United States Constitution. The Court agreed that the stamped money orders constituted inadmissible hearsay. In this case, the bank's CFO testified regarding the process by which the bank transmits money orders to the Federal Reserve and, eventually, the originating payor, and how the payor either honors the money order or stamps its reasons for not honoring it on the money order itself. Afterward, when the State tendered the stamped money orders, appellant objected, arguing that the documents were hearsay and violated his Confrontation Clause rights. But the trial court denied appellant's objection, agreeing with the State that the stamped money orders were admissible under the business records exception to the hearsay rule. In doing so, the trial court erred. The Court stated that the bank CFO's testimony indicated that the determination that the money orders deposited and cashed by appellant were counterfeit was a conclusion or opinion made by a third party institution, whose representatives did not testify at trial. Accordingly, the money orders stamped "Apparent Counterfeit" should not have been admissible as a business record to prove that the money orders were, in fact, counterfeit. Further, regarding appellant's next contention that the evidence was insufficient to support his convictions, arguing that without the stamped money orders, the State could not prove that the money orders were counterfeit, the Court agreed.

The State contended that appellant lacked authority from either the U.S. Post Office or the alleged payors of the money orders to possess and utter the money orders because they were counterfeit. However, the only evidence introduced at trial to prove that the money orders were counterfeit was copies of the processed orders themselves, which bore the stamp reading "Apparent Counterfeit." As the Court noted, no representative of the Post Office testified to confirm the counterfeit status of the money orders, and no one testified that the alleged payors listed on the money orders were either fictitious persons or actual persons, who never gave authority for the money orders to be issued.

Nevertheless, during the hearing on appellant's motion for new trial, the trial judge responded to appellant's argument that the stamped money orders should have been excluded by stating that he did not rely on those documents in finding appellant guilty of forgery. Rather, the trial judge explained that he found appellant guilty because the money orders were not honored and because "no one could reasonably be expected to believe that this was [a] legitimate transaction . . ." But money orders can be dishonored for a host of reasons, some of which involve no unlawful conduct. Thus, because there was no competent evidence establishing the essential element that appellant possessed or made a counterfeit money order, the evidence was not sufficient to sustain his first-degree-forgery convictions and accordingly, the Court held that appellant's convictions must be reversed.