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THE Georgia FAMILY VIOLENCE Resource Newsletter

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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

The Georgia Crime Victims Bill of Rights, enacted in 1995, outlines the rights of victims throughout the court process. Among its key provisions is an outline of the procedures to be followed by prosecutors when victims or witnesses are subject to threats or intimidation.

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Protective Orders in Criminal Cases: An Important Tool in Ensuring Justice for Victims

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Overview of Protective Orders

A protective order is a court order that protects a person from harassment, intimidation or violence. Georgia law provides for protective orders in civil and criminal cases. Civil Protective Orders are commonly issued in cases of stalking or domestic violence under O.C.G.A. § 19-13-1 and O.C.G.A. § 16-5-94. Georgia law also provides procedures for securing protective orders in criminal cases. These provide safety for victims who may not qualify for a protective order under the Family Violence Act[1], but may still need protection from intimate partner violence. These orders include Protective Orders under the Georgia Crime Victims Bill of Rights, Bonds for Good Behavior, Bonds to Keep the Peace, Criminal Sentencing Orders and Criminal Bond Orders.

According to the Georgia Domestic Violence Bench Book, several studies show that [civil] protective orders in the vast majority of cases, are effective, "...providing safety for families in ways that no other remedy can,…improvement in petitioners well-being, (quality of life, enhanced feelings of safety and self-esteem.)"[2] Protective orders can also help to improve the outreach and image of the courts as many victims who received protective orders, "appreciated the orders and the help they received from the justice system."[3]

Criminal Protective Orders can be granted as part of a criminal case. Some, such as conditions of bond and sentencing orders, depend upon the existence of a criminal action, others may not. Protective orders under the Georgia Crime Victims Bill of Rights O.C.G.A. § 17 17-16, may be sought whether or not an official proceeding is, "pending or about to be instituted…"[4] They may also be issued on behalf of any person who attends or testifies in an official proceeding, reports the commission of an offense, arrests or seeks the arrest of a person in connection with a criminal offense, or causes or assists with a criminal prosecution, parole or probation revocation.[5]

How do protective orders help victims in domestic violence cases?

Criminal Protective Orders can be helpful in enhancing safety in domestic violence cases. First, they can provide an immediate response to violence. Some of these orders may be issued on an ex parte basis, allowing a victim time to create and implement a safety plan. This enables a victim to feel more secure while the underlying criminal case is pending. Next, carefully drafted Criminal Protective Orders establish clear boundaries for a defendant's behavior and provide sanctions for any violations. When a Criminal Protective Order is in place, law enforcement can reference the order for clear guidelines with which to identify any violations. Moreover, providing a victim with legal recourse in case of a violation of the Criminal Protective Order helps to empower them. Timely enforcement of violations gives prosecutors the opportunity to hold batterers accountable before the violence becomes lethal. Finally, with Criminal Protective Orders in place, evidence of a violation of the order may support the admission of evidence under the doctrine of Forfeiture by Wrongdoing.[6]

Protective Orders under the Crime Victims Bill of Rights

The Georgia Crime Victims Bill of Rights, enacted in 1995, outlines the rights of victims throughout the court process. Among its key provisions is an outline of the procedures to be followed by prosecutors when victims or witnesses are subject to threats or intimidation. The Georgia Legislature amended the Crime Victims Bill of Rights to include additional protections for witnesses in Gang Cases. HB 1391, enacted into law, effective April 1, 1998, sought to address the issue of witness intimidation by streamlining the process for

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confronting the issue of witness intimidation under O.C.G.A. § 16-10-32 and O.C.G.A § 16-10-93.

> The language in this section is based on 18 U.S.C.1514, which restrains harassment of victims and witnesses. The Act's supporters sought to eliminate the "code of silence" created by the community's fear of retaliation and, thereby, encourage citizens to communicate about criminal activity to the police.[7]

This is particularly applicable in domestic violence cases where victims are often subjected to harassment and intimidation in order to prevent their testifying in court against their abuser.

Under O.C.G.A. § 17-17-16, a prosecutor can petition a Superior Court Judge for a temporary restraining order in cases of harassment or intimidation in a criminal case. The State must show, "by affidavit or verified complaint that there are reasonable grounds to believe that harassment of an identified victim or witness in a criminal case exists or that such order is necessary to prevent and restrain an offense under Code Section 16-10-32, attempted murder or threatening of witnesses in official proceedings, or 16-10-93, influencing a witness."[8]

The temporary protective order may be granted without notice to the abuser if the court finds, "upon written certification of the facts by the prosecuting attorney, that the notice is not required and that the state will prevail on the merits."[9] Once issued, the order will be in effect for up to ten days. A court may extend the duration of the order upon a showing of good cause.

If the temporary order is issued without notice, the court is then required to set the matter down for a hearing, at the "earliest time possible." The protective order must be in writing and include the reasons for the issuance of the order, outline the terms of the order, and describe in detail the act or behavior being restrained.

If necessary, the prosecutor can then move for a protective order with a duration of up to three years if, at a hearing, the State can show by a preponderance of the evidence, that harassment of an identified victim or witness in a criminal case exists, or that such order is necessary to prevent and restrain an offense under Code Section 16-10-32 or 16-10-93. Within 90 days of the expiration of the order, the prosecutor may apply for an extension of the order.

Don't forget to visit our Training Web page to register for our family violence-related conferences and training courses.

Orders of Pretrial Release and Sentencing Orders as Orders of Protection

In domestic violence cases, courts are under a special mandate to consider victim safety and when appropriate, impose restrictions upon domestic violence offenders. O.C.G.A. § 17-6-1 (f) (3) states that, " Upon setting bail in any case involving family violence, the judge shall give particular consideration to the exigencies of the case at hand and shall impose any specific conditions as he or she may deem necessary." These conditions may include prohibitions against contact with the victim and his or her household, prohibitions against physical abuse or threats of physical abuse, enrollment in domestic violence counseling, or substance abuse treatment.[10]

Under O.C.G.A § 17-10-1, upon a verdict or plea of guilty, a court may impose a sentence on a defendant that may be probated, suspended or deferred. The court is, "granted power and authority to suspend or probate all or any part of the entire sentence under such rules and regulations as the judge deems proper…"[11] This statute allows the court to impose a sentence that requires an offender abide by certain conditions as a part of the sentence. These conditions may include requirements that evict, or exclude and evicts the person from a residence or household; direct the person to stay away from a residence, workplace, or school; restrains the person from approaching within a specified distance of another person; or restrict the person from having any contact with the victim.[12] The court must expressly state the terms of the sentence in writing and designate the condition as one that if violated, would give the court the ability to revoke the probated or suspended sentence.[13]

In preparation for a sentencing hearing, it is a good practice to discuss possible bond and sentencing conditions with the victim to ensure that the order includes terms that provide a case-specific protection scheme that meets the needs of the victim and his or her family.

Quasi-Criminal Protective Orders

Additional options for protective orders include quasi-criminal protective orders like Bonds for Good Behavior under O.C.G.A. § 17-6-90 and Bonds to Keep the Peace under O.C.G.A. § 17-6-110. Both of these orders may be granted by a Magistrate Court judge.[14] Bonds to keep the peace may also be granted by a State or Probate Court judge.

A person seeking relief by obtaining a Bond for Good Behavior may apply under oath, or a court may issue a Rule Nisi on its own motion to any person in the county when, " a person's conduct sufficient to justify the belief that the safety of any one or more persons in the county or the peace or property of the same is in danger of being injured or disturbed"[15] The court must hold a hearing within seven days of the application and if sufficient cause is shown, must post a bond with a surety. The bond must contain, "reasonable conditions to ensure the safety of person or property or the preservation of peace." These Bonds for Good Behavior may stay in effect for up to six months. Further, if the court finds that there is imminent danger to a person or property in the county, the court may issue a warrant for the offender's arrest.

A Bond to Keep the Peace may be issued by any judicial officer authorized to hold a court of inquiry[16]. A person applying for the bond must be able swear under oath, alleging that they are in fear of bodily harm to themselves, or to their family, or that they fear violent injury to their property.[17] If the court finds sufficient probable cause for the fear to exist, the court may issue a warrant for the offender's arrest. The court should also require the offender to post a bond to keep the peace or, upon their failure to post the bond, must commit them to jail. The hearing on the warrant must take place within 24 hours of when it issues.

Enforcement

Georgia law provides additional means of addressing violations of criminal protective orders. Violations of all criminal protective orders may be prosecuted under the aggravated stalking statute, O.C.G.A. § 16-5-91:

> A person commits the offense of aggravated stalking when such person, in violation of a bond to keep the peace posted pursuant to Code Section 17-6-110, temporary restraining order, temporary protective order, permanent restraining order, permanent protective order, preliminary injunction, good behavior bond, or permanent injunction or condition of pretrial release, condition of probation, or condition of parole in effect prohibiting the behavior described in this subsection, follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person

In *State v. Burke*, 287 Ga. 377 (2010), the Georgia Supreme Court construed this statute to require that the State show that the violation of the protective order was part of a pattern of harassing and intimidating behavior and that it took place without the victim's consent. However, other courts have interpreted this ruling to include a single violation of a protective order, "if that violation is part of a pattern of harassing and intimidating behavior." *Oliver v. State, 325 Ga. App. 649 (2014).*

Violations of criminal family violence orders may be prosecuted as misdemeanors pursuant to O.C.G.A. § 16-5-95(2), when an offender violates, "Any order of pretrial release issued as

a result of an arrest for an act of family violence; or [a]ny order for probation issued as a result of a conviction or plea of guilty, nolo contendere, or first offender to an act of family violence."

Bonds to Keep the Peace may also be enforced by a contempt action pursuant to O.C.G.A. § 17-6-112 (b):

> In counties having a population of not less than 200,000 nor more than 250,000 according to the United States decennial census of 1950 or any future such census in which there is located a municipal court, upon oral or written complaint by the injured party, the court may in its discretion issue a rule for contempt against the offending defendant. Upon hearing the rule, if the court finds that there has been a violation of the bond, the court may, in addition to the remedy provided in subsection (a) of this Code section, impose a sentence for contempt of court.

Protective orders which are imposed as a condition of probation or suspension of a criminal sentence require a more involved procedure. If the offender violates the order, he or she may be punished by a revocation of the offender's sentence under procedure outlined in O.C.G.A. § 42-8-34.1. The prosecutor or probation officer must file a petition with the sentencing court, alleging specific facts which support the violation of the special condition of the probated or suspended sentence. The offender must then be served with a rule nisi giving them notice of the violation and hearing date. At the hearing, the court must make a finding by a preponderance of the evidence that the offender violated the special conditions of the sentence. If the court makes that finding, it may revoke the balance of the probated or suspended sentence.

Enhancing Victim Safety

Criminal protective orders are an important tool for enhancing victim safety. However, they are most effective when created in partnership with the victim of the crime and a victim advocate. It is important to fully understand each victim's individual needs in order to secure a protective order that best addresses concerns for safety and protection. By addressing these particular needs, prosecutors can uphold the integrity of the court system by ensuring that it serves those who most need its protection.

Endnotes

1. O.C.G.A. § 19-13-1 "…[t]he term "family violence" means 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."
2. Joan Prittie & Nancy Hunter, Georgia Domestic Violence Benchbook 2015, at 1:1. (SafeSolutions, Inc. 8th Ed. 2015).
3. *Id.*
4. O.C.G.A. § 16-10-32 (c) (2).
5. O.C.G.A. § 16-10-32 (b) & O.C.G.A. § 16-10-32 (c).
6. O.C.G.A.§ 24-8-804 (b) (5).
7. Adam Princenthal, "Review of the 'Georgia Street Gangs Act of 1998'" H.B. 1391, Act 696, (Ga. 1998).
8. O.C.G.A. § 17-17-16 (b) (1).
9. O.C.G.A. § 17-17-16 (b) (2).
10. O.C.G.A. § 17-6-1 (f) (3).
11. O.C.G. A § 17-10-1 (a) (1).
12. O.C.G.A. § 16-5-95 (3) (b).
13. O.C.G.A. § 42-8-34.1 (a) (1) and O.C.G.A. § 42-8-34.1 (a) (2).
14. O.C.G.A. § 15-10-2 (2).
15. O.C.G.A § 17-6-90 (a).
16. O.C.G.A. § 17-7-20, "Any judge of a superior or state court, judge of the probate court, magistrate, or officer of a municipality who has the criminal jurisdiction of a magistrate may hold a court of inquiry to examine into an accusation against a person legally arrested and brought before him or her."
17. O.C.G.A § 17-6-110 (a).

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

http://icje.uga.edu/domesticviolencebenchbook.html

Don't forget to visit our Training Web page to register for our family violence-related conferences and training courses.

UPCOMING TRAINING EVENTS

April 27-29, 2016
2016 VWAP Conference
Brasstown Valley Lodge
6321 Highway 76
Young Harris, GA 30582

May 6, 2016
Court School - Calhoun
Fairfield Field Inn and Suites Calhoun
1002 Highway 53 East
Calhoun, GA 30701

May 11, 2016
Family Violence - Morrow
Prosecuting Attorneys' Council of Georgia
1590 Adamson Parkway, 4th Floor
Morrow, GA 30260

June 24, 2016
Family Violence - Cedartown
Polk County Courthouse
100 Prior Street, Courthouse #1
Cedartown, GA 30125

July 7, 2016
Court School - Albany
Dougherty County Superior Court
225 Pine Avenue
Albany, GA 31701

July 13, 2016
Family Violence - Atlanta
Atlanta Police Department
Information Coming Soon

July 17-20, 2016
2016 Summer Conference
Jekyll Island Convention Center
75 Beachview Drive
Jekyll Island, GA 31527

July 21, 2016
Court School - Brunswick
Information Coming Soon

CaseLaw Update

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

Akhimie v. State
297 Ga. 801 (2015)

The defendant was convicted at trial for cruelty to children in the first degree and felony murder in the death of her infant son. She appealed her convictions for felony murder and cruelty to children in the first degree, arguing that there was insufficient evidence to support her convictions that the court abused its discretion in denying the defendant's challenge for cause to a prospective juror and that the trial court erred in permitting inadmissible hearsay.

The defendant and her infant son lived in a home with her mother and several other people. The infant's father would visit approximately two days a week and stay in the basement of her mother's home. The defendant and the infant's father were the sole caregivers of the child. At the time of the crime, the infant's father took a nap with the infant and when he woke up, found the child to be unresponsive. He tried to revive him but was unsuccessful. He then called 911. Paramedics who arrived to treat the infant noticed that he had bruises on his face, and that one of his legs was swollen. The infant was transported to the hospital where the doctors could not resuscitate him. An autopsy revealed that the child died as the result of blunt head trauma. The medical examiner also noted numerous other injuries including healing fractures of the femur, fluid in the lungs, rib fractures, severe anemia, signs of heart failure, and fresh facial bruises. The medical examiner testified that a baby with such injuries would have cried a lot, been very lethargic at times and would not have behaved normally. The state also presented evidence the defendant was unresponsive to the infant and that she had not taken him to a doctor since birth. The defendant made an admission that she would not have taken the infant to the doctor after he stopped breathing if he had revived.

The Court affirmed the defendant's convictions, citing the facts that the defendant was the infant's primary caregiver; that she failed to seek medical assistance for the infant in spite of his numerous injuries; and that the fatal blow to the infant's head would have, "caused immediate and visible symptoms," in support of its holding that the State presented sufficient circumstantial evidence of the defendant's guilt to authorize a conviction.

The Court also affirmed the trial court's denial of the defendant's challenge for cause to strike a juror on the basis of bias. The juror had witnessed an incident of child abuse when he saw his childhood friend's father beat his friend. While he indicated that he would have a bias, he also expressed that he had not formed an opinion on the guilt or innocence of the defendant. He also stated that he could, " 'separate' himself from the long-ago instance of abuse he had witnessed, affirmed that he was capable of setting aside any bias or prejudice and would not have a bias in the present case, and indicated that he would base any finding of guilt on the evidence presented." Because the juror's statements showed that his opinion was not fixed and definite, and that he was able to set aside any bias he may have had from the childhood incident, and base his decision on the evidence presented at the trial, there was no abuse of discretion in the trial court's denial of the challenge for cause.

Finally, the Court held that the trial court's admission of hearsay evidence was harmless error as it was cumulative of other admissible evidence. The defendant argued that her right to confrontation was violated when her codefendant's attorney elicited hearsay testimony from the detective about what her mother's fiancé said about how often the infant's father stayed in the home. The trial court sustained the defendant's objection. The Court held that because the objection was sustained and was not contemporaneous with a motion for mistrial that it could not be a basis for reversing the conviction.

Crawford v. State
297 Ga. 680 (2015)

The defendant was convicted after a jury trial of malice murder and robbery by force. He appealed the trial court's denial of his motion for new trial, asserting that the trial court erred when it allowed the State to use a rope to demonstrate the method of strangulation used to kill the victim and that there was insufficient evidence to prove venue.

The defendant along with the codefendant and the victim were riding in a car in Meriwether County when they stopped to look at a bridge. The defendant and his codefendant attacked the victim. The defendant strangled him while his codefendant beat him until the victim became unconscious. The defendants stopped at a restaurant, where a friend saw blood on the defendant's pants. At trial, the friend testified that they drove to her house where the defendant told her that they had killed the victim. As the defendant opened the trunk to show the victim, she testified, that, "she heard sounds like air was coming out of the victim's lungs." She then said that, "they took the victim to the defendant's mother's boyfriend's house where they 'finished him off." They then hid the victim's body under a boat before removing it and burying it in a sand pit in Pike County. The defendants were apprehended when the codefendant was involved in an accident while driving the victim's car. During the accident investigation, the police discovered blood later determined to be the victim's in the trunk of the car. The police eventually located the body of the victim in Pike County. The defendant also admitted to killing the victim and stealing his car and money to two other people.

The defendant appealed his conviction, claiming that the trial court erred in allowing the State to use a rope as a demonstrative aid during its closing argument as it was irrelevant and inflammatory. Defendant also argued that the State failed to prove venue.

As part of its closing argument, the State showed the time that it took for the victim to die using a timed four-minute pause along with a rope to demonstrate the act of strangulation. The Court held that since there was evidence presented that a rope might have been used to strangle the victim and that it could have taken four minutes for the victim to die, the State's demonstration was authorized by the evidence presented and was within the bounds of permissible argument.

The defendant also argued that the State failed to prove that venue was proper in Pike County, where the victim's body was found. The Court held that while there was conflicting evidence as to where the victim's injuries were inflicted, the evidence showed that the victim's body was found in Pike County. Accordingly, there was sufficient evidence to authorize the jury to find that venue was proper in Pike County.

Wetzel v. State
S15A0650 (11/2/15)

Appellant was convicted of computer pornography, tracking the language of O.C.G.A. § 16-12-100.2(d)(1) (Count 1) and electronically furnishing obscene material to minors, tracking the language of O.C.G.A. § 16-12-100.1(b)(1)(A) (Count 3). He was acquitted of child molestation (Count 2). The evidence showed that appellant was a high school paraprofessional who engaged in highly inappropriate, sexually oriented electronic communications with a 15-year-old student, which included emailing her two photographs of his erect penis.

Appellant first challenged his conviction for computer pornography. In Count 1 of the indictment, the State alleged that appellant "did intentionally utilize an electronic device, to wit: a cellular phone, to seduce, solicit, and entice [S.B.J.], a child under 16 years of age, to engage in the sending and receiving of nude photographs, conduct that is, by its nature, an unlawful sexual offense against a child; in violation of O.C.G.A. § 16-12-100.2(d)[.]" The issue was the meaning of the final clause in O.C.G.A. § 16-12-100.2(d)(1) (2011) — "or to engage in any conduct that by its nature

is an unlawful sexual offense against a child." The Court held that in saying that a person violates § 16-12-100.2(d)(1) by using an electronic device to seduce, etc. a child in order "to engage in any conduct that by its nature is an unlawful sexual offense against a child," the General Assembly was requiring the State to allege and prove that the defendant's conduct violated another specific criminal law; not, as the State argued, allowing the jury in each case to decide retroactively whether it believed the conduct at issue was "offensive."

Appellant also argued that the State was required to identify at least some underlying crime, and thus, the jury instruction on Count 1 was incomplete. The Court agreed. Although the instruction tracked the relevant statutory language, it did not give the jury any inkling of the underlying offense on which Count 1 was allegedly based or refer to the elements of any such offense. Nor did the indictment, the material allegations of which the trial court elsewhere directed the jury to consider, identify the "unlawful sexual offense" referenced in Count 1. Thus, the instruction failed to give the jury proper guidelines for determining guilt or innocence on Count 1. The Court further found this error was exacerbated when the State's closing argument told the jury that, as the "voice of the community" the jury had the power to create and then retroactively enforce an "unlawful sexual offense" based solely on its feelings, or its beliefs regarding how the community would feel, about appellant's conduct. Finally, the Court held, the errors were not harmless.

Going further, the Court also held that the State could not retry appellant on this Count. In interpreting O.C.G.A. § 16-12-100.2(d)(1), the Court found that it is not read naturally to allow the "unlawful sexual offense" in the final clause to be one of the four types of offenses specified earlier in the statute. Thus, the Court rejected the State's suggestion that the "unlawful sexual offense against a child" alleged in Count 1 could be the child molestation offense alleged in Count 2.

The Court also rejected the State's contention that the "unlawful sexual offense against a child" alleged in Count 1 could be the electronically furnishing obscene material to minors offense alleged in Count 3. Appellant's violation of § 16-12-100.1(b)(1)(A), as alleged in Count 3, was complete as soon as he sent the pictures of his erect penis to S.B.J., thereby furnishing someone he knew or should have known was a minor with pictures depicting "sexually explicit nudity," regardless of whether or how S.B.J. responded to his pictures. Moreover, even assuming that the nude photographs themselves could serve as the seduction, solicitation, or enticement and further assuming that appellant sent them intending to seduce, solicit, or entice S.B.J. to send sexually explicit photos of herself back to him (since the allegations of Count 1 spoke of "sending and receiving of nude photographs"), appellant — an adult — would not violate § 16-12-100.1(b)(1)(A) by receiving sexually explicit pictures from a minor. Accordingly, as a matter of law, the violation of O.C.G.A. § 16-12-100.1(b)(1)(A) alleged in Count 3 could not be the "unlawful sexual offense" alleged in Count 1.

And finally, the State did not identify any other "unlawful sexual offense" within the meaning of O.C.G.A. § 16-12-100.2(d)(1) that it contended was properly alleged by the indictment against appellant and was then proved by the evidence presented at trial. "And like the jury that heard his case, we do not have the authority to declare [appellant]'s conduct illegal simply because we find it detestable."

Appellant also argued that the evidence presented at trial was insufficient to support this conviction on Count 3 because there was no evidence that he electronically furnished his nude pictures to S.B.J. through the operation of a "computer bulletin board." He similarly argued that the jury instruction on this count was defective because the jury was not told that it could find him guilty only if he operated a computer bulletin board. The Court disagreed.

The Court noted that at the time of appellant's alleged violation in 2011, "electronically furnishes" was defined, in relevant part, as "[t]o make available by allowing access to information stored in a computer, including making material available by operating a computer bulletin board." O.C.G.A. § 16-12-100.1(a)(3)(B) (2011).Appellant argued that the word "including" as used in this provision is a word of limitation, meaning that "allowing access to information stored in a computer" is defined exclusively as "making material available by operating a computer bulletin board."

But, the Court found, in looking at the history of electronic bulletin boards, the context in which the word "including" was used, the history of the statute, and the legislative intent, O.C.G.A. § 16-12-100.1 is properly read to prohibit providing obscene materials to minors not only through operating a computer bulletin board but also through any other method of "allowing access to information stored on a computer." Sending an email is one of those other methods. When an email is sent, the information is stored on the server of the recipient's email provider, and the recipient then accesses that information from that server. Thus, when appellant emailed the pictures of his penis to S.B.J.'s Gmail address, the pictures were stored on Google's computer server, and when she opened the emails, she retrieved that information. In this way, appellant "electronically furnishe[d]" the material alleged in Count 3 to S.B.J. by providing her with access to information stored on a computer, within the meaning of O.C.G.A. § 16-12-100.1(a)(3)(B). And the jury instruction on this count tracked the language of the statute on this point. Accordingly, the evidence was sufficient to convict him on Count 3.

Gonzalez v. Hart S15A0884 (9/14/15)

Appellant was convicted of family violence battery, two counts of aggravated assault, kidnapping with bodily injury, and two counts of aggravated battery in connection with two incidents involving his ex-girlfriend. The habeas court found that the asportation element of the kidnapping was sufficient under *Garza*. The Court disagreed and reversed.

In relevant part, the evidence showed that appellant was a jealous person and the presence of a male shirt in the victim's apartment precipitated the violent confrontation. Specifically, while in the bedroom, appellant began hitting the victim in the face; he threw her onto the bed, where he choked her around the neck; the victim did not recall whether appellant hit her with an open hand or with a fist, but thought he used his fist because of the bruises she received; appellant and the victim struggled, and she got out of the bedroom; the victim told appellant that she was going to call the police, and he grabbed her cell phone; the victim was moving towards the door of the apartment when appellant reached her, grabbed her by the hair, and then threw her against the wall or door; and appellant then left, taking her cell phone.

The Court found that there was no evidence to support a finding that the movement of pulling the victim back by the hair was anything other than of minimal duration. After the bedroom altercation and appellant's taking the victim's cell phone, she went towards the door, but appellant caught up to her, grabbed her hair, and threw her against the door or wall. Appellant then immediately left the apartment. Thus, the Court found, the act was part and parcel of one violent event. In fact, such movement occurred during the commission of, and as an inherent part of, the first indicted aggravated assault, and the resulting conviction of family violence battery. The alleged kidnapping, i.e., the grabbing of the victim's hair, was inseparable from the family violence battery of throwing the victim against the wall as that was how appellant accomplished such criminal act. Separating appellant's grabbing the victim's hair from his act of throwing the victim against the wall or door, and labeling it kidnapping starkly illustrated both cumulative punishment under more than one criminal statute for a single course of conduct and the failure to provide fair warning of what type of conduct the kidnapping statute forbids.

Furthermore, the Court found, there was no evidence that pulling the victim by the hair

presented a significant danger to her that was independent of the family violence battery, as she was not isolated or somehow exposed to an independent danger outside of the one to which she was already being subjected from the family violence battery itself. The family violence battery and alleged kidnapping with bodily injury were one continuous event. The habeas court held that the hair grabbing presented an independent danger to the victim by isolating her and preventing her rescue; but, the court failed to recognize that appellant immediately left the apartment without returning or instructing the victim to stay in the apartment. Thus, right after appellant grabbed the victim's hair, the attack on her stopped and she was out of danger. Accordingly, the Court concluded, under *Garza*, the evidence was insufficient to show the necessary kidnapping element of asportation.

Agyemang v. State
A15A1364 (10/8/15)

Appellant was indicted for family violence battery, simple battery, simple family violence battery, disorderly conduct, and two counts of cruelty to children in the third degree. However, he was convicted of only simple battery. The evidence showed that while bathing their ten-year old special needs daughter, appellant became tired of holding the child aloft so his wife could clean her, and he dropped the child in the tub. His wife testified that she "had to hit him" to express her frustration at his act of dropping the child. His wife testified such hitting was "normal" for their relationship. However, she testified that appellant then retaliated by hitting her repeatedly all over her body while their child remained in the bathtub.

Appellant argued that the trial court erred in denying his motion to introduce prior difficulties between himself and his wife that would demonstrate that she had "a history of unprovoked violence" towards him. The Court agreed. The Court stated that a defendant's right to introduce evidence of prior acts by the victim against him is still contingent upon the defendant making out a prima facie case of justification. To make such a prima facie showing, the defendant must show that the victim was the aggressor, that the victim assaulted the defendant, and that the defendant was honestly seeking to defend himself. Such evidence is admissible to show the victim's character for violence or tendency to act in accordance with her character as it relates to the defendant's claim of justification.

Here, the victim testified that she struck him first and that her act of striking him had nothing to do with any act of aggression by appellant. Also, appellant testified that he struck her only in his attempt to defend himself from his wife's blows. Thus, the Court found, since appellant set forth a prima facie case of self-defense, the trial court was authorized to allow him to present evidence of his prior difficulties with the victim in order to support his justification claim. And, contrary to the State's assertion, the fact that he also argued that he did not intentionally strike his wife when attempting to protect himself did not render his prima facie case of self-defense invalid.

Furthermore, the Court determined, the trial court erred in finding that the evidence was more prejudicial to the victim than probative. Here, the victim testified at trial that she had hit appellant in the past after disagreements in their marriage and that she was the initial aggressor during the present incident. In light of such evidence, it would not be unfairly prejudicial to allow the jury to hear of specific acts of violence she committed towards her husband in the past. Further, the evidence of the victim's prior violent acts towards appellant was more probative than prejudicial. For a probative connection between the prior difficulties and the present case to exist, there must be some link of association, something which draws together the preceding and subsequent acts, something which gives color of cause and effect to the transaction, and sheds light upon the motive of the parties. Here, the evidence shed light on how the victim reacted to appellant during arguments in their marriage. Further, the evidence of prior difficulties was probative for its impeachment value. The victim testified that although she first hit appellant, that such hitting was not forceful. Appellant testified otherwise, explaining that the victim was "throwing punches" at him and that she hit him with a pail. He was entitled to impeach her testimony with similar acts of violence she had exhibited towards him in the past.

Thus, the Court concluded, in light of the conflicts in the testimony and the fact that the jury obviously believed portions of appellant's testimony when it acquitted him of all other counts, save for the single count of simple battery, it found that the trial court's exclusion of this evidence was not harmless.. Accordingly, appellant's conviction was vacated and the case remanded for a new trial.

Ruffin v. State
A15A1109 (9/9/15)

Appellant was convicted of rape, statutory rape, incest, aggravated child molestation, aggravated sexual battery, and two counts of child molestation. He contended that the trial court violated the continuing witness rule by allowing an anatomical diagram to go out with the jury over his objection. The Court disagreed.

First, the Court found that appellant did not properly object to the diagram going out to the jury. Next, the Court found that despite the trial court's statement that it would allow the exhibit to go out, nothing in the record demonstrated that it was with the jury during deliberations and it was appellant's burden to so demonstrate.

Finally, the Court found, even assuming the issue was properly before the Court, it was without merit. The continuing witness objection usually concerns testimonial documentary evidence, such as affidavits, depositions, or interrogatories. However, the objection has also been applied to unsworn, written dying declarations and written confessions or statements of criminal defendants, on the grounds that such statements are the equivalent of depositions. But, our courts have repeatedly held that anatomical charts or drawings used by witnesses during their testimony are not the functional equivalent of a deposition, but rather, are demonstrative evidence that serve only to illustrate testimony given by the witnesses. Furthermore, the fact that the witness wrote on the anatomical drawing does not change this result.

Nevertheless, appellant argued, the witness was so thorough and complete in her testimony that no illustrative diagram was necessary. But, the Court stated, admissibility, not necessity, is the question and an expert witness may use a diagram to illustrate testimony. Here, the diagram illustrated the physical location at which the witness found damage to the victim's hymen; such evidence was neither superfluous nor bolstering, but simply illustrative. The trial court therefore did not err in allowing the anatomical diagram to go out with the jury.

Goulding v. State
A15A0841 (11/10/15)

Appellant was convicted of two counts each of cruelty to children, aggravated assault, and aggravated battery after his three-month-old baby was diagnosed with injuries consistent with "shaken baby syndrome." He contended that the trial court erred in denying his motion to excuse a juror for cause. Specifically, he contended that the juror consistently and unequivocally swore she should not be a fair and impartial juror, but that the record was distorted and the trial court erroneously concluded that the juror stated only that she would find it difficult to serve on the jury. The Court noted that the juror was not questioned extensively on the record by the court or the parties. However, while the transcript established that the juror said she could not be fair because a baby was involved, it also established that she stated affirmatively that she had no bias or prejudice against appellant. For a juror in a criminal case to be excused for cause on the statutory ground that her ability to be fair and impartial is substantially impaired, it must be shown that she holds an opinion of the guilt or innocence of the defendant that is so fixed and definite that the juror will not be able to set it aside and decide the case on the evidence or the court's charge on the evidence. Accordingly, because the juror expressly stated that she held no bias against appellant, the trial court did not abuse its discretion in declining to excuse her for cause.

Appellant also argued that the trial court erred in allowing the State to play a "Day in the Life" video of the baby at age 19 months that established how profoundly damaged he was. The Court noted that the video contained, as appellant described, "gut-wrenching images." But, the Court stated, any evidence is relevant which logically tends to prove or to disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or to throw light upon a material issue or issues is relevant. Thus, while appellant contended that the video was unnecessarily prejudicial because he had never contested that the baby was severely injured, having plead not guilty to the charges, the State was required to prove each element of each offense beyond a reasonable doubt. Further, the State has the authority to choose the evidence needed to prove its case and a defendant cannot undermine the credibility of the State's story by selectively admitting certain incriminating evidence to prevent the jury from receiving that evidence.

In holding that the trial court did not abuse its discretion in admitting the video, the Court distinguished *Kesterson v. Jarrett*, 307 Ga. App. 244, 252 (3) (2010), overruled on other grounds, *Kesterson v. Jarrett*, 291 Ga. 380 (2012). First, the Court noted, in *Kesterson*, it found no abuse of discretion in the trial court's decision to *exclude* the video, not a decision to include it. Further, the issues that had to be determined during the liability phase of the civil trial in *Kesterton* were more limited than those that had to be determined during the guilt-innocence phase of this criminal trial. Here, the State had to prove all of the elements of the charged crimes, which included proving cruel and excessive pain and bodily harm to support the cruelty to children and aggravated battery charges.

What Is Domestic Violence?

Domestic violence, also described by the terms family violence, intimate partner violence, and teen dating violence, is a widespread problem in Georgia and across the country.

The Office of Violence Against Women defines domestic violence as "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner."

Common abusive tactics include:

- physical violence;
- sexual violence;
- isolation;
- economic abuse;
- emotional abuse;
- intimidation;
- reproductive coercion; and
- stalking.

Studies show that domestic violence is committed primarily by men against women; women and men in same-sex relationships experience domestic violence at the same rates as heterosexual women.

Georgia Commission on Family Violence 2015 Fact Sheet

Did You Know?

Georgia's Domestic Violence Statistics

- From 2003 through 2014, at least **1,400 Georgia citizens lost their lives** due to domestic violence.
- Georgia was recently ranked **17th in the nation** for its rate of **men killing women**.
- In **29%** of the cases studied through Georgia's Domestic Violence Fatality Review Project, **children witnessed the domestic violence homicides**.
- Firearms were the cause of death in **65% of the recorded domestic violence fatalities** in 2014.
- There are 46 certified domestic violence shelters and 24 certified rape crisis centers serving Georgia's 159 counties.

Georgia Commission on Family Violence 2015 Fact Sheet

61,415

In FFY 2014, the number of crisis calls to Georgia's certified domestic violence agencies.

68,313

In 2013, the number of domestic violence incidents law enforcement officersresponded to in Georgia.

23,010

In 2013, the number of protective and stalking orders issued in Georgia.

7,741

In FFY 2014, the number of victims and children who were provided refuge in a Georgia domestic violence shelter.

5,879

In FFY 2014, the number of victims that made a request for shelter but request was not met due to lack of space (statistics are not collected by number of people).

Georgia Commission on Family Violence 2015 Fact Sheet

1-800-33-HAVEN (voice/TTY & Spanish)

If you or someone you know is being abused, there are community and statewide resources available to you. Call the toll-free, 24-hour hotline for a confidential place to get help and find resources.

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

GA Cares:
www.gacares.org

GA Network to End Sexual Assault:
www.gnesa.org

Battered Women's Justice Project:
www.bwjp.org

GA Commission on Family Violence:
Provides Georgia domestic violence statistics, domestic violence protocols.
www.gcfv.org

GA Coalition Against Domestic Violence:
www.gcadv.org

Forensic Healthcare Online:
Provides links to studies on intimate partner violence and sexual assault
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

The Women's Legal Defense and Education Fund
www.legalmomentum.org

End Violence Against Women International
www.evawintl.org

National Sexual Violence Resource Center
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
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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) and Georgia Commission on Family Violence (www.gcfv.org)