Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING AUGUST 16, 2019
Issue 33-19

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Wiretaps; Standing

Bourassa v. State, S18G1136 (6/28/19)

Appellant was convicted of possessing more than one ounce of marijuana, conspiracy to commit that crime, and violating RICO by using a telephone to arrange for the purchase of more than one ounce of marijuana from co-indictee Beltran. The evidence supporting these convictions was obtained during a police investigation of Beltran and others that included extensive surveillance and investigation warrants that authorized the interception of electronic and oral communications for several phone numbers, including Beltran's. Neither appellant's phone number nor any phone number allegedly used by him was listed as a target in the investigation warrants, and appellant's phone number was not known to be associated with any of the phone numbers listed in the investigation warrants as targets.

Prior to trial, appellant moved to suppress the intercepted communications, but the trial court found that he lacked standing. The Court of Appeals affirmed his convictions, *Bourassa v. State*, 345 Ga. App. 463 (2018), and the Court granted certiorari.

The sole witness for the State on the motion to suppress was Sgt. Folsom of the sheriff's office. Appellant contended that the following testimony elicited during Sgt. Folsom's cross-examination at the motion to suppress hearing established appellant's standing: "Q. Okay. And so it's your belief and testimony that he [appellant] was a party to some of the phone calls that were tapped, that were listened to on this tap? A. Yeah, he was part of the conversations that we received."

The Court of Appeals rejected this argument and the Court found that in doing so, the Court of Appeals committed two fundamental errors. First, in holding that appellant had not established standing in this case, the Court of Appeals endorsed the notion that a movant must offer evidence "independent of the government's evidence" to prove standing. The general rule is that the defendant may not rely on positions the government has taken in the case but must present evidence of his standing, or at least point to specific evidence in the record which the government presented that established his standing.

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Thus, the Court found, the Court of Appeals was correct to the extent it suggested that appellant could not rely on a mere position, contention, or theory of the State. But it erred insofar as it concluded that appellant could not rely on the State's evidence to prove standing. Therefore, appellant should have been permitted to rely on Sgt. Folsom's testimony in an attempt to establish standing.

Second, the Court of Appeals held that Sgt. Folsom's testimony — which, among other things, evinced his "belief and testimony" that appellant was a party to some of the intercepted calls — was based only on "circumstantial evidence" and thus did not constitute evidence presented by the State or adduced through cross-examination that could establish that appellant was a party to the calls. But, the Court found, this incorrectly assumed that Sgt. Folsom's testimony did not contain any direct evidence when at least some of his testimony could have reasonably been construed as providing direct evidence that appellant was a party to intercepted phone conversations — for example, Sgt. Folsom's response of: "Yeah, he was part of the conversations that we received." Moreover, the Court stated, even if Sgt. Folsom's responses on cross-examination were not interpreted as providing direct evidence, appellant was not required to rely only on direct evidence to establish standing; he could have also relied on circumstantial evidence.

Accordingly, the Court held, the Court of Appeals erroneously concluded that appellant had to present his own evidence to prove standing and that circumstantial evidence could not suffice to meet that burden. As a result, the Court of Appeals did not properly evaluate appellant's arguments about the evidentiary value of Sgt. Folsom's testimony. Moreover, because the trial court did not make findings or credibility determinations about Sgt. Folsom's testimony, the Court of Appeals had nothing to review on appeal in that regard. Consequently, the Court vacated the judgment of the Court of Appeals and remanded the case to that court with direction to remand the case to the trial court for appropriate consideration of the evidence related to standing.

Ineffective Assistance of Counsel; Timing

Elkins v. State, S19A0331 (6/28/19)

Appellant was convicted of malice murder and other crimes in connection with the shooting death of a 13-month-old and the shooting of the baby's mother, as well as the shooting ten days earlier of a Pastor behind his church. The trial court sentenced appellant — who was 17 years old at the time of the crimes — to serve life in prison without the possibility of parole ("LWOP") for the baby's murder and consecutive terms of years for all but one of his other convictions.

Appellant contended that he received ineffective assistance of trial counsel because his lead trial attorney, Gough, purportedly slept throughout significant portions of the trial. The record showed that appellant was represented at trial by three attorneys — Gough, Lockwood, and Wood. After his conviction and sentence, appellant filed a motion for new trial, which he amended with his new counsel, attorney Mason, and the trial court held an evidentiary hearing on the new trial motion at which Gough testified. Appellant did not raise a claim of ineffective assistance of trial counsel based on Gough's alleged sleeping through portions of the trial either in his amended motions for new trial or at the motion for new trial hearing. Thus, the Court held, because he failed to raise this claim at the earliest practicable moment, he did not preserve it for appellate review.

Appellant also argued that he received ineffective assistance of counsel at the motion for new trial stage, because his motion-for-new-trial counsel, Mason, failed to support a specific claim of ineffective assistance of trial counsel based on Gough's alleged sleeping through portions of the trial. But, the Court found, this specific claim of ineffective assistance of trial counsel was not raised at the motion for new trial stage and was therefore waived. Furthermore, the Court stated, it does not allow a defendant to resuscitate a specific claim of ineffective assistance of trial counsel that was not raised at the motion for new trial stage by recasting the claim on appeal as one of ineffective assistance of motion-for-new-trial counsel for failing to raise the specific claim of trial counsel's ineffectiveness. Therefore, the Court stated, if appellant wishes to pursue a claim that his motion-for-new-trial counsel was ineffective in this regard, he must do so through a petition for a writ of habeas corpus.

However, the Court noted, appellant also contended a claim of ineffective assistance of motion-for-new-trial counsel that is not merely a camouflaged claim of ineffectiveness by trial counsel. Specifically, he contended that Mason provided ineffective assistance by filing an amendment to the motion for new trial seeking resentencing based on this Court's then-recent decision in *Veal v. State*, 298 Ga. 691 (2016), concerning the constitutionality of an LWOP sentence for a murder committed when the defendant was a juvenile, but then failing to gather and present at the hearing on the amendment allegedly readily available evidence showing that appellant cannot constitutionally be sentenced to serve life without the possibility of parole for the baby's murder.

The record showed that after the motion for new trial hearing, but before the trial court entered an order on appellant's new trial motion, the Court decided *Veal*, which explained that LWOP sentences may be constitutionally imposed only on the worst-of-the-worst juvenile murderers, and that an LWOP sentence for a juvenile murderer like appellant must be supported by a distinct determination on the record that the defendant is irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom an LWOP sentence is proportional under the Eighth Amendment. Three days after the decision in *Veal*, Mason filed an amendment to appellant's new trial motion that cited *Veal* and asked the trial court to resentence appellant to serve life in prison with the possibility of parole for the baby's murder. Appellant also requested a hearing, and several months later, the trial court held a brief evidentiary hearing. The court then entered a detailed order citing *Veal* and denying appellant's new trial motion as amended. In response to a motion by appellant, the trial court extended the deadline to file a notice of appeal. Appellant, assisted by new counsel Moore, filed in the trial court an "Emergency Motion" to reconsider, vacate, or stay enforcement of the order denying his new trial motion and to reopen the evidence. The Emergency Motion asserted among other things that Mason provided ineffective assistance in connection with appellant's request for resentencing and the subsequent evidentiary hearing. Four days later, the trial court denied the Emergency Motion without a hearing.

The State conceded, and the Court agreed, that appellant raised this claim of ineffective assistance of motion-for-new-trial counsel at the earliest practicable moment after Moore took over as counsel. When there has been no evidentiary hearing in the trial court on a preserved claim of ineffective assistance of counsel, the Court generally must remand the case to the trial court for an evidentiary hearing on the issue. However, the Court noted, a remand is not mandated if the Court can determine from the record that a defendant cannot establish ineffective assistance under *Strickland v. Washington*. But, the Court found, that was not the case here. Therefore, the Court remanded the case for an evidentiary hearing and appropriate findings concerning appellant's preserved claim of ineffective assistance of motion-for-new-trial counsel.

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Indictments; Statements

Budhani v. State, S18G0976 (6/28/19)

Appellant was convicted of possessing and selling XLR11, a Schedule I Controlled Substance. Appellant appealed his convictions to the Court of Appeals, claiming (among other things) that the indictment was void and that his statements to police were involuntary and therefore should not have been admitted at trial. The Court of Appeals rejected appellant's claims and affirmed his convictions. *Budhani v. State*, 345 Ga. App. 34 (2018), overruled on other grounds by *Willis v. State*, 304 Ga. 686, 706 n.3 (2018). The Court granted certiorari to consider (1) whether the Court of Appeals erred in holding that the indictment was not fatally defective; and (2) whether a promise of no additional charges constitutes a "slightest hope of benefit" under OCGA § 24-8-824.

The record showed that appellant was indicted for three counts of Sale of a Schedule I Controlled Substance. Each of those three counts alleged that appellant did "unlawfully sell [1-(5-fluoropentyl) indole-3yl]-(2,2,3,3-tetramethylcyclo-propyl) methanone (XLR11), a Schedule I Controlled Substance, in violation of OCGA § 16-13-30 (b)." He was also indicted for one count of possession with intent to distribute; that count alleged that appellant "did unlawfully possess with the intent to distribute [1-(5-fluoropentyl) indole-3yl]-(2,2,3,3-tetramethylcyclo-propyl) methanone (XLR11), a Schedule I Controlled Substance, in violation of OCGA § 16-13-30 (b)."

The Court found that the indictment withstands a general demurrer and satisfies due process because it alleged the essential elements of the offenses—that appellant sold, or possessed with intent to distribute, a specific Schedule I controlled substance—under OCGA § 16-13-30 (b), and put appellant on notice of the crimes with which he is charged and against which he must defend. Put simply, if appellant admitted to the allegations contained in each of the four counts of the indictment, the admission of the facts alleged would lead necessarily to the conclusion that the accused is guilty of a crime. That is because appellant would have to admit to "sell[ing]" or "possess[ing] with intent to distribute [XLR11], a Schedule I Controlled Substanc[e], in violation of O.C.G.A 16-13-30 (b)," and XLR11 was, at the relevant time, included in OCGA § 16-13-25 as a Schedule I controlled substance. See former OCGA § 16-13-25 (12) (N).

Nevertheless, appellant contended, there are three exceptions contained in OCGA § 16-13-25 (12) which are themselves "material element[s]" of the charged offenses, and that the State must allege in the indictment that the exceptions do not apply. Thus, appellant contended, the indictment was void because the State did not allege that the XLR11 at issue was "intended for human consumption."

But, the Court found, OCGA § 16-13-25 creates a default presumption that the controlled substances listed in subsection 12 "are included in Schedule I." Thus, by specifically naming in the indictment a substance listed in former OCGA § 16-13-25 (12) (N), and by alleging that it is "a Schedule I Controlled Substance," the indictment necessarily alleges that appellant possessed and sold a Schedule I controlled substance to which an exception to OCGA § 16-13-25 (12) did not apply. Indeed, if an exception to OCGA § 16-13-25 (12) did apply, then the "unless" clause in OCGA § 16-13-25 (12) would exempt the substance from the list of controlled substances "included in Schedule I." Because the indictment specifically named XLR11 and characterized it as a Schedule I controlled substance, appellant could not admit to the allegations in the indictment and be innocent of the crimes for which he was charged.

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Moreover, the Court found, appellant's argument also failed because OCGA § 16-13-50 (a) confirms that the exceptions listed in OCGA § 16-13-25 (12) are affirmative defenses—not elements of the crime—and, as a result, the State is not required to allege them in the indictment. Therefore, the Court of Appeals erred when it concluded that the exceptions listed in OCGA § 16-13-25 (12) were not affirmative defenses. Although generally speaking, an affirmative defense admits the doing of the act charged, but seeks to justify, excuse, or mitigate it by showing no criminal intent, the definition of affirmative defenses cannot be limited to those which preclude criminal intent, by relying on authority which deals only with those affirmative defenses which are specifically identified as such and listed in OCGA §§ 16-3-20 through 16-3-28. Moreover, as provided in OCGA § 16-1-3—which applies to the entirety of Title 16—"[t]he enumeration in this title of some affirmative defenses shall not be construed as excluding the existence of others."

Therefore, the Court concluded, the exceptions enumerated in OCGA § 16-13-25 (12) are affirmative defenses that the State is not required to allege in an indictment. As a result, a criminal defendant may raise the three exceptions enumerated in OCGA § 16-13-25 (12) as affirmative defenses at trial, and in so doing would bear the initial burden of coming forth with evidence to support those defenses. But whether those affirmative defenses are available at trial is a distinct issue from what the State is required to allege in the indictment, and OCGA § 16-13-50 (a) makes clear that the State was not required to allege in appellant's indictment the affirmative defenses enumerated in OCGA § 16-13-25 (12). The Court accordingly affirmed the Court of Appeals' holding that the indictment was not void, but under the right-for-any-reason doctrine.

The Court then turned to the second issue upon which it granted certiorari. Before trial, appellant moved to suppress statements he made to police during his recorded, custodial interview on the basis that investigators' statements that they would not seek additional charges amounted to a hope of benefit under OCGA § 24-8-824. The trial court denied appellant's motion to suppress, finding that, during the recorded interview, "there were no references to dismissing, reducing, or exonerating [appellant] of the current charges," though there was a "promise that there would be no *additional* charges if [appellant] revealed how long he was selling." (Emphasis in original.) The Court of Appeals affirmed. The Court granted certiorari to determine whether a promise of "no additional charges" constitutes a "slightest hope of benefit" under OCGA § 24-8-824.

The Court noted that in *Foster v. State*, 283 Ga. 484, 488 (2008), it held that a promise police made to "not press … additional charges" against a defendant rendered his confession inadmissible under prior OCGA § 24-8-824. But, in *Sosniak v. State*, 287 Ga. 279, 287 (2010), it departed from *Foster* when it held that a detective's statement in a custodial interview that "there would be 'no further charges' regarding 'any drugs or any intent to distribute' was made in the context of encouraging [the defendant] to be truthful regarding his activities leading up to the time of the crimes," rather than as offering a hope of benefit under prior OCGA § 24-8-824.

And here, the Court found, the record authorized the conclusion that just as Foster made statements to police in the hope of receiving no punishment for crimes related to his possession of the weapon, appellant made statements to police in the hope of minimizing his exposure to further drug charges. Thus, the Court held, to the extent *Sosniak* can be read as contravening the rule announced in *Foster*—including to the extent it can be read for the proposition that a promise of no additional charges does not constitute a hope of benefit if the charges do not directly relate to the crimes for which the defendant has already been charged—it is disapproved.

Therefore, the Court concluded, under the totality of the circumstances, promises made by law enforcement to bring no additional charges against appellant constituted an impermissible hope of benefit under OCGA § 24-8-824. Accordingly, the Court of Appeals, much like the trial court, erred by characterizing the investigators' recorded statements as "simply [telling appellant] that [police] would not charge him with additional crimes" in a manner that could not violate OCGA § 24-8-824.

Nevertheless, the Court found, even assuming that the promises investigators made to appellant did, in fact, induce the statements appellant sought to suppress, there was overwhelming evidence of appellant's guilt presented at trial. That evidence included testimony from the investigators who executed the three controlled buys and from the confidential informant who bought the XLR11 from appellant; audio and video recordings of the controlled buys; packets of XLR11 seized at the gas station; and marked bills from appellant's pockets that were used in the last controlled buy. Therefore, although the Court disagreed with the Court of Appeals', and the trial court's, failure to acknowledge that the promise of "additional charges" can constitute "hope of benefit" under OCGA § 24-8-824, the Court concluded that any error the trial court made by admitting the portions of appellant's recorded, custodial interview after investigators' promises of no additional charges was harmless.

Indictments; Seatbelt-Use Evidence

State v. Mondor, S19A0209, S19X0210 (6/28/19)

Mondor was indicted for homicide by vehicle in the first degree, in violation of OCGA § 40-6-393 (b), predicated on a hit-and-run offense (Count 1), and hit and run in violation of OCGA § 40-6-270 (b) (Count 2). The trial court dismissed the indictment concluding that the hit-and-run count (Count 2) did not allege the essential element of mens rea—i.e., that Mondor had "knowledge of the death, damage or injury" caused by an accident involving him. In the same order, the trial court denied Mondor's motion to present seatbelt-use evidence, declining to "find an exception" to the well-established "bar against seatbelt use evidence" under OCGA § 40-8-76.1. The State appealed and Mondor cross-appealed.

Evidence presented at a motions hearing showed that while Mondor was driving a large recreational vehicle and towing a trailer on an interstate highway, his front right bumper allegedly made contact with the left rear bumper of a second vehicle, causing it to strike a third vehicle. Braland, a passenger in the third vehicle, was ejected and later pronounced dead at the scene. After the collisions, Mondor stopped briefly on the side of the highway at a nearby exit. He then proceeded several more miles to another exit, where he stopped in a parking lot, called the police, and waited to make a report on the accident.

Count 2 of the indictment alleged, in relevant part, that Mondor, as the driver of a vehicle that "was involved in an accident … which was the proximate cause of the death of Bradley Braland, the victim, did knowingly fail to stop and comply with the requirements of O.C.G.A. § 40-6-270 (a), to wit: said accused, being the driver of a vehicle involved in an accident resulting in injury to and the death of Bradley Braland, a person, did fail to immediately stop said accused's vehicle at the scene of the accident and did fail to stop said accused's vehicle as close thereto as possible and forthwith return to the scene of the accident; … in violation of O.C.G.A. § 40-6-270 (b); contrary to the laws of [this] State."

The Court stated that because Mondor cannot admit the allegations in Count 2 of the indictment and be not guilty of the crime charged, Count 2 is not vulnerable to a general demurrer. Indeed, if Mondor admitted that he "was involved in an accident … which was the proximate cause of the death of Bradley Braland," and that he "did knowingly fail to stop and comply with the requirements of OCGA § 40-6-270 (a)" when he "did fail to immediately stop [his] vehicle at the scene of the accident and did fail to stop [his] vehicle as close thereto as possible and forthwith return to the scene of the accident"—the precise allegations contained in Count 2—he would be guilty of hit and run under OCGA § 40-6-270 (b).

Nevertheless, Mondor argued, the indictment omitted an essential element of the hit-and-run offense alleged in Count 2: knowledge that an accident had occurred resulting in death, damage, or injury to another. Mondor contended that "knowledge of the death, damage or injury is generally a prerequisite to conviction, even though the statute does not expressly require such knowledge by the motorist," and that "knowledge is, of course, an element of the offense." In essence, Mondor argued that the trial court correctly dismissed the indictment because "an individual cannot be punished for failing to return to the scene of an accident if he did not know that he was involved in an accident." To hold otherwise, he contended, would transform hit and run into a strict-liability offense.

But the Court stated, it disagreed that the indictment failed to allege mens rea or any other essential element of hit and run. First, both Mondor's argument and the trial court's order ignored that Count 2 of the indictment tracks OCGA § 40-6-270 (a) and (b)—including the knowledge requirement contained in subsection (b)—by alleging that Mondor "did knowingly fail to stop and comply with the requirements of O.C.G.A. § 40-6-270 (a)." A person cannot "knowingly" fail to stop and comply with certain statutory requirements unless he knows of the circumstances from which the duty to stop and comply arises in the first place. Knowledge of noncompliance as expressed in subsection (b) therefore requires knowledge of the condition that gives rise to the requirements specified in subsection (a), which references "an accident resulting in injury to or the death of any person or in damage to a vehicle." Thus, OCGA § 40-6-270 requires knowledge of an accident that resulted in at least one of three enumerated consequences: injury, death, or damage. And because Count 2 recites the statutory language setting out all of the elements of subsections (a) and (b) of OCGA § 40-6-270, including the mens rea element, that count is sufficient to withstand a general demurrer. Therefore, the Court reversed the trial court's dismissal of the indictment against Mondor for hit and run and for vehicular homicide.

In his cross-appeal, Mondor contended that OCGA § 40-8-76.1 (d), Georgia's statutory exclusion of seatbelt-use evidence, is unconstitutional as applied to him. Specifically, he argued that Braland's violation of state law by failing to wear a seatbelt is "highly relevant" evidence of causation of Braland's death. The Court disagreed.

The Court noted that in *Whitener v. State*, 201 Ga. App. 309, 311 (1991), the Court of Appeals affirmed in a criminal vehicular-homicide case the exclusion of seatbelt-use evidence under a prior version of OCGA § 40-8-76.1 (d). Nevertheless, the issue presented here—namely, whether a victim's alleged negligence in not wearing a seatbelt is relevant to causation in a criminal case—is one of first impression for it. To reach the answer, the Court stated that it, like the Court of Appeals, must look to Georgia law on proximate causation. It is well established that proximate cause in a criminal case exists when the accused's act or omission played a substantial part in bringing about or actually causing the victim's injury or damage and the injury or damage was either a direct result or a reasonably probable consequence of the act or omission. In homicide cases, an unlawful injury inflicted by the defendant is deemed the proximate cause of death whenever the injury itself constituted the sole proximate cause of the death, the injury directly and materially contributed to the

happening of a subsequent accruing immediate cause of the death, or the injury materially accelerated the death, although proximately occasioned by a pre-existing cause. Proximate cause thus imposes liability for the reasonably foreseeable results of a criminal act if there is no independent and unforeseen intervening cause. This principle applies in vehicular homicide cases, and is deeply embedded in Georgia law.

And here, the Court held, application of those well-established legal principles leads to the conclusion that a victim's failure to wear a seatbelt in a case like this is not an intervening cause and would not prevent a car accident from constituting the proximate cause of death of a passenger in a car involved in the accident. Indeed, a car passenger's failure to wear a seatbelt is not, generally speaking, an intervening cause at all. Instead, in most instances it is better described as a pre-existing or concurrent proximate cause, especially given that failure to wear a seatbelt generally only combines with other contributing causes of an accident and does not independently cause death or injury, So long as the car accident was at least a proximate cause of the victim's death—which means that it may be an additional proximate cause—the defendant may still be held criminally responsible.

Therefore, the Court held, evidence of a victim's failure to wear a seatbelt generally is not relevant evidence of causation in criminal cases. Put differently, but again in the context of this case: if the jury in a criminal trial were to determine that Mondor caused an accident that was a substantial contributing cause of Braland's death, then the causation element of hit and run and vehicular homicide, as set forth in OCGA §§ 40-6-270 (b) and 40-6-393 (b), has been met irrespective of whether Braland's failure to wear a seatbelt was also a contributing factor or even another proximate cause of his death. Evidence of Braland's failure to wear a seatbelt is thus irrelevant to causation because it does not tend to make it either more or less probable that an accident caused by Mondor proximately caused Braland's death in violation of OCGA §§ 40-6-270 (b) and 40-6-393 (b), and because it is irrelevant, it is inadmissible. Accordingly, the Court affirmed the trial court's exclusion of the seatbelt-use evidence in this case based on principles of proximate cause and declined to address whether OCGA § 40-8-76.1 (d) applies in this, or in any, criminal case.

Abuse of Disabled Adults; Mens Rea

Cawthon v. State, A19A0638 (6//21/19)

Appellant was convicted of abuse of a disabled adult, but acquitted of rape. He argued that the trial court erred in finding that his knowledge of the victim's disability is not an essential element of his offense. The Court disagreed.

The Court found that OCGA § 16-5-102 (a) provides, in relevant part: "Any person who *knowingly and willfully* exploits a disabled adult, elder person, or resident, *willfully* inflicts physical pain, physical injury, sexual abuse, mental anguish, or unreasonable confinement upon a disabled adult, elder person, or resident, *or willfully* deprives of essential services a disabled adult, elder person, or resident shall be guilty of a felony . …" (Emphasis supplied). Thus, the Court found, the plain language of the foregoing statutory provision provides three distinct ways, listed disjunctively, in which someone can commit the crime of abusing a disabled adult. Specifically, a person commits this offense if he (1) exploits a disabled adult; (2) inflicts physical pain, physical injury, sexual abuse, mental anguish, or unreasonable confinement upon a disabled adult; or (3) deprives a disabled adult of essential services. OCGA § 16-5-102 (a) also plainly provides that, while exploitation of a disabled adult must be done "knowingly and willfully[,]" the second and third ways in which the offense can be committed require only that the conduct be willful.

And here, the indictment charged appellant with committing abuse of the victim in the second way in which a person can commit abuse of a disabled adult—by willfully inflicting physical pain, physical injury, sexual abuse, mental anguish, or unreasonable confinement upon a disabled adult. Also, as to his specific conduct, the indictment alleged that he committed the charged offense by locking the door to his residence to prevent her from leaving, taking her to his bedroom, pushing her to the floor, feeling her breasts, pulling her pants down, touching her pubic area, and inserting his penis into her vagina and engaging in sexual intercourse. The indictment made no allegation that appellant "exploited" the victim which is the only conduct OCGA § 16-5-102 requires to be done knowingly. Furthermore, while appellant maintained that "[k]nowingly, willfully[,] and intentionally are all basically the same meaning[,]" the Court found that Supreme Court of Georgia has expressly rejected that argument, see *Cox v. Garvin*, 278 Ga. 903 (2005). Thus, the Court held, the trial court did not err in concluding that the portion of OCGA § 16-5-102 (a) that formed the basis for appellant's charged offense did not require the State to prove that he knew the victim was disabled when he attacked her.

Constitutional Right to Speedy Trial; *Barker* Factors

Durham v. State, A19A0673 (6/24/19)

Following the remand of this case to the trial court in *Durham v. State*, 345 Ga. App. 687 (2018), the trial court entered a written order denying appellant's plea in bar asserting a violation of his right to a speedy trial. Appellant contended that the trial court improperly weighed the four factors outlined in *Barker v. Wingo*, 407 U. S. 514 (92 SCt 2182, 33 LE2d 101) (1972). The Court agreed and remanded again.

As to the length of delay, the Court found that the trial court weighed the six-year delay against the State, but failed to assign a weight for the delay or decide whether the particular delay in this case was "uncommonly long," even though the State conceded in its brief that the delay between appellant's arrest and indictment was uncommonly long.

As to the reason and responsibility for the delay, the State conceded, that much of the reason for the delay was due to the negligence on its part in bringing the case to trial. Further, staffing turnover within the District Attorney's Office and overcrowded dockets, also contributed to the delay. However, the trial court found, there was no evidence of any deliberate attempt to delay the trial of the Defendant. Therefore, the Court found that the trial court did not abuse its discretion in weighing this factor benignly against the State.

As to appellant's assertion of his right to a speedy trial, the trial court weighed this factor "heavily against the Defendant" based upon his failure to assert this right for over six years and the fact that he only did so after the speedy trial issue was brought up by the trial court. However, the Court found, the trial court failed to consider whether appellant's delayed assertion of his right should be mitigated by announcements he was ready for trial. The record showed that appellant was arrested in December 2009, that he was indicted in April 2012, and that he was tried in February 2016. According to appellant, he announced ready for trial on each of the dates his case was scheduled to be heard. Whether the circumstances of a particular case warrant any mitigation is a question committed to the sound discretion of the trial court.

With regard to prejudice, the trial court weighed this factor heavily against appellant based upon his failure to present any evidence showing actual prejudice to his defense, his release from custody on December 23, 2009, and nothing in the

record showing any unusual anxiety. However, the Court found, the trial court failed to take into account the presumption of prejudice caused by the six year delay when it weighed this factor.

Accordingly, because the trial court failed to assign a weight for the delay, decide whether the particular delay in this case was "uncommonly long," consider mitigating factors with regard to appellant's assertion of his right to a speedy trial, and take into account the presumed prejudice from the six-year delay, the Court again remanded the case back to the trial court.

Motions to Sever

Elkins v. State, A19A0503 (6/24/19)

Appellant was convicted of tampering with evidence but acquitted of making a false statement to law enforcement. The evidence, very briefly stated, showed that appellant's son, De'Marquise, during an attempted robbery of a woman pushing her baby in a stroller, shot the baby in the head and shot the woman in the leg. De'Marquise then went to a friend's apartment and hid the gun. The next day, appellant picked up the gun from the apartment, drove to a lake and threw the gun into the lake. Appellant and her son were tried together.

Appellant contended that the trial court erred in denying the motion to sever her trial from De'Marquise's trial. The Court noted that OCGA § 17-8-4 (a) provides that when two or more defendants are jointly indicted for a noncapital offense, "such defendants may be tried jointly or separately in the discretion of the trial court." Here, appellant conceded that "[t]he number of defendants in this case likely did not create confusion of the evidence or the law," and she has never alleged that she and De'Marquise had antagonistic defenses. In fact, appellant acknowledged that the only factor at issue before the trial court was whether, despite cautionary instructions, there was a danger that the evidence admissible against De'Marquise would be improperly considered against her.

Specifically, appellant's argued that she was entitled to a severed trial because the evidence against her was minimal, while the evidence against De'Marquise was substantial, making it probable that the significant amount of evidence presented against him during their eight-day trial overwhelmed the jury. And she identified some of that evidence as pictures of the deceased baby, "wrenching testimony" from his parents, an explanation of the autopsy results, testimony regarding an unrelated shooting and robbery, and the presentation of "30 some odd documents." According to appellant, there was "no way" this evidence did not "spillover" to her in the mind of the jurors. Finally, appellant contended that the evidence presented against De'Marquise was even more prejudicial to her than in other cases because she is his mother, and in the jury's view, she "created a baby murderer."

The Court stated that although there was substantial evidence presented against De'Marquise as to serious charges that appellant did not face, the evidence presented against her to support her sole conviction for evidence tampering was brief, straightforward, and related only to a specific set of actions she took over a two-day period following the murder. Thus, the Court agreed with the trial court that there was nothing particularly confusing about the evidence supporting appellant's conviction.

Nevertheless, the Court also acknowledged that the evidence presented against De'Marquise—who faced 11 charges, including malice murder of a baby—was more voluminous, substantial, and damning than the evidence presented against appellant. But De'Marquise played no role in appellant's crime of evidence tampering, and she played no role in any of his more serious offenses, except to the extent that she illegally disposed of evidence used in a murder that she was not implicated in. Indeed, the Court found, while appellant detailed evidence presented against De'Marquise for much more egregious crimes, she failed to explain how any of that evidence, which was mostly irrelevant to the charge against her, prejudiced her or could have confused the jury in determining her guilt or innocence of evidence tampering.

Moreover, there was ample evidence to support appellant's conviction, and the jury could not have found her guilty of any of De'Marquise's more serious crimes merely due to her association with him because she was not charged with any of those offenses. Additionally, evidence related to the baby's murder would have been admissible at a separate trial because the State was required to establish that she disposed of the murder weapon to hinder the prosecution of De'Marquise. Furthermore, the jury demonstrated its ability to decide each case separately, rather than assuming appellant's guilt based solely on the criminal conduct of her son, because it acquitted her of making false statements to police. And in doing so, the jury appeared to have heeded the court's instruction that it "must consider the guilt or innocence of each defendant separately." Accordingly, the Court concluded, under the circumstances, the trial court did not abuse its discretion in denying appellant's motion for a severed trial.

Jury Charges; Aggravated Assault

State v. Thomas, A19A0207 (6/24/19)

Thomas was charged with murder and other crimes related to the shooting death of Shinnara Gee. A jury found him not guilty of murder, felony murder, and voluntary manslaughter, but guilty of aggravated assault with a deadly weapon and firearms charges. The trial court granted Thomas's motion for a new trial, concluding that it had committed an error of law in instructing the jury on the offense of aggravated assault with a deadly weapon.

The State argued that the trial court erred in granting Thomas's motion for a new trial because the trial court adequately cured any potential defect in its instructions. The Court noted that since Thomas did not object to the charge, its review was limited to whether there was plain error. And here, the Court found, there was no plain error.

The Court stated that it is error to charge the jury that an aggravated assault may be committed in a method not charged in the indictment. Here, because the indictment specifically charged Thomas with aggravated assault by shooting, the trial court's instruction that the jury may find Thomas guilty based on placing the victim in reasonable fear of receiving a violent injury was erroneous, and the error was obvious.

But, the Court stated, even if the trial court's charge on aggravated assault was erroneous, a trial court may cure an erroneous jury instruction by providing the jury with the indictment and instructing the jury that the State was required to prove every material allegation in the indictment and every essential element of the crime charged beyond a reasonable doubt. And here, the Court found, during deliberations, the jury submitted the following note to the court: "Do we go by the wording in the indictment or by [the] definition provided to us; e.g., aggravated assault? Verbiage in the indictment reads: 9th day of October, 2014, did unlawfully commit an assault upon the person [of] Shinnara Gee by shooting him

with a handgun, the same being a deadly weapon. Shoot or Discharge of a firearm? Threat of shooting?" Following discussion with the prosecutor and defense counsel, the trial court informed the jury that "[a] crime may be committed in a number of ways. There is a statutory definition. When the State accuses a person of a crime, they are required to prove that the crime was committed in the manner that it was alleged in the indictment. So, what you are to determine is *whether the State has proven beyond a reasonable doubt that the offense occurred in the manner that it was alleged in the indictment*. The definition that you have been given is a generic definition of aggravated assault." (Emphasis supplied).

Thus, the Court found, because the trial court provided the jury with a copy of the indictment for their deliberations, and explained that the indictment and Thomas's plea of not guilty formed the issue the jury was to decide under the circumstances, the trial court sufficiently cured any error in its charge on aggravated assault. Moreover, the Court found, the trial court's instruction, when viewed as a whole did not impermissibly broaden the manner in which the jury could convict Thomas of aggravated assault, nor did it relieve the State of its burden of proving that Thomas shot Gee in order for the jury to find Thomas guilty of that crime. Accordingly, the Court concluded, the trial court erred in concluding that its instructions to the jury constituted plain error.

Jury Charges; Impeachment Evidence

Bashir v. State, A19A0653 (6/24/19)

Appellant was convicted of three counts of aggravated assault with a deadly weapon and one count each of possession of a firearm during the commission of a felony and possession of a firearm by a convicted felon. The evidence showed that, after getting into verbal and physical altercations with his live-in girlfriend and her brother, appellant fired several shots from a gun toward a departing car carrying the three aggravated assault victims named in the indictment — his girlfriend, her brother, and her mother. A bullet struck the car near where one of the victims was sitting.

Appellant first argued that the trial court erred by failing, in her charge to the jury, to inform the jury of the definition of simple assault even though that offense is an essential element of aggravated assault. Because he did not object to the charge at trial, the Court stated that its review was limited to plain error affecting the substantial rights of the parties.

The Court noted that appellant was correct that in certain circumstances, it is error for a trial court in an aggravated assault case to fail to charge on the methods of committing a simple assault set forth in OCGA § 16-5-20 (a). And, the Court found, citing *Cantera v. State*, 289 Ga. 583 (2011), this case arguably presents such circumstances because it was undisputed that appellant intentionally shot at the victims, but missed and caused them no injury. Thus, the Court stated, it would assume that the trial court's failure to include that language was clear or obvious error.

Nevertheless, the Court found, appellant failed to show plain error because his argument did not show the third prong of the plain error analysis, that the trial court's failure to give the charge affected his substantial rights. Specifically, appellant argued that the charge given to the jury did not adequately instruct them on the required element of intent. But, even if the trial court gave an incomplete charge on aggravated assault, the omission probably did not affect the outcome at trial. Appellant admitted to intentionally firing a gun in the victims' direction, which is conduct that would constitute aggravated assault. Appellant argued that this intentional conduct was justified as self-defense, and the trial court charged the jury on his justification defense, which the jury rejected.

Appellant also contended that the trial court erred in admitting, under OCGA § 24-6-609 (Rule 609), evidence of three of his prior convictions for the purpose of impeaching him: a 2003 conviction for aggravated assault and two drug convictions, one from 2005 and the other from 2007. The Court noted that at the time of appellant's 2015 trial, two of the prior convictions were more than ten years old. Under OCGA § 24-6-609, the more recent prior conviction could be "introduced for the purpose of attacking appellant's character for truthfulness if the court determined that the probative value of admitting the evidence outweighed its prejudicial effect. But the two older prior convictions could be introduced only if the court "determine[d], in the interests of justice, that the probative value of the conviction[s] *substantially* outweigh[ed their] prejudicial effect." OCGA § 24-6-609 (b) (emphasis supplied).

The Court stated that the purpose of admitting evidence of prior convictions under Rule 609 is to attack a witness's credibility. Even for older convictions assessed under the more stringent Rule 609 (b) standard, if the defendant's credibility is a key issue in the case there is a ground for the trial court to admit the evidence. In fact, the Court noted, in a seminal case, *United States v. Pritchard*, 973 F2d 905, 909 (II) (11th Cir. 1992), the Eleventh Circuit identified the "centrality of the credibility issue" as one of several factors to be considered by a trial court deciding whether to admit, under Rule 609 (b), evidence of a conviction more than ten years old.

And here, the Court found, appellant's credibility was central to his defense. Testifying at trial, appellant did not deny firing the gun but stated that he did so in defense of himself and his family. His descriptions of the altercations with his girlfriend and her brother and of the shooting that followed differed significantly from the testimony of several other trial witnesses. The trial court noted the centrality of appellant's credibility to the case when she determined that the Rule 609 standards for admitting the evidence of his prior convictions had been met. Therefore, the Court held, because the evidence supported that finding, the trial court did not commit an abuse of discretion in admitting the evidence.