

## THIS WEEK:

- **Prosecutorial Misconduct; Authentication**
- **Violation of Oaths of Office; Sufficiency of Oaths**
- **Motion to Withdraw Guilty Plea; Partially Void Sentences**
- **Sufficiency of the Evidence; Fatal Variance**
- **Discovery Violations; List of Witnesses**

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### Prosecutorial Misconduct; Authentication

*Beamon v. State, A18A1803 (2/21/19)*

Appellant was convicted of armed robbery, aggravated assault, and possession of a firearm during the commission of a felony. During opening statements, the prosecutor referenced a photograph of appellant that the store clerk identified as one of the perpetrators. The clerk was only person in the store at the time of the armed robbery. However, when the clerk was called to testify, in the presence of the jury, the clerk was unable to take the oath because of difficulties understanding English. The trial court held a hearing outside the presence of the jury, and ultimately determined the clerk was incompetent to testify without an interpreter. As the State did not secure an interpreter, the jury heard no testimony from the victim. Nevertheless, the jury convicted appellant based on the videotape of the crime from the store's camera and other evidence.

Appellant argued that his trial counsel was ineffective for failing to object to the State's closing arguments, during which the prosecutor referenced the photographic lineup that was not admitted into evidence. The Court disagreed. The law forbids the introduction into a case by way of argument of facts which are not in the record and are calculated to prejudice a party and render the trial unfair. But here, the Court found, the State's remarks were responsive to appellant's closing argument, during which trial counsel opened the door by arguing that the absence of the lineup, as well as the store clerk's testimony, were favorable to appellant's defense. Notably, in response, the State emphasized to the jury that they could not consider the lineup in their deliberations. The record therefore showed an objection for curative instruction or for mistrial would have been baseless. Accordingly, the Court concluded, trial counsel's performance was not deficient in this regard.

Appellant also argued that the trial court erred in admitting the surveillance video because it was not properly authenticated. The Court stated that generally, a videotape is admissible where the operator of the machine which produced it, or one who personally witnessed the events recorded testifies that the videotape accurately portrayed what the witness saw take place at the time the events occurred. Because the store clerk did not testify, there was no testimony at trial from a witness to the robbery. However, the store manager testified that his store had an eight channel DVR that recorded the outside and inside of the store, and that the cameras were working and functioning properly on the day of the robbery. The manager further testified that he personally pulled the surveillance video of the robbery from the system to give to the police, and identified the State's exhibit as the video recorded from the store on the day of the robbery.

OCGA § 24-9-901 (a) provides that “[t]he requirement of authentication or identification as a condition precedent to admissibility shall be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Documentary evidence, such as a videotape, may be authenticated by “[a]ny method of authentication or identification provided by law.” OCGA § 24-9-901 (b) (10). Pursuant to OCGA § 24-9-923 (b), a videotape is admissible “when necessitated by the unavailability of a witness who can provide personal authentication and when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered.”

Here, the Court found, in the absence of personal authentication, the store manager's testimony provided sufficient evidence of the video's reliability. Accordingly, the trial court did not err in overruling appellant's objection to the authenticity of the surveillance video.

## **Violation of Oaths of Office; Sufficiency of Oaths**

*Pierson v. State, A18A1460 (2/25/19)*

Appellant was convicted of two counts of sexual assault of a person in custody, four counts of violation of oath by a public officer, and one count each of false imprisonment and tampering with evidence. The evidence, briefly stated, showed that appellant, while employed as a deputy sheriff, sexually assaulted a woman he pulled over for a traffic stop. He contended that the evidence was insufficient to support his convictions for violation of oath by a public officer, arguing that the evidence failed to show that he had taken an oath "as prescribed by law," as required by OCGA § 16-10-1. The Court disagreed.

The Court noted that OCGA § 45-3-7, entitled "Oaths of deputies," provides as follows: "Before proceeding to act, all deputies shall take the same oaths as their principals take and the oaths shall be filed and entered on the minutes of the same office with the same endorsement thereon; but this Code section shall not apply to any deputy who may be employed in particular cases only. *A deputy sheriff may take his oaths before the sheriff and the oaths may be filed in and entered in the records of the sheriff's office.*" (Emphasis supplied). At trial, the Sheriff testified that, before appellant or any other deputy sheriff in his office was allowed to take any actions in his or her official capacity, he or she was administered the "Official Oath of a Deputy Sheriff" ("the oath"). The State introduced into evidence a copy of the oath appellant had taken, and the Sheriff read the oath to the jury.

The Court found that the first paragraph of the oath was almost identical to the oath that sheriffs are required to take, pursuant to OCGA § 15-16-4. Thus, the oath fulfilled the requirement, under OCGA § 45-3-7, that the appellant "take the same oath[ ] as [his] principal[,]" i.e., the sheriff. Further, the Sheriff testified that he personally administered the oath to appellant, that appellant swore the oath, and that a copy of the oath, with appellant's name hand-written at the top, was filed in the sheriff's department, as required by OCGA § 45-3-7. Consequently, the Court found, there was sufficient evidence to show that the terms of the oath taken by appellant were "prescribed by law," as required by OCGA § 16-10-1.

Nevertheless, appellant contended, even if the Sheriff had administered the oath to him at some point prior to the improper conduct at issue, the oath was invalid because it was not "subscribed" by him, as required by OCGA § 45-3-3, which provides "[w]hen not otherwise provided by law . . . , the oaths of office may be taken before any officer authorized by law to administer an oath. Such oaths shall be written and *subscribed by the persons taking them* and accompanied by the certificate of such officer, which shall specify the day and year taken. (Emphasis supplied). Specifically, appellant argued, absent a showing that he "subscribed" to the oath, the State failed to show that he took the oath "as prescribed by law[.]" as required to constitute a violation of his oath of office under OCGA § 16-10-1.

However, the Court found, pretermittting whether OCGA § 45-3-3 applies in this case, given that its requirements only apply when there is no other law with conflicting requirements, the statute dictates the *manner* in which an oath may be taken and how the administration of the oath is to be officially recorded, not the terms of the oath itself. In contrast, a plain reading of OCGA § 16-10-1 shows that the phrase "the terms of [the] oath as prescribed by law" refers specifically to the *terms* of the oath itself, not the manner in which the oath had to be administered or memorialized. And, the State proved that the terms of the oath taken by appellant were "the terms of [the] oath as prescribed by law," i.e., the terms required and codified by the Georgia Legislature for deputy sheriffs in OCGA §§ 15-16-4 and 45-3-7. Accordingly, the Court concluded, this argument failed.

## **Motion to Withdraw Guilty Plea; Partially Void Sentences**

*Thompson v. State, A18A1862 (2/26/19)*

In 2000, appellant pled guilty to rape, aggravated sodomy, two counts of aggravated sexual battery, aggravated battery, and robbery by force. Even though appellant was given two life sentences and three twenty year sentences, the court stated that "[a]s a special condition of parole, the defendant shall have no contact, directly or indirectly, with [the] victim."

In 2018, appellant filed a "motion to vacate a void sentence/and motion to withdraw guilty plea as a matter of right." He argued that his sentence was illegal because the trial court had no authority to impose conditions on his parole. The trial court ruled that the no-contact provision was in fact improper, but that the invalidation of the parole condition did not render the remainder of the sentence void. Thus, the trial court removed the no-contact condition, left the remainder of the sentence intact, and ruled that the motion to withdraw guilty plea was untimely because it was filed out of term.

Appellant argued that because the no-contact provision was part of his negotiated plea agreement with the State, his entire sentence was rendered void due to the illegality of the no-contact provision, and he therefore had an absolute right to withdraw his guilty plea. The Court disagreed. First, the Court found, the record did not support appellant's assertion that the no-contact provision was one of the negotiated plea terms, as there was no plea agreement form to this effect, and the State did not mention any such provision when it offered its recommendation to the trial court at the plea hearing.

Second, appellant did not demonstrate that the illegality of the portion of the sentence regarding the no-contact provision on his parole required the trial court to vacate the sentence in its entirety. Here, the trial court properly vacated only the discrete portion of the sentence relating to the improper parole condition. Therefore, the remainder of appellant's sentence — which had long been entered since November 2000 — was still in force, and appellant had no absolute right to withdraw his plea.

And, since appellant was required to file his motion to withdraw his plea within the term of court in which he was sentenced under the plea, the trial court lacked jurisdiction to entertain a motion to withdraw filed beyond the term of sentencing. Thus, the Court concluded, the trial court properly dismissed appellant's motion for lack of jurisdiction.

## **Sufficiency of the Evidence; Fatal Variance**

*Maxwell v. State, A18A1692 (2/28/19)*

Appellant was convicted of aggravated assault (family violence) in connection with an offense committed against the mother of his children. He contended that there was a fatal variance between the manner in which the indictment averred an aggravated assault and the evidence at trial. Specifically, he argued that the State failed to prove that he placed his *hands* around O. I.'s throat, as the indictment alleged, whereas the victim's demonstration at trial showed that he had "his *arm and forearm and elbow* around [her] neck" and the officer testified that he had his "*arm* around the neck area." (Emphasis supplied.) The Court disagreed.

First, there was evidence from which the jury was authorized to find that appellant placed his hands around the victim's throat. Second, the distinction — that the evidence shows he used his arm rather than his hands — was not material because our courts no longer employ an overly technical application of the fatal variance rule, focusing instead on materiality. Thus, the true inquiry is not whether there has been a variance in proof, but whether there has been such a variance as to affect the substantial rights of the accused. Further, it is the underlying reasons for the rule which must be served: 1) the allegations must definitely inform the accused as to the charges against him so as to enable him to present his defense and not to be taken by surprise, and 2) the allegations must be adequate to protect the accused against another prosecution for the same offense. And only if the allegations fail to meet these tests is the variance fatal.

Here, the Court found, appellant's defenses at trial were that he did not put his hands around the victim's neck and did not apply pressure, that the victim's breathing and blood circulation were not affected by his restraint on her neck, that the victim was the aggressor, and that appellant was justified in "grabb[ing] hold of [the victim] to calm her." Thus, the Court found, the allegations set forth in the indictment informed appellant of the aggravated assault charge against him, enabling him to present his defenses thereto and not be taken by surprise. Also, the allegations were adequate to protect him against another prosecution for the same offense.

Nevertheless, appellant contended, a person could violate OCGA § 16-5-21 (b) (3) (2014) in two ways: either by committing an assault which is likely to result in strangulation or by committing an assault that actually does result in strangulation. Citing the definition of "strangulation" in OCGA § 16-5-21 (a) (2014), appellant argued that "the State averred a completed strangulation with pressure to the neck which impeded the normal breathing or circulation of the blood," and that the State was thus required (but failed) to prove he committed an aggravated assault in that specific manner. The Court disagreed.

Here, the indictment alleged appellant assaulted the victim with an object which is likely to result in strangulation (not which actually does result in strangulation). Thus, the State was only required to show that appellant had used his hands in a manner likely to result in strangulation. In any event, the jury was authorized to find from the evidence presented that

appellant placed his hands around the victim's throat and applied pressure, thereby impeding her normal breathing or blood circulation. Consequently, the Court concluded, there was no fatal variance between the allegations in the indictment and the evidence introduced at trial.

## Discovery Violations; List of Witnesses

*State v. Banks, A18A1727, et al (2/28/19)*

In these consolidated appeals, the State challenges the trial court's dismissal of 26 misdemeanor accusations for want of prosecution in the wake of the State's failure to provide each defendant with a list of witnesses against him or her, in violation of the Criminal Procedure Discovery Act (OCGA § 17-16-21). Briefly stated, the record showed that in filings made between April 25, 2017, and October 26, 2017, each of the defendants either notified the State of their election to proceed under the provisions of the Criminal Procedure Discovery Act or specifically requested a list of the witnesses the State planned to call at trial pursuant to OCGA § 17-16-21. The trial court called its calendar on December 11, 2017, and it was undisputed that the State had failed to respond to the defendants' discovery requests prior to the calendar call. Accordingly, each defendant moved to dismiss the accusation against him or her for want of prosecution.

The trial court conducted hearings on these motions, and the State conceded at each hearing that it had failed to provide the defendants with a list of witnesses before the call of the calendar, but argued that the proper remedy was a continuance rather than dismissal. The trial court orally denied the State's motions for continuance, granted the defendants' motions to dismiss, and entered uniform orders finding that each defendant "had not received discovery in response to his/her witness request," that the State "had failed to provide a witness list in advance of trial" as required by OCGA § 17-16-21, and that because the State was "unable to demonstrate diligence in meeting the statutory duty to provide discovery," no continuances were warranted. The court then dismissed the cases "for want of prosecution" on December 11, 2017.

The State argued that the trial court erred when it dismissed the accusations because dismissal is not an appropriate sanction for the State's failure to produce a list of witnesses before trial. The Court noted that a trial court is vested with considerable discretion in its conduct of court proceedings. And, while trial courts are authorized to dismiss accusations, this authority is not unlimited, and a trial court abuses its discretion when it interferes with the State's right to prosecute by dismissing an accusation without a legal basis to do so. Thus, a trial court is without authority to dismiss criminal charges for want of prosecution if such dismissal amounts to a dismissal *with prejudice*.

Here, the Court noted, the trial court's order did not specify whether the dismissals were with or without prejudice. It was undisputed that the State commenced prosecution of the defendants prior to the applicable two-year statute of limitation. Therefore, the Court stated, in order to determine whether the dismissals in these 26 case amounted to impermissible dismissals with prejudice, the relevant question must be whether, at the time of the dismissal, the State could have re-accused the defendants prior to the expiration of the period of limitation.

Consequently, the Court held, in those cases in which the defendant was accused of committing the charged offenses between December 16, 2015 and September 23, 2016, the trial court's dismissal was without prejudice because the statute of limitations had not expired on the date of the dismissals, and the State could have re-accused those defendants. The Court therefore affirmed the trial court's dismissals in those cases.

*Prosecuting Attorneys' Council of Georgia*

# CaseLaw UPDATE

WEEK ENDING MARCH 29, 2019

Issue 13-19

However, in those cases in which the defendants were accused of committing offenses between May 9, 2015 and October 27, 2015, the trial court's order operated as a dismissal with prejudice, because it effectively barred the State from prosecuting those defendants. The trial court therefore exceeded its authority, and the Court stated it was "constrained to vacate the orders of dismissal in those cases."

Finally, the Court stated, "[a]lthough we recognize the difficult position in which the trial court was placed due to the State's failure to comply with its discovery obligations, we are bound by this Court's precedent which precludes the dismissal with prejudice of a criminal case for want of prosecution. Accordingly, these dismissals cannot be upheld."