



# THE Georgia FAMILY VIOLENCE Resource Newsletter

A PUBLICATION OF THE PROSECUTING ATTORNEYS' COUNCIL OF GEORGIA DOMESTIC VIOLENCE AND SEXUAL ASSAULT PROGRAM  
WITH FUNDING FROM THE CRIMINAL JUSTICE COORDINATING COUNCIL

## Our Mission

The goal of PAC's Domestic Violence and Sexual Assault Program is to effectively assist and be a resource to prosecutors, law enforcement and victim advocates across Georgia; to improve the effective adjudication of domestic and sexual violence cases; and to reduce such crimes across our state.

## In this Issue



### feature article

Forfeiture by Wrongdoing

The equitable principle of Forfeiture by Wrongdoing is based on the premise that a defendant should not profit from his wrongful actions

### headlines

CaseLaw Update 4

### in every issue

Upcoming Training 3

Resources for Prosecutors 6

## Forfeiture By Wrongdoing

By Sharla D. Jackson, Domestic Violence and Sexual Assault Resource Prosecutor, and Christopher Ivory, Intern, Prosecuting Attorneys' Council of Georgia

Many family violence cases rise and fall on a victim's availability or willingness to testify. When a defendant causes a victim to be unavailable to testify through death, influence or intimidation, it can be devastating to the State's case. Although victims may be reluctant to testify for many reasons, the most common is pressure or influence by the defendant.

Evidence-based prosecution—using evidence to prosecute cases without victim testimony—is the best practice; but there are times when the unavailable victim's testimony may be the most valuable piece of evidence. Fortunately, under Georgia Law, prosecutors can use the doctrine of Forfeiture by Wrongdoing to admit testimonial hearsay statements for those times when, through the actions of a defendant, the victim becomes unavailable.

The equitable principle of Forfeiture by Wrongdoing is based on the premise that a defendant should not profit from his wrongful actions.<sup>1</sup> Relying on this doctrine, courts have held that a defendant's misconduct can forfeit his right to confront witnesses against him.

The Sixth Amendment of the Constitution honors a defendant's right to be confronted with the witnesses against him or her. Under early common law, the admissibility of an absent witness's examination depended upon the unavailability of that witness and the defendant's prior opportunity to cross-examine him or her.<sup>2</sup> The Sixth Amendment incorporates those limitations.<sup>3</sup> However, when the defendant is the cause of the witness's unavailability, courts have approved the admission of hearsay testimony.<sup>4</sup>

This latter exception to the Confrontation Clause's protections—the defendant's misconduct in procuring the witness's unavailability to testify—has its roots in the common law preceding the Sixth Amendment's drafting.<sup>5</sup> In 1878, the Supreme Court recognized that a defendant's wrongful actions can forfeit his right to confront witnesses against him:

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses

against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.<sup>6</sup>

The law recognizes that “[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. [The Constitution] grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps witnesses away, he cannot insist on his privilege.”<sup>7</sup>

### Forfeiture By Wrongdoing Under Georgia Law

The doctrine of Forfeiture by Wrongdoing has long been followed by Georgia courts. In 1856, the Supreme Court of Georgia in *Williams v. State*, 19 Ga 402 (1856) held:

...any witness, who had been examined by the Crown and was then absent, was detained by the means or procurement of the prisoner, and the Court should be satisfied from the evidence, that the witness was detained by means or procurement of the prisoner, then the examination should be read<sup>8</sup>...

The U.S. Supreme Court in *Giles v. California*, 554 U.S. 353 (2008), cited this historic Georgia case to support its holding and support the doctrine of Forfeiture by Wrongdoing on domestic violence cases.<sup>9</sup> While this doctrine has not been widely used in Georgia law, the drafters of the new Georgia Evidence Code did not eliminate this common law rule. Rather, they codified it under O.C.G.A. § 24-8-804(b)(5), which states:

(b). The following shall not be excluded by the hearsay rule if the declarant is unavailable as a witness:

(5). A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

This Code section tracks the language of the Federal Rules of Evidence, USCS Fed Rules Evid R 804 (b) (6). Further, the Editor's notes in the preamble to the new Evidence Code indicate the legislative intent that the common law will prevail unless the Code states otherwise, "...Unless displaced by the particular provisions of this Act, the General Assembly intends that the substantive law of evidence in Georgia as it existed on December 31, 2012, be retained." Therefore, prior cases that are not in conflict with the statute can be persuasive authority.

### Forfeiture By Wrongdoing Cases

Courts have upheld the admission of evidence under this doctrine in myriad contexts. In *Brittain v. State*, 329 Ga. App. 689 (2014), the State sought to admit the hearsay statement of Chastity Jones, a murder victim. Jones' husband had been implicated as a member of the defendant's restaurant robbery crew. Jones gave several videotaped statements to investigators after being kidnapped by the defendant and the murder of her husband. At a hearing on the motion, the trial court ruled that Ms. Jones' statements to police investigators were admissible under this doctrine after the State showed through the testimony of family, friends and law enforcement agents that the defendant procured Jones' unavailability to testify at trial. Citing *Giles*, the Court held that the doctrine of Forfeiture by Wrongdoing "permits the introduction of statements made by a witness who has been detained or kept away by the means or procurement of the defendant."<sup>10</sup> Further, the Court held that although the case was tried in 2011, prior to the effective date of the new Evidence Code, the rule would still apply as the new Code codified the Forfeiture by Wrongdoing exception for hearsay evidence and would be admissible at subsequent trial if the court were to reverse the case.<sup>11</sup>

Federal courts have also looked favorably on the admission of evidence under this doctrine. In *United States v. Montague*, 421 F.3d 1099 (10<sup>th</sup> Cir. 2005), the 10<sup>th</sup> Circuit upheld the admission of hearsay testimony of the defendant's wife, who gave incriminating testimony to a grand jury about her husband. The defendant had been arrested for a domestic violence incident at their home. During the investigation, the defendant's wife related to police that the defendant, a convicted felon, was in possession of several guns. While testifying before the grand jury, the defendant's wife stated that she and the defendant talked about her changing her story and that the defendant told her that she would not get into trouble if she did so. The State also presented evidence that the defendant and his wife spoke on the phone several times and that his wife visited the defendant on at least five occasions at the prison in violation of a no-contact order. At trial, she invoked her marital privilege and refused to testify. Citing the daughter's testimony that her mother was afraid of the defendant and the unauthorized visits to the defendant by his

wife, the Court held that there was sufficient evidence presented to meet the preponderance standard and admitted the hearsay testimony. The Court also held that evidence of a history of spousal abuse presented during the hearing was relevant to provide a better understanding of the relationship between the parties.<sup>12</sup>

In *U. S. v. Jonassen*, 759 F.3d 653 (7<sup>th</sup> Cir. 2014), the 7<sup>th</sup> Circuit affirmed the mid-trial admission of hearsay statements of the defendant's 21-year-old daughter after the defendant's campaign of 75 phone calls; guilt; bribery; veiled threats; and 20 letters, in violation of a no-contact order, caused her to become unavailable at trial. The court found her to be unavailable when, while on the witness stand, she "suddenly clammed up when called to testify at trial, saying 'I don't remember' or something equivalent in response to all of the prosecutor's questions."<sup>13</sup>

Many other jurisdictions have also applied this doctrine to allow hearsay testimony in domestic violence cases. In *People v. Turnquest*, 938 N.Y. S.2d 749 (Sup. Ct. Queens County 2012), a trial court ruled that the defendant forfeited his confrontation rights when it found that the defendant committed several acts in an effort to persuade the victim to not testify against him. In violation of the court's no-contact order, the defendant called the victim 348 times, came to her home uninvited on two occasions, and tried to get his friends and family to contact the victim about dropping the charges against him.

The Supreme Court of Massachusetts upheld the application of the doctrine in *Commonwealth v. Szerlong*, 457 Mass. 858, (2010), where the defendant married the victim to enable her to exercise her spousal privilege, thereby making her unavailable to testify. Also, the Oregon Supreme Court, in *State v. Supanchick*, 354 Or 737 (2014), affirmed the trial court's admission of the victim's hearsay statements to the police when the defendant killed her to prevent her from reporting his violation of a restraining order. While these out-of-state cases are not binding precedent in Georgia, they offer an interesting framework for analyzing this issue.

### Forfeiture By Wrongdoing and Family Violence

In the context of a family violence case, the doctrine of Forfeiture by Wrongdoing can be helpful when a victim becomes unavailable to testify based on coercion, influence or intimidation by the defendant. This is often manifested in a victim's evasion of the service of subpoenas, a refusal to appear in court, to testify truthfully, or "memory lapses." This doctrine is especially helpful in this context as it provides the State another tool with which to seek offender accountability by admitting the victim's testimonial statements when the batterer causes that victim's unavailability at trial. While preventing a defendant from benefiting from his coercive behavior, it also en-

hances victim safety as the State can secure a defendant's conviction without relying on the presence or testimony of the victim who may be unwilling or unable to testify against the defendant. The Supreme Court recognized this challenge faced by domestic violence prosecutors in its opinion in *Giles*,

Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.<sup>14</sup>

### Preparing The Forfeiture By Wrongdoing Case; Where To Look For Evidence

Given the dynamics of family violence and barriers that victims of family violence may face in leaving or prosecuting their batterers, it is important to anticipate the potential obstacles as a part of the case in chief. The same elements of power and control that play out in the relationship of the victim and the batterer will also become a part of the case. In some instances, the arrest of the batterer may tend to exacerbate these situations as the batterer begins to lose control over the victim. To that end, prosecutors should take steps during the initial investigation and throughout the trial process to proactively address the possibility of witness tampering and intimidation:

1. Refer the victim to the local domestic violence services agency. Many studies have shown that referring domestic violence victims for services increases their willingness to cooperate with the prosecution and decreases the risk of death or serious injuries.<sup>15</sup>
2. Learn about and understand the dynamics of the relationship. A clear understanding of how the elements of power and control manifest in the victim's relationship will provide concrete facts to argue in support of any anticipated Forfeiture by Wrongdoing motions.
3. Describe the court system, the timing of court hearings and the possibility of any delays to the victim so that they have realistic expectations of the process. Ensure that the prosecutor or victim

advocate maintains regular contact with the victim so that the victim will understand the status of his or her case.

4. Explain to the victim that witness tampering, in addition to threats or acts of violence, can include guilt, declarations of love, promises to marry or to change, or gifts. As these acts can be used as inducements to the victim to be unavailable to testify, the prosecutor should provide the victim with clear instructions, including contacting investigators and documenting any instances of tampering.
5. Identify friends or family members that may be effective State's witnesses as they are often the best source of information about the effect of the defendant's influence over the victim.
6. Locate and document all reported and unreported incidents of abuse between the batterer and the victim to show an ongoing pattern of abuse. If these incidents are not admitted under the Forfeiture by Wrongdoing doctrine, they may still be admitted as prior difficulties under O.C.G.A. § 24-4-404(b) or used as evidence of consciousness of guilt, motive or intent.
7. Use proper procedures for service of subpoenas under O.C.G.A. § 24-13-21 so that the State will be in a position to use all available court processes to procure the witness' testimony. Document all attempts made to secure the availability of the witness.
8. Consider other sources of evidence such as jail calls, letters, threats, violation of protective orders (even if the victim participates in the violation), or contact through third parties to assist in proving the Forfeiture by Wrongdoing case.
9. Consider using an expert witness during the Forfeiture by Wrongdoing hearing to explain how the dynamics of domestic violence affect a victim's willingness to cooperate with the court process.

## The Procedure

Georgia law requires that the proponent of testimonial hearsay make two showings: (1) that the witness is unavailable; and (2) that the defendant engaged in or acquiesced in wrongdoing that intended to or did procure the unavailability of the witness.<sup>16</sup> This must be shown by a preponderance of the evidence. Non-testimonial statements may be admitted under other hearsay exceptions. Bear in mind that some statements, which may begin as non-testimonial, may become testimonial as the investigation continues.<sup>17</sup> The Supreme Court recognized this possibility in *Michigan v. Bryant*:

... A conversation which begins as an interrogation to determine the need for emergency assistance can "evolve into testimonial statements."<sup>18</sup> This evolution may occur if, for example, a declarant provides

police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what appeared to be a public threat is actually a private dispute. It could also occur if a perpetrator is disarmed, surrenders, is apprehended, or, as in *Davis*, flees with little prospect of posing a threat to the public. Trial courts can determine in the first instance when any transition from non-testimonial to testimonial occurs, and exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence.<sup>19</sup> (Internal quotation marks omitted)

Georgia Evidence Rule 804 specifically defines unavailability as situations in which the declarant,

- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
- (2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
- (3) Testifies to a lack of memory of the subject matter of the declarant's statement;
- (4) Is unable to present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance or, in the case of exceptions under paragraph (2), (3), or (4) of subsection (b) of this Code section, the declarant's attendance or testimony, by process or other reasonable means.<sup>20</sup>

The requirement that the proponent of a statement make efforts to procure the witness through process or other means makes it incumbent on prosecutors in these cases to document all of their efforts to secure the witness's presence in court.

A prosecutor seeking to admit a statement under this doctrine will be required to file a written motion requesting a pretrial hearing in advance of trial. It can also be helpful to prepare a motion in advance for any family violence trial in anticipation of any potential witness issues.

While the court must consider the evidence presented under the preponderance of the evidence standard, Georgia law does not specifically require a test of the reliability of the statement. However, the evidence is still subject to Rule 401 relevance requirements, i.e.,

the probative value of the statement must outweigh its prejudicial effect. The new Evidence Code has relaxed these admissibility standards in that it gives a presumption of admissibility to all relevant evidence.<sup>21</sup>

## Conclusion

Throughout legal history, the doctrine of Forfeiture by Wrongdoing has protected the integrity of our court system by preventing defendants from benefitting from the unavailability of hostile witnesses through bribery, violence or intimidation. The doctrine of Forfeiture by Wrongdoing in the family violence case is an important tool for prosecutors to use in ensuring the safety of victims and that those offenders are held fully accountable for their crimes. 

## Endnotes

1. Adrienne Rose, *Forfeiture of Confrontation Rights Post-Giles: Whether A Co-Conspirator's Misconduct Can Forfeit A Defendant's Right to Confront Witnesses*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 281, 288-89 (2011).
2. *Crawford v. U.S.*, 541 U.S. 36, 55 (2004).
3. *Id.*
4. *Giles v. California* 554 U.S. 353 (2008).
5. *Rose*, at 288-289.
6. *Rose*, at 288.
7. *Reynolds v. U.S.*, 98 U.S. 145 (1878).
8. *Williams v. State*, 19 Ga 402, 403 (1856).
9. *Giles*, at 371.
10. *Giles*, at 359.
11. *Brittan v. State*, 329 Ga. App. 689,698 (2014).
12. *United States v. Montague*, 421 F.3d 1099, 1104 (10<sup>th</sup> Cir. 2005).
13. *U. S. v. Jonassen*, 759 F. 3d 653 (7<sup>th</sup> Cir. 2014).
14. *Giles*, at 376.
15. A list of state certified Domestic Violence Shelters can be found here: See [www.cjcc.georgia.gov](http://www.cjcc.georgia.gov).
16. O.C.G.A. § 24-8-804(b)(5).
17. *Michigan v. Bryant*, 562 U.S. 344 (2012).
18. *Id.* at 1160.
19. *Id.* at 1160.
20. O.C.G.A. § 24-8-804(a)(1-5).
21. O.C.G.A. § 24-4-402.

## UPCOMING TRAINING EVENTS

**MAY 8, 2015**

**Family Violence**

300 North Lee Street  
Valdosta, Georgia 31601  
9:00 AM - 4:00 PM

**JUNE 26, 2015**

**Family Violence**

Lithonia Department of Public Safety  
6920 Main Street  
Lithonia, Georgia 30058  
9:00 AM - 4:00 PM

**JULY 19-22, 2015**

**Summer Conference**

Jekyll Island Convention Center  
75 Beachview Drive  
Jekyll Island, Georgia

# CaseLaw Update

By Sharla D. Jackson, Domestic Violence and Sexual Assault Resource Prosecutor, Prosecuting Attorneys' Council of Georgia

## **Ray v. State, A14A0774; September 4, 2014**

Following a jury trial, Sylvester Ray was convicted on three counts of rape, three counts of aggravated assault, two counts of kidnapping with bodily injury, and one count of aggravated sodomy arising out of sexual assaults against three different women. At trial, the State presented evidence of three incidents, all taking place within six months of each other. In each case, the victims were all adult women between the ages of 23-38 years old. Each rape took place in an automobile in a secluded area after the victim was threatened with a handgun. After the assaults, the defendant's DNA profile was found on each victim.

On appeal, the defendant argued that the trial court erred in denying his motion to sever. Specifically, he argued that the joint disposition of the unrelated offenses deprived him of a fair determination of his guilt or innocence as to each of the offenses.

The Court of Appeals disagreed with defendant. The Court recognized that defendants have a right to sever multiple offenses if they are joined solely because they are of a similar character. However, where the modus operandi of the perpetrator is so strikingly alike that the totality of the facts unerringly demonstrate and designate the defendant as the common perpetrator, the offenses may be joined—subject to the right of the defendant to severance in the interests of justice. In this case, the trial court properly found that each incident would be admissible as a similar transaction to show a common motive, plan, scheme, and bent of mind.

## **Harris v. State A14A1357; September 23, 2014**

Defendant appealed his conviction of one count of rape and kidnapping on the basis that the trial court erred in determining that defense counsel opened the door to character evidence, and the trial court erred in admitting testimony of an expert witness concerning the psychology of rape.

At trial, the evidence showed that during a college weekend event, defendant raped the victim by grabbing her arm, pulling her into his car, and forcing her to have sex with him by repeatedly telling her that there was a gun in the glove department.

Defendant's cousin testified for the defense and stated that he and defendant were "probably the nicest people [at the college event]." During cross-examination, the State then introduced evidence of defendant's three prior robbery convictions and prior conviction for possession of marijuana by asking defendant's cousin whether his opinion of the defendant would change had he been aware of them. Defendant alleged that the trial court should

not have allowed character evidence because the defense did not intentionally place defendant's character at issue. The Court disagreed. Counsel's conscious decision not to object or redirect the nonresponsive witness once a reference to defendant's character was made created an inference that counsel intended to inject character evidence into the trial and thus triggered the State's right to explore and impeach that testimony.

Defendant next argued that the trial court erred in admitting testimony from the State's expert witness—a rape psychologist—that he asserted bolstered the victim's testimony. Again, the Court disagreed. Georgia law has held that "an expert witness may testify as to the existence of certain typical patterns of behavior exhibited by victims of rape, as long as the jury was permitted to draw for itself the final conclusion as to whether the victim in the case at hand was raped," as was the case here.

## **Levin v. Morales S14A0691; October 6, 2014**

Defendant was convicted of aggravated assault, burglary, simple assault, possession of a firearm during commission of felony, and was found guilty but mentally ill of kidnapping with bodily injury and making harassing telephone calls. Defendant appealed and alleged that the State failed to prove asportation to support the defendant's conviction for kidnapping with bodily injury.

The victim was asleep in her bedroom when her 12-year-old daughter heard defendant banging on the back door of their small duplex apartment, and she called the police. The daughter testified that when appellant entered the bedroom he had a hammer and a gun in his hands. Defendant told the daughter to leave the house and she did so. After the daughter left and while still in the victim's bedroom, defendant held the gun to the victim's head, made threats, and hit her numerous times.

Defendant held the victim hostage for approximately 12 hours. During that time, defendant and the victim mostly stayed in the victim's bedroom, but defendant moved the victim to various other places in the apartment at gunpoint, including the kitchen and bathroom. The incident ended when a SWAT team forced their way into the apartment and apprehended defendant.

To determine whether the asportation requirement has been met, *Garza v. State* requires the following four factors to be considered: (1) the duration of the movement; (2) whether the movement occurred during the commission of a separate offense; (3) whether such movement was an inherent part of that separate offense; and (4) whether the movement itself presented a significant

danger to the victim independent of the danger posed by the separate offense.

The Supreme Court reversed the defendant's conviction for kidnapping with bodily injury after determining there was insufficient evidence of asportation per *Garza*. Pretermitted whether the second and third prongs of the test were satisfied with regard to the crimes charged, the movement in this case was not sufficient to meet the threshold of the fourth prong of the test. Specifically, defendant's movement of the victim did not allow him to exercise more control over her, did not place her in more danger, and did not isolate her from protection or rescue.

## **State v. Martinez-Palomino A14A1375; October 17, 2014**

Following a jury trial, defendant was convicted of kidnapping, aggravated child molestation, and child molestation. The State appealed from the trial court's grant of defendant's motion for new trial on the basis that the court erred in allowing a video recording of the child victim's forensic interview to be played during jury deliberations.

Defendant had earlier indicated that he would agree to allow the jury to see the video if requested, and he did not object to the playing of the video during jury deliberations. The video was then played in open court, and the jury returned to their deliberations. A judge who did not preside over the original trial granted defendant's motion for new trial on the special ground that the original judge erred by allowing the entire video recording of the child victim's forensic interview to be played during jury deliberations.

The Court of Appeals reversed, agreeing with the State that there was no error in allowing the jury to view the video in its entirety during jury deliberations. Not only did defendant not object to the playing of the video during deliberations at the jury's request, it is well-established that it is permissible for the trial judge, at his discretion, to permit the jury at their instigation, to rehear requested parts of the evidence after they have retired and begun deliberations, so long as it is done in open court.

## **Lynn v. State S14A0910; November 3, 2014**

Defendant was convicted of the murder of his wife of sixteen years. At trial, defendant did not dispute that he killed his wife, but rather



The eighth edition of the Georgia Domestic Violence Benchbook can be accessed at:

<http://icje.uga.edu/documents/2014DVBenchbookFinal.pdf>

he claimed that her killing was only voluntary manslaughter; the killing was “the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person.” Defendant argued that the killing was provoked by, among other things, her admission that she recently had been unfaithful, and her statement that she was leaving him for other men. The trial court permitted defendant to testify about this admission, but it refused to allow additional evidence of her recent infidelity, including the testimony of two men with whom she allegedly was having extramarital affairs. On appeal, defendant contended that the trial court erred when it disallowed this additional evidence as irrelevant.

The Supreme Court agreed with defendant and reversed his conviction. The Court held that the discovery that a spouse has been unfaithful could be sufficient evidence of provocation. Therefore, the jury should have been allowed to consider evidence of the victim’s extramarital affairs because, if the jury had accepted defendant’s testimony about his wife, it could have found sufficient provocation to justify reducing murder to manslaughter.

**Owens v. State**  
**A14A0980; November 3, 2014**

The defendant was convicted for felony obstruction, possession of a knife during the commission of a felony, and disorderly conduct. He contested the admission of recordings of the victim’s 911 calls to the police and the sufficiency of the evidence.

The victim called 911 twice seeking assistance with a domestic dispute in progress at his home. He made the first call from upstairs, inside his house, telling the operator that the defendant had cursed him, and slammed the refrigerator door breaking the objects inside. He stated that he was afraid to go downstairs and leave the house. While still on the phone with the operator, the victim placed his cell phone into the pocket of his shorts and went outside shoeless, as the defendant continued to throw things inside the house. The victim told the 911 operator that he was afraid and “could not live like this anymore.” That call was disconnected and the victim immediately made a second call stating that he needed assistance and that he was fearful that the defendant would start looking for him. He again described the refrigerator door and pot throwing incidents.

The officers responded, spoke to the victim and found the defendant in the kitchen washing a large knife. The defendant initially spoke with the officers, but when they told him that he would have to leave the house, he refused to do so. The officer unsnapped his Taser from his holster and approached the defendant who threatened the officer with the knife. After being stunned with the Taser, the defendant was taken into custody.

At trial, the victim and the 911 operator were unavailable and the state proffered the recordings as evidence. The trial court admitted

them as non-testimonial statements of present sense impressions.

The Court found that the recordings were properly admitted as non-testimonial statements as the victim, while in immediate danger, made them while seeking assistance from law enforcement. Once the trial court found that the statements were non-testimonial, it properly admitted them as present sense impressions as the victim’s statements in the recordings described “an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.”

**Francis v. State**  
**S14A0877; November 17, 2014**

Defendant was convicted of the October 2006 shooting death of his wife. He appealed the trial court’s denial of his motion for new trial, challenged the sufficiency of the evidence, the denial of his motion to suppress his custodial statement and the court’s refusal to give a specific jury charge.

The defendant argued with his wife, and after the argument, they slept in separate bedrooms. The next morning, the defendant heard his wife moving around in the master bathroom and entered it, carrying a loaded gun. His wife saw him enter with the gun and picked up a knife that was on the counter while backing away from him. The defendant shot her twice, seriously injuring her. She called 911 from a cell phone that was on the bathroom floor. While she was on the phone, the defendant shot her in the head, killing her.

At trial, the defendant testified that he killed his wife because he was scared of her and alleged that he suffered from post-traumatic stress disorder and battered person syndrome. Defense witnesses testified that they had heard the defendant’s wife verbally abuse him. The defendant also told police that he was “glad that he shot her because she was mean and vindictive and would not leave things alone.”

The Court upheld the trial court’s denial of the motion to suppress the defendant’s custodial statement as it found that his statement was voluntary because the agent interviewing him explained that he was presenting him with his rights and confirmed that the defendant understood his rights before questioning him. The Court also held that because the defendant’s request for counsel was “ambiguous and equivocal,” law enforcement was not required to end their questioning of him.

The Court affirmed the trial court’s ruling, holding that ongoing marital difficulties and past acts of violence are not sufficient evidence of the sudden irresistible passion necessary to support a conviction for voluntary manslaughter unless the provocation takes place at the time of the murders. The Court also found no error in the trial court’s refusal to give a supplemental jury charge on battered person syndrome as it gave a pattern charge on battered person syndrome that was substantially the same.

**Owens v. Urbina**  
**S14A1334; November 17, 2014**

The Commissioner of the Georgia Department of Corrections (GDC) appealed the trial court’s ruling issuing a declaratory judgment and permanently enjoining the GDC from requiring Urbina from registering as a sexual offender.

While working as a piano teacher in Alabama, Urbina was charged under Alabama State Law with “Enticing a Child to Enter for Immoral Purposes” and “Sex Abuse of a Child Less than 12 Years of Age,” for an alleged sexual assault on one of his female piano students. As part of a negotiated plea, the state nolle prossed the Sex Abuse charge and Urbina pled to a charge of Interference with Custody, a felony for which he was sentenced to serve four years in prison. The trial court reduced his sentence to four years of probation. At some point, the defendant decided to move to Georgia and was required to transfer his probation. As a condition of his transfer, the GDC required that he register as a sex offender. Urbina successfully contested this requirement because under Georgia law, the corresponding charge of Interference with Custody is a misdemeanor and he would not have been required to register as a sex offender.

The Court affirmed the trial court’s ruling, holding that since Alabama nolle prossed the original indictment and proceeded on an information on the charge of Interference with Custody, the Georgia courts could only consider the facts related to the charges for which Urbina was convicted. Even though the underlying facts of the charges were sexual offenses, they were not a part of the information, which contained the only facts that the court could consider. The trial court therefore ruled correctly that Urbina was not required to register as a sexual offender.

**Watson v. State**  
**A14A0742; October 22, 2014, Cert. Granted, S15C0385, January 20, 2015**

Defendant appealed his jury trial conviction of two counts of sexual battery for incidents involving his teenaged daughter, and one count of child molestation for an incident involving his daughter’s friend. Defendant contended that the trial court improperly instructed the jury that it was required to reach a unanimous verdict on the greater offense of child molestation before it could consider the lesser offense of sexual battery. He also argued that the trial court improperly charged the jury that a minor cannot consent to sexual conduct in the context of sexual battery, and the trial court should have merged his two sexual battery convictions for sentencing purposes.

The evidence at trial showed that defendant exposed and touched the private areas and breasts of his daughter and her friend, made sexually explicit comments to the girls, and had previously told his daughter’s friend that he wanted to perform oral sex on her.

The court instructed the jury as to each of the child molestation counts, “sexual [b]attery is

a lesser included offense of child molestation. If you believe the Defendant is not guilty of child molestation as alleged in Count Two of this indictment you must then decide whether the Defendant is guilty of sexual battery[.]” The court also instructed the jury regarding a minor’s ability to consent to a sexual act, “under Georgia law a person under the age of sixteen lacks legal capacity to consent to sexual conduct.”

The Court of Appeals disagreed with defendant’s unanimity contention. It was permissible for the trial court to instruct the jury to consider the greater offense before considering the lesser offense; this was not synonymous with instructing the jury that it must reach a unanimous verdict on a greater offense before considering a lesser offense.

Secondly, the Court held that the State properly charged the jury that a minor cannot consent to sexual conduct in the context of sexual battery. The victims in this case were under 16 years of age, below the age of consent. Finally, on the issue of merging the offenses, the Court held that because the counts of the indictment charged defendant with separate and distinct acts, the trial court did not err in refusing to merge for sentencing purposes the convictions that were based on those counts. [GFV](#)

## RESOURCES:

### *Domestic Violence and Sexual Assault Resources for Prosecutors*

**24/7 Domestic Violence Hotline:**

1 (800) 33 HAVEN  
1 (800) 334-2836 (V/TTY)

**GA Criminal Justice Coordinating Council:**

[www.cjcc.georgia.gov](http://www.cjcc.georgia.gov)

**GA Cares:**

[www.gacares.org](http://www.gacares.org)

**GA Network to End Sexual Assault:**

[www.gnesa.org](http://www.gnesa.org)

**Battered Women’s Justice Project:**

[www.bwjp.org](http://www.bwjp.org)

**GA Commission on Family Violence:**

*Provides Georgia domestic violence statistics, domestic violence protocols.*  
[www.gcfv.org](http://www.gcfv.org)

**GA Coalition Against Domestic Violence:**

[www.gcadv.org](http://www.gcadv.org)

**Forensic Healthcare Online:**

*Provides links to studies on intimate partner violence and sexual assault*  
[www.forensichealth.com](http://www.forensichealth.com)

**AEquitas: The Prosecutors Resource on Violence Against Women**

*Provides information on complex topic areas, emerging issues, and promising practices related to the prosecution of violence against women cases*  
[www.aequitasresource.org](http://www.aequitasresource.org)

**The Women’s Legal Defense and Education Fund**

[www.legalmomentum.org](http://www.legalmomentum.org)

**End Violence Against Women International**

[www.evawintl.org](http://www.evawintl.org)

**National Sexual Violence Resource Center**

[www.nsvrc.org](http://www.nsvrc.org)



# THE Georgia FAMILY VIOLENCE Prosecutor Resource Newsletter



A PUBLICATION OF THE PROSECUTING ATTORNEYS’ COUNCIL OF GEORGIA DOMESTIC VIOLENCE AND SEXUAL ASSAULT PROGRAM WITH FUNDING FROM THE CRIMINAL JUSTICE COORDINATING COUNCIL  
Prosecuting Attorneys’ Council of Georgia, 1590 Adamson Parkway, Fourth Floor, Morrow, Georgia 30260-1755

## GEORGIA DOMESTIC VIOLENCE AND SEXUAL ASSAULT RESOURCE PROGRAM



**Sharla D. Jackson**  
Domestic Violence and Sexual Assault Resource Prosecutor  
(770) 282-6300  
[sdjackson@pacga.org](mailto:sdjackson@pacga.org)

### *Did you know?*

In Georgia, “Family Violence” also known as Domestic Violence is defined as: “the occurrence of one or more of the following acts between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons living or formerly living in the same household: (1) Any felony; or (2) Commission of offenses of battery, simple battery, simple assault, assault, stalking, criminal damage to property, unlawful restraint, or criminal trespass. The term “family violence” shall not be deemed to include reasonable discipline administered by a parent to a child in the form of corporal punishment, restraint, or detention.”

Statistics from 2012 Georgia Domestic Violence Fatality Review Annual Report courtesy Georgia Coalition Against Domestic Violence ([www.gcadv.org](http://www.gcadv.org)) and Georgia Commission on Family Violence ([www.gcfv.org](http://www.gcfv.org))