Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING JULY 26, 2019
Issue 30-19

THIS WEEK:

- **Closing Arguments; Attorney's Fees**
- **Website Images; Admissibility**
- **Self-Representation; Waiver of Right to Counsel**
- **Jury Charges; Mutual Combat**
- **Opinion Testimony; Rule 701**
- **Money Laundering; Jury Charges**
- **Implied Consent; Coercion**
- **Trafficking; Sufficiency of the Evidence**
- **Jury Charges; Verdict Form**

Closing Arguments; Attorney's Fees

Pettis v. State, A19A0685 (6/12/19)

Appellant was convicted of family violence battery and simple assault against his wife and son, respectively. He contended that his trial counsel rendered ineffective assistance by failing to object to the State's closing argument. The Court disagreed.

The record showed that the State asserted in closing argument that the victim was part of a cycle of violence characteristic of abused women, including self-blame and false reconciliation, with the victims sometimes "pos[ing] more of a threat to [a police] officer than the defendants do or the perpetrators" and eventually "working against" the State's case, as outside the scope of the evidence. Appellant also objected to the State's assertion that the victim had been "nasty to [the prosecutor's] office" and to the prosecutor "personally."

The Court stated that given these victims' refusal to stand by their statements at the scene, the State's characterization of them as hostile witnesses was a reasonable extrapolation from the evidence presented at trial, and any objection would have been meritless. But even assuming that the State's argument was improper and that counsel's failure to object to that argument amounted to deficient performance, the trial court instructed the jury that closing arguments were not to be considered as evidence. Thus, the Court found, in light of the evidence against appellant, including the wife's written statement to police on the night of the incident, appellant's other convictions arising from his prior difficulties with the victims, and the wife's testimony that she did not remember the circumstances of those prior difficulties, it could not be said that there was a reasonable probability that the outcome would have been more favorable even if counsel had objected.

Citing OCGA § 42-8-34, appellant also argued that given his indigency, the trial court erred when it imposed a sentence including the reimbursement of attorney fees without a hearing on the issue. The Court noted that at the time appellant committed the crimes at issue — that is, in August 2014 — former OCGA § 42-8-34 (e) provided that "[t]he court may,

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in its discretion, require the payment of a fine or costs, or both, as a condition of probation." A trial court has the "general authority to order reimbursement of attorney fees" based on the "broad powers" granted to the trial court.

And, the Court stated, while it is true that in the absence of any valid penal objective by a state statute that converts a fine into a term of imprisonment for failure to pay the fine, the State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay that fine, a defendant seeking to challenge a trial court's imposition of court-appointed attorney fees as restitution must make a "contemporaneous objection" at the time of sentencing. And here, the Court found, appellant did not do so. Accordingly, the Court held, it had nothing to review on appeal.

Website Images; Admissibility

Holzheuser v. State, A19A0757 (6/12/19)

Appellant was convicted of child molestation and public indecency. The evidence showed that he exposed himself to a 9-year-old in a home improvement store. Because appellant was at the time an active member of the U. S. Navy, the police contacted Special Agent Jason Boswell, an investigator with the Naval Criminal Investigative Service (NCIS). At trial, Boswell testified that part of the investigation included reviewing the contents of appellant's smart phone, based on appellant's admission during the police interview that he had viewed child pornography on his phone. As part of that search, Boswell obtained a list of the websites that had been viewed on appellant's phone as well as Internet search terms and notes stored in a note-taking application. Included in this information were sexually suggestive uniform resource locators ("URLs") and searches with the term "little girls" in them. Boswell further explained that he entered the search terms and URLs on a dedicated investigative computer and printed out screen shots of the results, including a small number of "representative images" he selected independently. There was also at least one suggestive website URL saved in appellant's note-taking application, and Boswell printed out screen shots of the results when he visited that website as part of the investigation. According to Boswell, the images and web sites from these searches featured "images [of] consistently young[] girls in their underwear or lingerie." As part of his testimony, Boswell explained that these were images that displayed when he searched the terms and URLs found on appellant's phone; he did not claim that the images themselves were found on appellant's phone. Essentially, "I opened up three of the links to get a gist of what is on the website or where it takes you. And that was enough for me." He also testified that there were no images that he believed to be pornographic saved on the phone itself, and on cross-examination, Boswell agreed that he did not know whether appellant actually viewed any of the particular images presented at trial.

Citing *United States v. Bansal*, 663 F3d 634, 667 (VII) (D) (2) (3d Cir. 2011), appellant contended that his trial counsel rendered ineffective assistance by not objecting to this evidence based on lack of proper authentication. The Court disagreed. First, *Bansa*l did not establish the clear rule requiring the use of an internet archive to show how that website appeared at the time of access. Instead, *Bansal* merely reiterates one way to satisfy Federal Rule of Evidence 901.

The applicable rule in Georgia is OCGA § 24-9-901 (a): "The 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." This can be shown by testimony of a witness with knowledge that a matter is what it is claimed to be, or by a document's appearance, contents, substance, internal patterns, or other distinctive characteristics,

taken in conjunction with circumstances. Thus, the Court stated, there is no bright line rule specifically requiring the use of an Internet archive, and based on Boswell's testimony — that the screen shots accurately depicted the images Boswell viewed and printed out, not that they had been viewed by appellant at a particular time — appellant's argument failed as to an authenticity objection regarding those documents. Consequently, appellant's argument did not demonstrate deficient performance on the part of his trial counsel.

Nevertheless, appellant argued, his counsel was deficient for not objecting on grounds of relevancy. However, the Court stated, the images the State introduced through Boswell were admitted, in part, to show appellant's sexual intent in exposing himself to a young girl. Demonstrating a prurient interest in underage girls would support a finding that appellant intended to expose himself for the purpose of sexual gratification, which is an element of child molestation. And, since appellant denied any sexual intent during his police interview, evidence tending to prove that fact would be relevant. Accordingly, a relevance objection would have been meritless and therefore did not support appellant's ineffective assistance claim.

Finally, appellant argued that the danger of unfair prejudice outweighed its evidentiary value because there was no evidence that he actually viewed the specific images at issue. The Court disagreed. The Court stated that appellant misapprehended the purpose of the evidence. The State did not argue that the images were on appellant's phone or that appellant viewed the particular images proffered through Boswell's testimony. Instead, the State argued that the evidence was representative of the type of images available on the websites appellant admitted to visiting as well as on URLs stored on appellant's phone. Furthermore, because the police found no sexually explicit images actually stored on appellant's phone, the evidence was useful to show the type of content displayed when someone visited the URLs and used the search terms saved on appellant's phone. Moreover, the images were probative of the fact that appellant sought sexual gratification by viewing sexually suggestive images of underage girls which would be relevant to his intent in committing the acts alleged in the indictment.

And, the Court stated, the harm that Rule 403 seeks to minimize is not mere prejudice, but "unfair prejudice," such as by introducing inflammatory material that has no bearing on the issues at trial. But here, appellant admitted to police that he had viewed child erotica on his phone, and the images were the result of visits to the URLs on appellant's phone and in his note-taking app. Thus, the material offered by Boswell was part of the subject matter of the police interview, and it was helpful in demonstrating the type of content in appellant's phone and web activity. Boswell was careful to explain what the images were as well as what they were not, and the State did not attempt to confuse the jury as to what the images represented. Under these circumstances, the Court held, the challenged evidence did not present a risk of undue prejudice that substantially outweighed its probative value. Accordingly, the Court concluded, trial counsel's failure to make an objection on Rule 403 grounds did not meet appellant's burden under *Strickland*.

Self-Representation; Waiver of Right to Counsel

Rutledge v. State, A19A0454 (6/14/19)

Appellant was indicted and convicted of one count of aggravated stalking after he was accused of sending harassing text messages to his ex-wife in violation of a temporary restraining order. The record showed that right before trial, appellant decided to represent himself and have Rhodes, his appointed counsel, remain as stand-by counsel. He contended that the

trial court erred in allowing him to proceed pro se without first establishing that he made a knowing, intelligent, and voluntary waiver of his right to counsel. The Court stated that while it agrees that the trial court could have inquired further to ensure appellant's decision to represent himself was knowing and voluntary, the record clearly demonstrated a valid waiver by him.

First, the Court disagreed with appellant's contention that the trial court failed to make a finding on the record that he made a knowing and voluntary waiver of his right to counsel. In its order denying the motion for new trial, the trial court expressly found that "the totality of the record demonstrates that [appellant] made this decision freely, voluntarily, and intelligently." A trial court's determination of a knowing and voluntary waiver within an order denying a motion for new trial qualifies as a finding on the record. Moreover, the determination by the trial court as to whether a defendant has made an intelligent waiver of his right to counsel depends on the peculiar facts and circumstances of each case and trials courts are not required to make specific inquiries of a defendant. Also, the Court stated, while articulated findings on the record by a trial court are preferable, it is not required when the record as a whole demonstrates a defendant's knowing waiver.

And here, the Court found, the record reflected that appellant was advised of the nature of the charge against him during his arraignment when the State presented him with a copy of the indictment. At a separate status hearing, appellant was further advised by the trial court of the nature of the charge against him as well as the maximum sentence he could receive if found guilty of the charge. On the morning of trial, the trial court counseled appellant that Rhodes had comprehensive knowledge about the legal issues involved with the case and reminded him that while he may not always agree with his attorney, Rhodes would provide him with the best defense possible. The trial court engaged in a short colloquy with appellant and expressed its opinion that appellant was making a "horrible decision" to represent himself, but ultimately granted appellant's request. After voir dire, the trial court engaged in a second colloquy with appellant where the trial court further explained the procedure of the court and appellant's constitutional rights with respect to testifying and the burden of proof. Despite the trial court's warnings, appellant chose to exercise his right to represent himself.

Nevertheless, the Court cautioned, although the trial court expressed concern to appellant that he was making a "horrible decision" by electing to represent himself, merely apprising a defendant that self-representation is generally a bad decision is not sufficient to show that a defendant was made aware of the dangers of self-representation. And, even with its explanation of trial procedure, the trial court should have queried further to ensure that appellant was aware of the dangers and disadvantages of representing himself beyond expressing in general terms its disapproval of appellant's decision.

However, notwithstanding any perceived scantiness in the trial court's warning to appellant, based on a review of the record as a whole, the Court found that appellant was made fully aware of the dangers of self-representation. At the motion for new trial hearing, Rhodes testified that he made appellant fully aware of the nature of the charge, the possible sentences, potential defenses, plea offers, and the dangers of self-representation. Thus, the trial transcript clearly indicated that appellant was not denied the right to counsel by the trial court, but instead knowingly, understandingly and voluntarily elected to represent himself. Accordingly, the Court held, under the circumstances of this particular case, there was no error requiring a reversal of the conviction.

Finally, the Court added, even assuming, arguendo, that the trial court erred in allowing appellant to represent himself, any perceived error was harmless beyond a reasonable doubt. A review of the entire record demonstrated that appellant

was prepared to try his case and mounted an able defense of his case. The trial court found that appellant performed the "yeoman's work in representing himself on trial" from voir dire to closing argument, and did so in a cogent and able manner throughout. At the hearing on the motion for new trial, Rhodes testified that appellant's questioning of witnesses was good, that appellant is "an intelligent person," and that overall appellant did a good job defending his case under the circumstances. The record also showed that appellant's examination of witnesses, objections, and arguments for certain motions reflected not only his clear understanding of the charges against him, but also demonstrated his defense strategies and theories of the case. Nevertheless, the Court found, despite his best efforts, the evidence against appellant was uncomplicated and simply overwhelming. Thus, viewing the evidence as a whole, and in light of the overwhelming evidence of appellant's guilt, it was unlikely that his conviction was attributable to his decision to represent himself.

Jury Charges; Mutual Combat

Johnson v. State, A19A0417 (6/14/19)

Appellant was convicted of three counts of voluntary manslaughter (as lesser included offenses of malice murder and two counts of felony murder), one count of aggravated battery, one count of aggravated assault, and one count of possession of a knife during the commission of a crime. The evidence, very briefly stated, showed that appellant, Guerndt and his girlfriend, Harris, were homeless. The three happened to be at the same apartment, doing drugs and partying. Guerndt and Harris invited appellant to their tent in a homeless camp and appellant accepted the invitation. When they arrived, appellant got nervous when he saw knives lying about the inside of the tent and Guerndt's use of a knife. In an apparent effort to ease appellant's concern, Guerndt handed appellant his knife, which had a blade of eight or nine inches. Harris left the tent to relieve herself. But, a brief time later, appellant looked up and saw Harris approaching the tent—and him specifically—with what appeared to be a board or large stick raised above her head. Wielding the knife Guerndt had just given him only minutes earlier, appellant rushed out of the tent toward Harris, stabbed her several times, and fled into the woods back toward the street.

Appellant contended that the trial court erred in denying his claim that his trial counsel rendered ineffective assistance by failing to object to the court's jury charge on the law of mutual combat. The Court stated that the legal concept of mutual combat is essentially a codified exception to a defense of justification. The essential difference between the two concepts is the essential ingredient of mutual intent. In in order to constitute mutual combat, there must be a willingness, a readiness, and an intention upon the part of both parties to fight, and that reluctance, or fighting to repel an unprovoked attack, is self-defense, and is authorized by the law, and should not be confused with mutual combat. Furthermore, to charge on mutual combat, when there is no evidence to support it, effectively cancels the justification defense, and the charge is therefore error.

Here, the Court found, there was at least some evidence—in the form of appellant's own testimony—that Harris was armed with either a stick or a board, and it was undisputed that appellant armed himself with Guerndt's knife. Additionally, there was some evidence supporting the theory that, rather than trying to flee, appellant affirmatively chose to charge at Harris and engage in combat and, as a consequence of that decision, fatally stabbed her. Given these particular circumstances, the Court found, there was at least slight evidence to support a charge on mutual combat, and the trial court's instruction in that regard was not erroneous. Consequently, appellant could not show that his trial counsel's performance was deficient for failing to object to it, as such, objection would have been futile.

Moreover, the Court noted, although the charge on mutual combat may have carried a cost to the justification defense, it presented the benefit of improving the chances that the jury might find appellant guilty of only voluntary manslaughter, not murder, and the jury did exactly that. In other words, because the mutual combat charge authorizes a jury to find the defendant guilty of voluntary manslaughter in lieu of murder, it is a charge that benefits a defendant and, as such, a convicted defendant's complaint that it was improper to give the charge is without merit. Accordingly, the Court held, for this additional reason, appellant's trial counsel's failure to reserve objections to the trial court's mutual-combat charge did not constitute deficient performance, and appellant's assertion of ineffective assistance of counsel was properly denied by the court.

Opinion Testimony; Rule 701

Handy v. State, A19A0538 (6/14/19)

Appellant was convicted of cruelty to children in the first degree and battery, but acquitted of aggravated assault. The evidence showed that appellant got into an argument with her 16-year-old niece that escalated into a physical altercation when appellant grabbed her niece by the hair. During the fight, appellant punched her niece in the face, threw her to the ground, and sliced her arm with a razor blade or box cutter.

Appellant argued that the trial court erred in allowing a law enforcement officer, who was not tendered as an expert witness, to give his opinion that the cut to the victim's arm looked like a knife wound. The Court stated that Georgia's new Evidence Code permits lay witness testimony in the form of opinions or inferences that are rationally based on the witness's perception, helpful to a clear understanding of the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge. OCGA § 24-7-701 (a).

Here, the officer testified that on the night of the incident he went to the hospital in response to a call about a victim with a knife wound on her arm, that he observed and photographed the cut on the victim's arm, and that it looked like a knife wound because it was "one clean slice" and was very similar to knife wounds he had dealt with in his experience. The officer further opined that the wound could be from a box cutter or other cutting tool.

Thus, the Court found, it was clear that the officer's testimony qualified as a lay witness opinion under OCGA § 24-7-701 and did not constitute an expert opinion. Just because the officer's position and experience could have qualified him for expert witness status does not mean that any testimony he gives at trial is considered expert testimony. And here, the officer made layperson observations about the cut and knife, and therefore he did not provide expert testimony. Accordingly, the court concluded, appellant failed to show reversible error with respect to the officer's testimony.

Money Laundering; Jury Charges

Carr v. State, A19A0346 (6/14/19)

Appellant was convicted on three counts of RICO. He contended that the trial court committed plain error in its instruction to the jury on money laundering. Specifically, appellant argued that because the jury was not provided with an instruction on the essential elements of the indicted charge, his convictions should be vacated. The Court disagreed.

The Court noted that the indictment charged that appellant committed the predicate act of money laundering in violation OCGA § 7-1-915 (c) (2). Thus, the State was required to prove that appellant (1) knew the money involved in the currency transaction was the proceeds from unlawful activity; (2) conducted or attempted to conduct a transaction that involved the proceeds of specified unlawful activity; (3) used the funds or proceeds from the specified unlawful activity; and (4) knew that the transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the specified unlawful activity.

However, in its instruction to the jury, the trial court erroneously gave the following charge with no objection: "A person commits currency transaction fraud or money laundering when that person, knowing that the monies involved in the currency transaction represent the proceeds of some form of unlawful activity, conducts or attempts to conduct such a transaction which in fact involves the proceeds of specified unlawful activity *with the intent to promote the carrying on of specified unlawful activity.*" (Emphasis supplied).

The Court found that the first two prongs of the plain error analysis were met—that is, the charge given was erroneous and obviously so. However, appellant failed to show that the giving of the incorrect money laundering charge changed the outcome of the trial or that the error seriously affected the fairness, integrity, or public reputation of the proceedings. Where the indictment charges a defendant committed an offense by one method, it is reversible error for the court to instruct the jury that the offense could be committed by other statutory methods with no limiting instruction. The defect is cured, however, where the court provides the jury with the indictment and instructs jurors that the burden of proof rests upon the State to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt.

And here, the Court found, in reviewing the jury instructions as a whole, the record clearly demonstrated that the trial court read the indictment to the jury and the jury had a copy of the indictment with them in the jury room during deliberations. The trial court properly instructed the jury on the state's burden to prove every essential element of the crimes charged beyond a reasonable doubt, and instructed the jury that it would be authorized to find appellant guilty if it believed beyond a reasonable doubt that he committed the crimes as set forth in the indictment. The trial court further defined the crimes alleged in the indictment, instructed the jury on the essential elements of the crimes alleged in the indictment, and reminded the jury that the burden of proof does not shift to the defendant. Therefore, the Court held, under these circumstances, appellant could not demonstrate plain error.

Additionally, the Court was unpersuaded by appellant's argument that because the jury did not specify which predicate acts it found appellant guilty of, there was no way to know what predicate acts the jury did find, and as such, appellant may have been found guilty of a crime for which he was not indicted. Evidence of two predicate acts will sustain the RICO conviction; where the evidence authorized the jury to find that defendant committed at least two predicate acts, the Court need not consider the remaining predicate acts charged. This is true even where certain predicate offenses were improperly charged in the indictment; if two remaining predicate offenses were proven beyond a reasonable doubt, the proof was sufficient to support a RICO conviction. Thus, even with the removal of the money laundering predicate act, appellant's RICO convictions were overwhelmingly supported by the evidence that he committed predicate acts involving theft.

Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING JULY 26, 2019
Issue 30-19

Implied Consent; Coercion

Sigerfoos v. State, A19A0276 (6/14/19)

Appellant was convicted of DUI (per se) and speeding. The evidence showed that after placing appellant under arrest, and reading him his implied consent rights, the officer asked for a blood test. Appellant stated "No, I'll do a breath test." Appellant stated that he did not want to submit to a blood test. The officer informed appellant that if he refused the blood test, he would be placed in a holding cell while the officer applied for a search warrant for appellant's blood. Appellant responded, "so if I say no, then you're going to take [my blood] anyway?" The officer explained that if appellant refused the blood test, the officer would apply for a search warrant and only take his blood if a judge found probable cause and approved the warrant. But, if the judge did not approve the warrant, the officer would not take his blood. The officer told appellant that he did not know what decision the judge would make, and was merely informing appellant as to the possible outcomes.

The officer told appellant that he was not trying to threaten or coerce him, and reiterated that the decision regarding whether to submit to the blood test was "totally up to [appellant];" "[the test is] voluntary;" and he was "allowed to say no." Appellant stated that he would like to be able to keep his license. The officer informed appellant that he could not explain the statute and that he did not know "what they'll do in court, that's up to them, but right now your license won't get suspended if you go along with the [testing]." Appellant responded, "I'll go along with it if my license won't get suspended, that way I can at least continue to go to work." The officer reiterated, "if you do the voluntary blood draw, then I don't send anything in for your license to get suspended today." Appellant stated, "Alright, then I'll do that, that way I can at least continue to work." Upon agreeing to the blood test, appellant confirmed to the officer that he did not feel threatened or coerced into giving his consent. After the blood test was performed, appellant never asked for an additional test.

Appellant contended that the trial court erred in denying his motion to suppress because his request to take a breath test was a request for an independent test. In support, appellant cited *Ladow v. State*, 256 Ga. App. 726, 729 (2002) and *Johnson v. State*, 261 Ga. App. 633, 637 (2003). The Court disagreed.

The Court stated that an accused's right to have an additional, independent chemical test administered is invoked by some statement that reasonably could be construed — in light of the circumstances — to be an expression of a desire for an additional, independent test. An arrested party's statement regarding the type of test that he would like administered — when made in response to an officer's question as to whether the accused will submit to a certain type of state-administered test — does not qualify as a request for an independent test. And here, the Court distinguished *Ladow* and *Johnson* based on the unique facts of those two cases and found no similar comparisons in this case. Thus, when the officer read appellant his implied consent warnings and asked whether he would submit to a blood test, and appellant responded "No, I'll do a breath test," this response was made directly to the officer's request for appellant's consent to a state-administered blood test. Viewed in context of the circumstances and his colloquy with the officer, the Court held that appellant's statement was not a request for an independent test, but rather an attempt to designate which test he wanted the State to administer.

Appellant also contended that the trial court erred by failing to suppress the blood test results because the officer coerced him into submitting to the blood test by falsely informing appellant that his license would not be suspended and

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threatening to transport him to jail while he applied for a warrant. But, the Court stated, it found nothing inherently coercive or threatening with regard to the officer's statements that, if appellant refused to comply, appellant would be placed in jail while the officer applied for a warrant. While these statements may have served as a factor in appellant's ultimate decision to consent to a blood test, the statements were merely a true and informative description of what would happen if appellant refused the required testing. Moreover, the officer reiterated that the decision to submit to testing was solely appellant's, it was voluntary, and that appellant had the right to say no. The Court found nothing in the record that indicated that appellant's consent was involuntary. Accordingly, the Court held, the trial court did not err in denying appellant's motion to suppress the results from the state-administered blood test.

Trafficking; Sufficiency of the Evidence

Smith v. State, A19A0089, A19A0092 (6/17/19)

Co-defendants Smith and Reno were each convicted of trafficking methamphetamine following a traffic stop of a car owned by Smith but driven by Reno. Each filed motions for new trial. Smith's motion was denied, while Reno's motion was granted. Smith and the State each appealed.

Smith alleged that the trial court erred in finding that the evidence was sufficient to support his conviction. The Court disagreed. To establish the crime of trafficking in methamphetamine, the State was required to show only that the defendant possessed 28 or more grams of methamphetamine. Here, the evidence that police found over 55 grams of methamphetamine in a box that Smith admitted was his and inside a car that Smith told the officer belonged to him was sufficient to present a question for the jury as to his guilt and also to support his trafficking conviction beyond a reasonable doubt. Although Smith denied owning the methamphetamine and offered another explanation for its presence, the jury was not required to accept his version of events as true, but could assess his credibility and weigh his testimony against other evidence. Accordingly, the Court affirmed Smith's conviction.

The State argued that the trial court erred in finding the evidence insufficient to support Reno's conviction for trafficking. The Court agreed. Viewed in the light most favorable to the verdict, the evidence at trial showed that Reno was driving the car at the time of the stop and thus he necessarily was in possession of the vehicle's keys, affording him access to the trunk where the methamphetamine was located. He also admitted to possessing marijuana, which was on his person and in the passenger door on the other side of the car. Smith testified that Reno and he had known each other for three to four months when they travelled together down I-85 from North Carolina to Atlanta for a meeting with a friend's uncle. The two remained together the entire trip and returned four to five hours after arriving. They were on their way back to North Carolina from that meeting when the traffic stop occurred. The officer observed that Reno was nervous beyond what he would normally expect to see on a traffic stop. The State also presented evidence showing that I-85 between Atlanta and North Carolina is a "known drug corridor," with money flowing into Atlanta from North Carolina to buy drugs and drugs flowing back to North Carolina, and that drug buyers often drove to Atlanta, stayed a few hours, and then drove back in the same day, as the defendants did in this case.

Therefore, the Court found, this and other evidence at trial was sufficient to support Reno's conviction on the trafficking charge beyond a reasonable doubt. Accordingly, the Court reversed the trial court's order finding that the evidence at trial was insufficient to support Reno's conviction on that charge.

Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING JULY 26, 2019
Issue 30-19

Jury Charges; Verdict Form

Harris v. State, A19A0506 (6/17/19)

Appellant was convicted of aggravated assault. The indictment charged him with "aggravated assault (OCGA § 16-5-21) for … mak[ing] an assault upon [the victim] with a deadly weapon," without specifying which manner of simple assault (attempting to commit a violent injury to another or committing an act which places another in reasonable apprehension of immediately receiving a violent injury, OCGA § 16-5-21 (a) (1), (a) (2)). At trial, the trial court instructed the jury as to both types of assault that could support the aggravated assault charge, as well as the lesser included charges of reckless conduct and pointing a gun at another.

Appellant contended that the verdict form — combined with the jury instructions — was confusing to the jury because it divided the definitions of aggravated assault, thus giving the appearance that he was charged with two separate counts of aggravated assault, i.e., (1) aggravated assault by placing the victim in reasonable apprehension of receiving a violent injury and (2) aggravated assault by attempting to commit a violent injury to the person of another or a lesser charge. The Court disagreed.

During its instruction, the trial court charged that appellant was indicted with "*the offense* of aggravated assault"; differentiated between the two methods of simple assault; and charged that the "lesser included offenses [of reckless conduct and pointing a firearm at another] apply to aggravated assault by attempting to commit a violent injury to another. They are not lesser included offenses of aggravated assault by doing an act that places another in reasonable apprehension of immediately receiving a violent injury." The court then instructed the jury how to complete the verdict form, differentiating several times between the methods of aggravated assault.

Furthermore, the jury had a copy of the indictment during deliberations, and the trial court expressly instructed the jury that appellant was charged with "*the offense* of aggravated assault" and that he could only be convicted of one manner of aggravated assault. Additionally, inclusion on the verdict form of the capitalized, bolded "OR" between the two sections of the verdict form necessarily communicated to the jury that appellant could only be found guilty of one *or* the other type of aggravated assault, but not both. Finally, the jury never voiced any confusion about the verdict form or asked for a recharge on the issue. Accordingly, the Court concluded, because the verdict form was not one that would mislead jurors of reasonable understanding, there was merit in appellant's challenge.