

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 25, 2014

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THIS WEEK:

- **Right to Fair Trial; Electronic Security Belts**
- **Robbery by Intimidation; Sufficiency of the Evidence**
- **Aggravated Assault; Sufficiency of the Evidence**
- **Incest; Sufficiency of the Evidence**
- **Right to be Present at Trial**
- **Attorney-Client Privilege; Crime-Fraud Exception**
- **Custodial Statements; Hostile Witnesses**
- **Ineffective Assistance of Counsel**
- **Merger; Voir Dire**

Right to Fair Trial; Electronic Security Belts

Weldon v. State, A14A0135 (7/7/14)

Appellant was convicted of twelve counts of armed robbery, aggravated assault, and giving a false name to a law enforcement officer. On the first day of trial, the court noted that appellant had not been paying much attention to his case. Instead, appellant spent most of his time looking around the courtroom and paying attention to where the exits were and who was coming and going. Given this behavior, and noting that appellant was looking at a life sentence in addition to a recent sentence of 40 years on multiple armed robberies which were to be admitted in this case as similar transactions, the court determined appellant to be a flight risk. Therefore, the court ordered that appellant be required to wear an electronic security shock belt that would not be visible to the jury. Appellant refusal initially to participate in the

trial while wearing the device. The trial court instructed him that the trial would proceed in his absence. After a recess, appellant finally agreed to wear the device in the courtroom, and the trial court assured him that he would be able to move around the courtroom to view the evidence without the risk of being shocked. Nevertheless, appellant contended that he was denied the right to a fair trial because he was not able to focus on jury selection or during witnesses' testimony because he was worried about activating the shock device.

The Court stated that a trial court has the power to preserve and enforce order in its immediate presence and, as near thereto as is necessary, to prevent interruption, disturbance, or hindrance to its proceedings. The use of extraordinary security measures to prevent dangerous or disruptive behavior which threatens the conduct of a fair and safe trial is within the discretion of the trial court. Furthermore, a trial court has discretion to require a defendant to use a remote electronic security device worn under clothing and not visible to jurors if the use of the device is warranted and the defendant fails to show that he was harmed by its use. To demonstrate error, the defendant must show that the security measure utilized was so inherently prejudicial as to pose an unacceptable threat to his right to a fair trial.

Here, the Court found, the trial court explained that based upon the nature of the charges against appellant (which included multiple incidents of pointing a gun at a victim or striking him or her with the gun) and its observations about his behavior in the courtroom, it required appellant to use the device, which would not be visible to the jury. The deputy explained the device to appellant,

and the trial court repeatedly assured appellant that he would be permitted to move around the courtroom to view the evidence without the risk of shock. Under these circumstances, the Court found no abuse of discretion in the trial court's requirement that appellant wear the security device. Furthermore, appellant failed to establish that the security measure utilized during his trial was so inherently prejudicial as to pose an unacceptable threat to his right to a fair trial. Although appellant testified that he was unable to focus at trial, he failed to specifically indicate how his apprehension about the device impeded his ability to participate in his defense, thereby failing to demonstrate harm.

Robbery by Intimidation; Sufficiency of the Evidence

Simon v. State, A14A0276 (7/8/14)

Appellant was convicted of robbery by intimidation (O.C.G.A. § 16-8-40(a)(2)) as a lesser included offense of armed robbery (O.C.G.A. § 16-8-41(a)). The evidence showed that Geraldine Jones and her husband Gene operated a grocery store. On the day of the robbery, Gene was outside the store and Geraldine was in the back of the store when she heard a racket coming from the cash register. Geraldine turned and saw appellant standing at the cash register. Geraldine approached appellant and asked him what he was doing. Appellant came around the counter and announced a holdup. Geraldine thought appellant had a gun. Geraldine threw some bags at appellant, and appellant lunged at her. Geraldine and appellant began wrestling, and Geraldine called for Gene to help. When Gene came inside the store, appellant turned Geraldine loose. Appellant then backed up, clasped his hands like he had a weapon, and threatened to kill Gene. Gene reached for appellant with his left hand; however, appellant hit Gene's arm and ran out through the back of the store. Law enforcement eventually caught appellant and the only item he took from the store were matches.

Appellant contended that the evidence was insufficient to support his conviction. The Court agreed and reversed. There was no evidence that appellant used threats or coercion to cause the Joneses to part with the matches. Although appellant told Geraldine that he was holding-up the grocery store and

appeared to have a weapon, there was no evidence that Geraldine was induced to give up any property as a result of appellant's threats. Notably, before the matches recovered from appellant's bag were shown to the Joneses, they were unaware that appellant had taken anything from the store. In fact, Geraldine stated that she knew appellant had not taken any money from the register because he could not access it. Gene testified that he did not know whether appellant had taken any of the couple's property before he ran out of the store. Therefore, the Court concluded, it must reverse appellant's conviction for robbery by intimidation because, while the Joneses may have been afraid of appellant based on his threats or actions, the evidence did not show that they parted with the matches on account of such fear.

Aggravated Assault; Sufficiency of the Evidence

Ford-Calhoun v. State, A14A0343 (7/3/14)

Appellant was convicted of armed robbery, aggravated assault and false imprisonment. She contended that the evidence of aggravated assault was insufficient. The Court agreed and reversed.

The Court stated that while an unnecessary description of an unnecessary fact averred in an indictment need not be proved, in criminal law even an unnecessarily minute description of a necessary fact must be proved as charged. If the indictment sets out the offense as done in a particular way, the proof must show it to be so, or there will be a variance. No averment in an indictment can be rejected as surplusage which is descriptive either of the offense or of the manner in which it was committed. All such averments must be proved as laid, or the failure to prove the same as laid will amount to a variance. To permit the prosecution to prove that a crime was committed in a wholly different manner than that specifically alleged in the indictment would subject the accused to unfair surprise at trial and constitute a fatal variance.

Under O.C.G.A. § 16-5-21(a)(1), "[a] person commits the offense of aggravated assault when he or she assaults . . . [w]ith intent to murder, to rape, or to rob. . . ." The indictment for the aggravated assault at issue charged that "[appellant] did unlawfully make an assault upon the person of [Campbell], with

intent to rob, by pointing a gun at [Campbell] and demanding money" The evidence showed that appellant and her co-defendant committed armed robbery of a retail store. A victim testified that Campbell returned to the register to assist in opening it, and when she did so, Campbell had her hands in the air and was saying "don't shoot." Campbell testified that "the [co-defendant] came in real fast. And he got up on the register [where Campbell and the other victim were standing] so fast, it shocked me[,] and I started running . . . for the [front] door." Campbell explained, "I did not see a gun. [the other victim] said that he pulled the gun. He had the gun on his side and pulled the gun up, just as she was taking off to run behind me. But I never saw the gun." On cross-examination, Campbell answered "no" when asked if either appellant or the co-defendant pointed a weapon at her. Thus, the Court found, appellant correctly argued that no evidence supported a finding that her co-defendant pointed a gun at Campbell.

Nevertheless, the State argued, appellant was indicted under O.C.G.A. § 16-5-21(a)(1), and the language "by pointing a gun at [Campbell] and demanding money" was mere surplusage to the necessary element of "intent to rob," and not an essential element to the crime requiring proof at trial. But, the Court found, no averment in an indictment can be rejected as surplusage which is descriptive either of the offense or of the manner in which it was committed. The State chose to indict appellant alleging a specific manner in which she (as a party to the crime) committed assault with the intent to rob Campbell. The evidence at trial showed that Campbell did not see a weapon at all, and no testimony supported a finding that a gun was pointed at her. Based on this evidence the evidence as to this Court was insufficient.

Incest; Sufficiency of the Evidence

Gordon v. State, A14A0440 (6/26/14)

Appellant was convicted of child molestation, rape, aggravated sexual battery and incest. The evidence showed that the victim's mother and appellant are half-siblings who have the same father. Thus, appellant is the victim's uncle, related by half-blood.

Appellant argued that the evidence was insufficient to prove incest. The Court agreed.

O.C.G.A. § 16-6-22(a)(6) provides that “[a] person commits the offense of incest when such person engages in sexual intercourse . . . with a person whom he or she knows he or she is related to either by blood or by marriage as follows: . . . [u]ncle and niece[.]” The Court noted that the statute does not refer to half-blood uncles, but does specifically refer to other half-blood relationships in prohibiting incest between a brother and sister “of the half blood[.]” O.C.G.A. § 16-6-22(a)(3).

Well-settled principles of statutory construction provide that “expressio unius est exclusio alterius (the expression of one thing implies the exclusion of another) and expressum facit cessare tacitum (if some things are expressly mentioned, the inference is stronger that those not mentioned were intended to be excluded). Because Georgia’s incest statute specifically refers to a brother and sister of the half-blood, it necessarily excludes other, unmentioned half-blood relationships. “The fact that the sexual acts here involved are fully as loathsome and disgusting as the acts proscribed by the Code does not justify us in reading into the statutory prohibition something which the General Assembly either intentionally or inadvertently omitted. Because the relationship at issue here was not one expressly enumerated by the statute, the sexual relationship between appellant and the victim was not incestuous. Accordingly, appellant’s incest conviction was reversed.

Right to be Present at Trial

Wedel v. State, A14A0622 (7/8/14)

Appellant was convicted of child molestation. He argued that the trial court decided his lawyer’s motion to withdraw during an informal hearing from which appellant was absent, and that this conduct violated his constitutional right to be present at all critical stages of the proceedings against him. The evidence showed that appellant retained defense counsel to represent him in this case. Defense counsel then brought in co-counsel to assist him. On the day of trial, defense counsel brought a suit for appellant to wear in court. Unbeknownst to defense counsel, appellant had requested his sister place a valium in the pocket of the suit so he could “relax” during trial. This request was made from the jail in a telephone call. Since calls from the jail are monitored, law enforcement was aware of

the request and located the pill when the suit arrived with defense counsel. A meeting was then informally held in the judge’s chambers, without appellant being present, in which defense counsel requested to withdraw from the case. The trial court then conducted a hearing in the courtroom with appellant being present. At the conclusion of the hearing, defense counsel was allowed to withdraw and co-counsel represented appellant at trial.

The Court stated that under both the Georgia and the federal constitutions, a criminal defendant has the right to be present at all critical stages of his trial. The right to be present attaches at any stage of a criminal proceeding that is critical to its outcome if the defendant’s presence would contribute to the fairness of the procedure. A critical stage in a criminal prosecution is one in which a defendant’s rights may be lost, defenses waived, privileges claimed or waived, or one in which the outcome of the case is substantially affected in some other way. Nevertheless, a defendant’s right to be present during a critical stage may be waived if the defendant later acquiesces in the proceedings occurring in his absence.

Here, the Court found, evidence supported the trial court’s conclusion that the trial court did not rule on defense counsel’s withdrawal motion until after court had been convened and appellant was present. The record also showed that the judge went to great lengths to get all of the information about what had transpired at the in-chambers meeting on the record in appellant’s presence; that the judge repeatedly asked appellant if he had a problem with the fact that a discussion about the situation occurred without appellant being present; and that neither appellant nor co-counsel objected. Under these circumstances, the Court concluded, appellant waived the right to claim that his absence was error.

Attorney-Client Privilege; Crime-Fraud Exception

Sullivan v. State, A14A0531 (7/11/14)

Appellant was convicted of violating O.C.G.A. § 16-10-93(a) by “unlawfully offering [the victim] \$10,000, a benefit, reward and consideration[.]” and doing so “with the intent to deter [the victim], a witness, from testifying freely, fully, and truthfully to a

matter pending before the . . . Grand Jury.” The evidence showed that appellant was indicted for raping the victim. He hired defense counsel who thereafter retained the services of a private investigator (“PI”). The investigator was contacted by Roberts who claimed to have knowledge of the facts of the case. However, Roberts told the PI that he knew the victim, that he doubted her version of events, and that he believed she was probably seeking a monetary payout. Accordingly, Roberts suggested offering the victim money, and volunteered to act as a go-between. The PI contacted appellant and appellant wanted to meet with Roberts. During that same conversation, and in Roberts’s presence, the investigator advised appellant that he did not believe appellant needed to pursue the case in such a manner, that it was in his best interest to let an attorney handle the matter, and that he would not attend appellant’s meeting with Roberts. Thereafter, appellant and Roberts met repeatedly and engaged in a conspiracy to offer the victim money to drop the charges.

Appellant argued that the trial court erred by permitting the State to admit portions of the confidential conversations that took place between himself and his PI by finding that the conversations fell under the crime-fraud exception to the attorney-client privilege. Specifically, the instances in which the State elicited testimony from the PI that he advised appellant on more than one occasion that he believed the scheme with Roberts was illegal; that he, the investigator, wanted nothing to do with the scheme; and that appellant should let attorneys or law enforcement handle the matter.

The Court noted that appellant was correct that conversations with a PI who is employed to assist in a client’s defense may be protected by the attorney-client privilege. However, the attorney-client privilege does not extend to communications which occur before perpetration of a fraud or commission of a crime and which relate thereto. This is known as the crime-fraud exception to the privilege. In this regard, the privileged communication may be a shield of defense as to crimes already committed, but it cannot be used as a sword or weapon of offense to enable persons to carry out contemplated crimes against society, frauds or perjuries.

The Court found that the trial court did not err in determining that the relevant

conversations fell within the ambit of the crime-fraud exception. The record reflected that appellant communicated with the PI throughout the course of a weekend during which Roberts made repeated contact with the victim at appellant's behest (which included offers of a monetary payout to the victim in exchange for dropping the charges), and the complained-of statements related to continuation of the plan appellant willingly undertook with Roberts. And even if the complained-of testimony did not fall under the crime-fraud exception, any error was harmless because the testimony was cumulative of other testimony. In fact, the Court noted, the record reflected that the PI testified that he informed appellant both in private and in a telephone conversation in Roberts's presence that he advised against approaching the victim and recommended allowing attorneys or law enforcement to handle the matter, and the privilege does not extend to those situations in which third parties are present for attorney-client discussions. Additionally, the PI testified without objection that he provided Roberts with the same advice that he provided to appellant: that he "thought the[] actions were wrong and illegal" and that he "was no longer going to be involved in them in any way." Accordingly, the Court concluded, appellant's argument was meritless.

Custodial Statements; Hostile Witnesses

Spencer v. State, A14A0268 (7/8/14)

Appellant was convicted of two counts of armed robbery and aggravated assault. Appellant argued that the trial court erred by finding that his custodial statement was voluntary. Specifically, he contended that he was 18 years old, had a tenth grade education, no prior experience with law enforcement, was not allowed to speak with his parents prior to the interview, was interviewed in the middle of the night, and had smoked marijuana prior to the incident, rendering clearly erroneous the trial court's determination that his custodial statement was admissible.

The Court stated that in deciding the admissibility of a statement during a *Jackson-Denno* hearing, the trial court must consider the totality of the circumstances and must determine the admissibility of the statement under the preponderance of the evidence

standard. Unless the factual and credibility findings of the trial court are clearly erroneous, the trial court's decision on admissibility will be upheld on appeal. Here the Court found, the record showed that officers interviewed appellant after arresting him at the crime scene; the interview occurred at the police station at approximately 2:20 a.m. on the morning after the incident earlier that night. Prior to conducting the interview, the officer read appellant his *Miranda* rights and provided him a written waiver of rights form; the officer asked appellant whether he had ingested any drugs or alcohol, and he responded that he had smoked marijuana at approximately 7:00 p.m. earlier that evening (about 7 hours prior to the interview). Appellant stated that he was no longer under the influence at the time of the interview: "I'm fine; we can continue." The interview lasted about 20 minutes, and the officer, who was experienced with individuals under the influence, testified that appellant did not appear impaired.

Appellant contended that his impairment from ingesting marijuana established that he was not capable of knowingly and voluntarily waiving his right to silence. Specifically, appellant argued, the law's treatment of marijuana intoxication as evidence of per se impairment of ability to drive showed that it was clear error on the part of the trial court to determine that appellant was capable of consenting to the interview while his faculties were similarly affected. The Court disagreed. The mere fact that appellant may have been somewhat intoxicated at the time of the interview did not automatically render evidence thereof inadmissible. Although another trial court weighing the circumstances surrounding appellant's custodial statements may have found that he did not knowingly and voluntarily consent, here, the trial court was faced with conflicting evidence and determined that appellant made his statement knowingly and voluntarily; there was evidence to support this determination; and there was no reversible error in the court's denial of the motion to suppress.

Appellant also argued that the trial court erred by allowing the State to treat his co-defendant as a hostile witness. The record showed that during her plea colloquy in which she pled guilty, the co-defendant agreed to testify on behalf of the State at appellant's trial. Prior to her testimony, the State called

the co-defendant before the trial to determine whether she would testify pursuant to the plea agreement, to which she responded affirmatively. Nevertheless, upon being questioned before the jury, the co-defendant attempted to invoke the Fifth Amendment right to remain silent, and the State reminded the co-defendant that she had waived her right. But instead of responding, she stated she did not remember where she was on the night in question. At that point, the State requested that it be allowed to treat the co-defendant as a hostile witness. Appellant did not object to the request.

The Court stated that a trial court has discretion to permit leading questions on direct examination when a witness is reluctant, hostile, or overly nervous. In fact, the Court stated, it would be a rare case in which the trial court's exercise of discretion on this issue would warrant reversal. Appellant nevertheless argued that the State should have been required to refresh the co-defendant's recollection prior to treating her as a hostile witness. However, the Court found, the co-defendant did not simply state that she could not remember, she first sought protection from testifying from the Fifth Amendment, which she was prevented from invoking under her plea agreement. Accordingly, the trial court did not abuse its discretion.

Ineffective Assistance of Counsel

Douglas v. State, A14A0649 (6/27/14)

Appellant was convicted of three counts of armed robbery, two counts of aggravated assault, possession of a gun during the commission of a crime, carjacking, and misdemeanor obstruction of an officer. The evidence generally showed that appellant and another came upon three people relaxing in a park, drew weapons and robbed them. Appellant and his accomplice were then chased through the neighborhood. Appellant and his accomplice split up and eventually, appellant was caught approximately two hours after the robbery. All three victims identified appellant as he sat in the patrol car.

Appellant argued that his trial counsel was ineffective for failing to investigate the victims' criminal histories even though the defense theory was that the victims misidentified him as one of the robbers. The Court agreed.

To prove ineffective assistance of counsel under *Strickland v. Washington*, a defendant must prove that defense counsel rendered deficient performance and that the deficient performance prejudiced his case. As to deficient performance, the Court found that defense counsel's performance was deficient because she failed to obtain the victims' criminal records. Counsel admitted having no strategic reason not to investigate the three victims who identified appellant as the robber, despite the fact that appellant's main theory of defense was mistaken identity and the State relied primarily on the victims' identification of appellant as one of the robbers. The Court stated that a defense counsel's failure to investigate is unreasonable where it results from inattention and not from reasoned strategic judgment. Accordingly, appellant proved the defense counsel rendered deficient performance under the *Strickland* test.

As to the prejudice prong of the *Strickland* test, the Court agreed with appellant that had trial counsel not been deficient, she would have been able to introduce three kinds of impeachment evidence against the victims at trial: impeachment with prior felony convictions; impeachment regarding the nature of the victims' relationship (they were very possibly drug dealers who were in the park conducting their drug business); and impeachment for possible bias due to pending charges (the victims all had major felony drug charges pending).

Nevertheless, the State argued, the evidence against appellant was overwhelming and thus, there was no prejudice from the failure to investigate. The Court disagreed. Although the State characterized the evidence against appellant as "overwhelming," its proof consisted entirely of the eyewitness identification of appellant by the three victims and a bystander who lost sight of the robbers while chasing them. Considering that (1) appellant's defense was that the victims identified the wrong person, (2) the responding police officers did not remember any of the victims saying they knew one of the robbers, (3) none of the victims' statements indicated that they knew either of the robbers, (4) the victims' description of the robbers' clothing (a gray-white t-shirt and blue jeans) was fairly generic, (5) the witness who chased the robbers lost sight of them, and (6) the victims and witness all identified appellant from a

one-on-one show-up, the Court concluded that a reasonable probability—a probability sufficient to undermine confidence in the outcome—existed that but for trial counsel's unprofessional errors, the outcome of this trial would have been different.

Merger; Voir Dire

Polanco v. State, A14A0617 (7/1/14)

Appellant was convicted of four counts of armed robbery, four counts of aggravated assault (O.C.G.A. § 16-5-21), four counts of false imprisonment, theft by taking, and possession of a firearm or knife during the commission of a felony. The evidence showed that appellant and seven others committed a home invasion. During the home invasion, the perpetrators used a 9mm assault pistol and a sawed-off shotgun. Also, at one point during the home invasion, a victim was beaten with a metal pipe to force compliance.

Appellant contended that the trial court erred in failing to merge his aggravated assault convictions with his convictions for armed robbery. The Court agreed and the State conceded the issue. In determining whether one crime merges with another, the Court applies the required evidence test set forth in *Drinkard v. Walker*, 281 Ga. 211 (2006). Under that test, the Court must examine whether each offense requires proof of a fact which the other does not. Here, the indictment charged appellant with using offensive weapons—a handgun and a shotgun—to commit armed robbery against the four victims. Appellant was charged with committing aggravated assault against those same victims by using a handgun and a shotgun, both of which are deadly weapons, and a metal pipe, which when used offensively was likely to result in serious bodily injury. Neither the indictment, nor the jury's verdict, however, required the jury to find that appellant committed the aggravated assaults with a metal pipe. Moreover, the trial court instructed the jury that the State had to prove as a material element of aggravated assault that an assault was made with a deadly weapon; a firearm when used as such is a deadly weapon as a matter of law; and when an indictment charges that a crime was committed in more than one way, proof that the crime was committed in one of the separate ways alleged in the indictment makes a prima facie case. Finally, the Court found,

these actions arose out of the same act or continuous transaction as the armed robbery against the same victims and therefore merged as a matter of fact. Accordingly, the Court vacated appellant's convictions for aggravated assault and remanded for resentencing.

Appellant also contended that the trial court erred by not allowing him to ask potential jurors whether they would prejudice his case or cause them to be biased based on the large number of charges in the indictment. The Court disagreed. With regard to the trial court's limitation on voir dire, appellant was entitled under O.C.G.A. § 15-12-133 to examine the individual jurors as to any matter or thing which would illustrate any bias of the juror in the case. However, hypothetical questions, such as the question here, that would require a response from a juror which might amount to a prejudgment of the case are improper and should be excluded from voir dire. Accordingly, the trial court did not err in prohibiting defense counsel's examination of the prospective jurors regarding their possible reaction to the multi-count indictment.