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## Enticing a Child for Indecent Purposes; Sufficiency of the Evidence

*Phillips v. State, A19A2458 (3/5/20)*

Appellant was convicted of three counts of criminal attempt of enticing a child for indecent purposes. He contended that the evidence was insufficient to support his convictions. The Court agreed and reversed.

The evidence, briefly stated, showed that on Dec. 14, 2013, M. B. was standing outside in front of a house when appellant drove by in a black truck and used his hand to make a “money” gesture to her. Appellant did not say anything to her, he did not stop the truck once he reached her, but continued to drive past her at “medium” speed. On August 23, 2013, C. H. and her friends had been walking down a street into a yard when she noticed a black truck following her. As the truck passed her, the driver, whom she did not know but later identified as appellant, pointed at her and gestured for her to enter his truck and sit on the passenger seat. On October 4, 2013, J. D. was riding her bike when a truck began to follow her. As the truck reached J. D., the driver, whom J. D. later identified as appellant, stopped the truck, rolled down his window, and told her that he liked her hair. Appellant then asked her if she wanted “to put [her] bike in the back of [his] car and go[.]”

The Court stated that a person commits the offense of enticing a child for indecent purposes when he or she solicits, entices, or takes any child, under the age of 16 years to any place whatsoever for the purpose of child molestation or indecent acts. A conviction for enticing a child requires evidence of a joint operation of the act of enticing a child and the intention to commit acts of indecency or child molestation. Thus, although a conviction under OCGA § 16-6-5 need not be based upon evidence that an act of indecency or child molestation was accomplished or even attempted, a conviction under OCGA § 16-6-5 must nevertheless be based upon some evidence that *an act of indecency or child molestation was the intended motivation for the enticement.*

Therefore, the Court concluded, the evidence was insufficient to sustain appellant's convictions for these offenses. The State had the burden to prove each element of the offense beyond a reasonable doubt, and here, the State failed to present any evidence to show that an act of indecency or child molestation was the intended motivation for appellant's attempted enticement of the victims as required to sustain a conviction under OCGA § 16-6-5. Accordingly, in the absence of evidence showing that an act of indecency or child molestation was the intended motivation behind appellants' apparent attempts to entice the victims into his vehicle, the Court stated it must reverse his convictions for these offenses.

## **Motions to Withdraw Pleas; Waivers**

*Rice v. State, A19A1645 (3/6/20)*

The record showed that appellant pled guilty to two counts of child molestation, and the trial court sentenced him to twenty years to serve in confinement on the first count, followed by a consecutive ten years of probation on the second count. Appellant filed a motion to vacate the sentence, arguing that his sentences were void for failure to meet the split-sentence requirement of OCGA § 17-10-6.2 (b). The trial court denied the motion, and appellant appealed. Because appellant was correct, the Court in an unpublished opinion vacated the trial court's order and remanded for resentencing.

Prior to resentencing, appellant moved to withdraw his plea, which the trial court denied, finding that appellant waived his right to withdraw his plea. Specifically, the trial court determined that appellant “waived his right to withdraw his plea or appeal when he entered into it, as evidenced by the change of plea form filed at the time of sentencing.”

Appellant argued that the trial court erred in finding a waiver. The Court agreed. The relevant portion of the plea form stated that “the defendant ... changes his/her plea from not guilty to guilty of as set forth [at the bottom of the form] ... . Furthermore, the defendant now waives all rights of appeal to the process and procedure in this case; of the entry of his plea of guilty; and of the entry of judgment and the sentence of the court hereon.” The Court found that this language was too imprecise and too vague to establish that appellant made a voluntary, knowing, and intelligent waiver of his right to withdraw his plea. The form did not expressly address the specific right at issue here — the right, pursuant to OCGA § 17-7-93, to *withdraw* the guilty plea at any time before (a valid) sentence was pronounced. And the Court stated it would not ascribe thereto a waiver of that statutory right if the waiver was not established upon a clear, unambiguous, and explicit record that the defendant knew that he would be subject to future sentencing *without having the opportunity to withdraw the plea* beforehand; and that he understood and affirmatively agreed that he *would not be able to withdraw his guilty plea* once he had entered it.

In so holding, the Court rejected the State's argument that appellant was precluded from withdrawing his guilty plea because the motion was filed outside the term in which it was imposed and that the trial court was precluded from entertaining the motion under the “law of the case” rule.

## **Prior Consistent Statements; Synthetic Marijuana**

*Moore v. State, A19A2332 (3/6/20)*

Appellant was convicted of trafficking of persons for sexual services and cruelty to children in the second degree. Appellant contended that her trial counsel was ineffective because he failed to object to the admission of the victim's prior consistent

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statements that constituted hearsay or improper bolstering. Specifically, counsel did not object when several witnesses - a sheriff's deputy, a sheriff's investigator, the victim's mother, and a social worker - repeated the victim's out-of-court statements, thus bolstering her testimony. The Court disagreed.

OCGA § 24-6-613 (c) provides that “[a] prior consistent statement shall be admissible to rehabilitate a witness if the prior consistent statement logically rebuts an attack made on the witness's credibility.” Here, the victim was the first witness to testify at trial. Appellant (and her co-defendant) asked the victim questions on cross-examination that placed the veracity of her testimony at issue, questioning her about statements she made or failed to make sooner regarding the allegations. The victim was challenged on cross-examination regarding her earlier testimony that she had wanted to attend school and asked if she had used heroin. Defense counsel also asked the victim if she had engaged in “basically [the] same prostitution things” when she was on her own in the months before she started staying at appellant's home. The victim replied that she had been doing what she had to do in order to survive, including exchanging sex acts for money, but that she did not consider what she was doing then as “prostitution.” She added that she had not expected to have to sell her body in order to stay at appellant's house, and she thought appellant loved and cared about her. Thus, the Court found, the prior consistent statements logically rebutted an attack made on the victim's credibility. Therefore, the prior consistent statements were relevant and admissible to rehabilitate the victim as a witness.

Appellant also contended counsel was ineffective because he failed to object to testimony that she gave the victim synthetic marijuana to coerce her to perform sex acts for money, that synthetic marijuana was found in appellant's house, and that the substance referred to as “Gucci” was synthetic marijuana. Appellant argued that the State failed to lay a foundation to support the claim that “Gucci” was the equivalent of marijuana, as there was no evidence that the substance was subjected to chemical analysis.

The Court noted that neither the charged statute (OCGA § 16-5-46 (c) (2017)) nor the allegations set forth in the indictment required the State to prove that appellant gave the victim drugs. But, the Court stated, in any event, no deficiency was shown.

Expert testimony is not necessary to identify a substance, including drugs. And even if police officers are not formally tendered as expert witnesses, if an adequate foundation is laid with respect to their experience and training, their testimony regarding narcotics is properly admitted.

Here, the Court found, when asked at trial if appellant and her codefendant ever gave her any drugs, the victim replied that they gave her “Gucci” to smoke; the victim testified that Gucci was “[s]ynthetic marijuana.” An investigator with over five years of experience with the sheriff's office, including experience investigating narcotics cases, testified that he participated in the search of appellant's house. He stated that synthetic marijuana and items used to make synthetic marijuana cigarettes were found in the house. He explained that synthetic marijuana is made by spraying potpourri-type leaves with a chemical compound that has a “hallucinogenic-type marijuana effect”; when asked to compare the relative street value of Gucci and “just marijuana,” the investigator testified that Gucci was more expensive. He testified that people place synthetic marijuana into emptied-out tobacco cigarette wrappers and roll the leaves into cigarettes or “blunts” to smoke.

Thus, the Court concluded, the trial court was within its discretion in permitting the investigator to give his opinion that the substance in question was synthetic marijuana. Accordingly, trial counsel was not deficient for failing to object to testimony that synthetic marijuana was found in the house.

## **Waiver of Right to Counsel; Sovereign Citizens**

*Faulkner v. State, A19A2220 (3/6/20)*

Appellant was convicted of theft by receiving a stolen firearm, criminal use of an article with an altered identification mark (the firearm), possession of less than one ounce of marijuana, and possession of a firearm by a convicted felon. The evidence showed that the evidence was gathered as a result of a traffic stop.

Appellant contended that the trial court erred by approving his request to represent himself because the waiver colloquy was insufficient. He also argued that his answers to the waiver form employed by the court showed that his waiver was not knowing and intelligent. The Court agreed and reversed his convictions.

The record, briefly stated, showed that the trial court held two hearings and had appellant fill out a waiver of representation form. However, when asked if he was going to represent himself, appellant responded, "Yes, I will be representing myself in propria persona sui juris. ..." In addition, in response to the question, "Why do you think you could do a better job than a lawyer in representing you in this case?" Appellant responded, "Not better than lawyer but aware of status of jurisdiction." And when asked, "Do you specifically waive your right to have a lawyer represent you in this case?" Appellant wrote, "No, but I agree to address the court on behalf of the entity Cameron Faulkner to hear his case in propia sui juris." The Court noted that the record did not indicate that the trial court asked appellant about any of these responses.

To prove a knowing and intelligent waiver of the right to counsel, the record should reflect a finding by the trial court that the defendant has elected to proceed pro se and should show that this choice was made after the defendant was made aware of his right to counsel and the dangers of proceeding without counsel. And here, the Court found, the responses on the pretrial waiver form did not show that appellant clearly made the choice to proceed pro se after he was informed of his right to counsel and the dangers of proceeding without counsel. Also unclear was appellant's response to the trial court's questions about self-representation during the second representation status hearing. Initially, when asked if he was going to represent himself at trial, appellant said that he was still considering how to proceed and that he had asked for a continuance. When the trial court told appellant that its understanding was that appellant was going to represent himself, followed by "Aren't you going to represent yourself? Didn't you tell me that?" appellant's response was yes, which could have been responsive to either or both questions. If only responsive to the second question, appellant's response could have indicated that although he had previously told the trial court that he wanted to represent himself, he was currently unsure how to proceed.

The Court stated that it is sympathetic to the frustration experienced by the trial court in dealing with a pro se defendant who refused to provide straightforward responses on several pretrial issues under the guise of asserting "sovereign citizen" type arguments. And it recognized that when presented with similar theories of individual sovereignty and immunity from prosecution based on an individual's claimed status of descent, be it as a "sovereign citizen" or a "flesh-and-blood human

being,” federal courts and it have determined that such theories should be rejected summarily, however they are presented. But, the rejection of these types of arguments does not, however, alter the required analysis of the waiver of counsel issue.

And here, the Court found, the trial court did not investigate as long and as thoroughly as the circumstances of the case before him demanded to determine whether appellant's waiver was knowing and voluntary. A cursory review of appellant's answers on the waiver form would have revealed the potential problems with the responses at issue that could have been addressed by asking appellant about them during one of the hearings on his representation status. Given the presumption against waiver, the Court concluded that the record did not show that appellant intentionally relinquished his constitutional right to counsel.

Next, the Court addressed whether the State showed that it was harmless to allow appellant to represent himself under these circumstances. The Court found that appellant did not mount an able or even coherent defense in this case, as evidenced by his ineffective cross-examinations and rambling testimony. And during his own brief testimony, appellant switched topics several times but continued to focus on whether the first officer was dishonest when he testified that appellant told him that he had rented the car he was driving, despite the trial court's repeated instruction that the rental car issue was not relevant. Thus, the Court concluded, under the circumstances, the State failed to meet its burden of demonstrating harmless error. Accordingly, the Court reversed and remanded the case for the trial court to inquire as to whether appellant wants an attorney to represent him and whatever he decides, the case can be retried.

## **Forfeitures; Final Judgments**

*State of Georgia v. White, A19A1959 (3/9/20)*

The police seized a very large amount of cash from White on November 7, 2018. White filed a timely motion for a probable cause hearing pursuant to OCGA § 9-16-14 (4). The State filed a timely complaint for forfeiture and White filed a timely answer. The trial court set the probable cause hearing down prior to a hearing on the merits of the case. Following the hearing, the court ruled that the State lacked probable cause to seize the currency and ordered the currency to be released. The State directly appealed.

The Court stated that generally, an order is final and appealable when it leaves no issues remaining to be resolved, constitutes the court's final ruling on the merits of the action, and leaves the parties with no further recourse in the trial court. And here, the Court found, the forfeiture complaint had not been finally resolved, and remained pending before the trial court. Thus, the order appealed from was not a final order, and consequently, the State was required to follow the interlocutory application procedures in OCGA § 5-6-34 (b). Therefore, the Court concluded, the State's failure to do so deprived the Court of jurisdiction and the State's direct appeal was dismissed.

## **Restitution; Termination of Probation**

*Taylor v. State, A19A1973 (3/9/20)*

In November 2011, appellant pled guilty to theft by taking and was placed on first offender felony probation for ten years. Appellant was also ordered to pay restitution in the amount of \$140,078.27 to her victim at the rate of \$150 per month.

In 2017, the Department of Community Supervision (“DCS”) filed a petition for termination of appellant’s probation, incorrectly stating that appellant owed no restitution. The petition was granted on February 2, 2018 and on February 15, 2018, the trial court ordered appellant discharged under the provisions of the First Offender Act.

On April 4, 2018, the State filed a motion for reconsideration and to vacate the orders granting the DCS’s petition for termination of appellant’s probation and discharge without adjudication of guilt, explaining that the petition wrongly stated appellant owed no restitution when she in fact owed \$128,978.27 of the total amount she was sentenced to repay. After a hearing, the trial court granted the motion.

Appellant argued that the trial court was prohibited from granting the State’s motion for reconsideration outside the term of court, while the State argued that the order granting the petition was void and therefore could be reconsidered outside the term of court.

The Court noted that after the trial court entered its order granting the State’s motion for reconsideration and vacating its grant of DCS’s petition to terminate appellant’s probation, the Court issued its opinion in *Kinsey v. State*, 350 Ga. App. 317 (2019) in which this Court addressed an identical situation and arguments and held that the trial court erred in rescinding the termination of the Kinsey’s probation, outside the term of court because under the first offender statute, Kinsey had been discharged as a matter of law and the trial court lacked jurisdiction to modify, correct, or rescind the valid discharge order. And here, the Court found, the State provided no compelling reason to deviate from its decision in *Kinsey*, and therefore, the trial court’s order granting the State’s untimely motion for reconsideration was reversed, thereby reinstating the trial court’s February 2 and February 15 orders terminating appellant’s probation and discharging her under the First Offender Act.

## **Ineffective Assistance of Counsel; Redacting Videotaped Statements**

*Jackson v. State*, A19A2017 (3/9/20)

Appellant was convicted of armed robbery and possession of a firearm during the commission of a felony. The facts, very briefly stated, showed that the victim went to the bank around 1:30 a.m. to 2:00 a.m. after he got off work. A car driven by Clark with appellant as his passenger followed the victim home. Appellant got out of the car and robbed the victim. When appellant was initially questioned by the police later that night, he claimed he was with a woman at her apartment during the time of the armed robbery. However, about six weeks after the robbery, appellant and his trial counsel met with the detective assigned to the case. Appellant told his story to the detective about how he knew nothing of Clark’s plan to rob someone and that Clark put a gun on him, forced him out of the car after handing him a different gun, and essentially coerced him into robbing the victim. As appellant was explaining why he did not run away after Clark handed him a gun, his attorney interrupted him, stating, “Dell, Dell, you’re not going to convince us that this was reasonable behavior. It wasn’t. ... What I told you the first time I met you ... kind of crazy.” She then asked another question clarifying that he did not know whether the chrome gun provided by Clark was loaded. Finally, appellant explained that he did not initially tell the police about Clark’s involvement because Clark threatened to kill him if he told anybody about it.

Appellant contended that his trial counsel rendered ineffective assistance because she failed to seek redaction of the comments she made about the reasonableness of his story during his videotaped interview. The Court agreed.

The Court noted that trial counsel testified in the motion for new trial hearing that she did not consider filing a motion to redact her comments and that she should have done so. She explained that she watched the interview video with her client, his wife, and her assistant a few days before trial and advised appellant that he should enter a plea rather than going to trial. Although they had “intended to enter a plea the whole time,” he changed his mind on a Monday, and they “picked a jury that same day.” At that point, she had not subpoenaed any witnesses because she “really, really thought” that appellant would plead guilty. The case was tried on Wednesday and Thursday. Trial counsel offered no strategic reason for failing to ask that the interview be redacted before it was played for the jury. She stated that appellant's main defense was coercion.

Based upon the record and the fact that the prosecutor used appellant's trial counsel's comments against him in the State's closing arguments, the Court stated that it is obvious that no reasonable attorney would have failed to seek redaction of her comments from the videotape and that a trial court would have abused its discretion in failing to authorize such a redaction. The attorney's statements related to opinion, not fact, and were not relevant evidence. Even if they were somehow relevant and admissible, there could be no doubt that a trial court would abuse its discretion by failing to conclude that the statements should be excluded under OCGA § 24-4-403 based upon the danger of unfair prejudice.

Next, having concluded that counsel's performance was deficient, the Court addressed whether appellant was prejudiced by counsel's performance. The Court stated that while the State submitted evidence sufficient to disprove the coercion defense asserted by appellant in the video, appellant presented evidence at trial of a subsequent altercation between himself and Clark, during which Clark stated that appellant should be dead. Given the damaging nature of counsel's unredacted comments used to great effect by the State in its closing argument and the fact that the credibility of witnesses and questions of coercion are for the jury, the Court concluded that a reasonable probability existed that the outcome would have been different but for counsel's deficient performance. Therefore, the Court reversed appellant's convictions, but because sufficient evidence supported his convictions, the State may retry him.

### **Rule 404 (b) Evidence; OCGA § 5-7-1 (a) (5)**

*State v. Watson, A19A2358 (3/9/20)*

Watson was indicted for armed robbery, hijacking a motor vehicle, robbery by sudden snatching, kidnapping, theft by receiving stolen property, fleeing and attempting to elude a police officer, and obstruction of an officer. The record showed that Watson and four others were indicted for numerous offenses stemming from a 2016 incident in which the men allegedly stole a Jeep occupied at the time by the owner's 8-month old infant, who was strapped into a car seat in the back of the vehicle. The men drove in their previously stolen sedan to a gas station, where Watson is alleged to have entered the Jeep through the passenger's side while the owner pumped gas. Watson drove away in the Jeep with the infant in the car and was followed by the other individuals in the sedan. A police chase of both vehicles ensued, and after the vehicles eventually crashed, the co-conspirators fled on foot.

Prior to trial, the State moved to introduce evidence of prior acts committed by Watson, including three instances of him stealing or being found in possession of stolen vehicles and personal property. The State argued that the evidence was admissible under Rule 404 (b) to prove motive, intent, and knowledge. After a hearing, the trial court denied the State's

motion, finding that because Watson's defense rested on his claim that he was not involved in the crimes at all, rather than a mere presence defense, the extrinsic evidence was prejudicial and should not be admitted. The trial court explained that the extrinsic evidence was not sufficiently probative to the issue of motive, which was apparent based on the nature of the charges, intent was not a heavily contested issue and would also be apparent based on the nature of the charges, and the incidents did not involve the type of specialized knowledge such that the probative value of the extrinsic evidence overcame its prejudicial effect of entering into the record propensity or bad character evidence against Watson. The State appealed pursuant to OCGA § 5-7-1 (a) (5).

Watson contended that the State's appeal should have been dismissed because it was taken for the purposes of delay and because the evidence excluded by the trial court did not constitute substantial proof of a material fact in the proceeding. The Court disagreed. The extrinsic evidence was offered to assist the State in proving motive, intent, and knowledge, which are material issues in the case. Therefore, the State was authorized to appeal. And the Court stated, as for the argument that the State pursued the appeal for purposes of delay because Watson had a motion for speedy trial pending, the Court declined to hold that the mere existence of such a motion prohibits the State from exercising its right to appeal under OCGA § 5-7-1 (a) (5).

The State argued that the trial court abused its discretion by excluding the extrinsic evidence of Watson's other acts for the purposes of showing intent, motive, and knowledge because the acts were relevant to those issues, were similar to the charges, and occurred close in time. The Court disagreed.

The Court found that the trial court was aware of the proper standard and applied it. It was clear from reading the order as a whole that the trial court understood and found that while some of the extrinsic acts were relevant in the technical sense, the factual scenario of this case rendered the State's need to have more evidence to prove motive, intent, and knowledge very low because those issues are obvious to a fact finder after the identity of the perpetrator is determined. Thus, the Court held, the trial court did not abuse its discretion by finding that based on the factual scenario, the State's admission that the evidence is not admissible to show identity, and the defense Watson is presenting, the undue prejudice substantially outweighs the minimal probative value of the evidence as to the issues of intent, knowledge, and motive.

Furthermore, the Court noted, the trial court specifically reserved ruling on whether the extrinsic evidence could be admitted for other reasons in the event that, for instance, Watson concedes he was there but argues he was merely present.

## **Search & Seizure; Corroboration of Source of Information**

*Nunez-Mendoza v. State, A19A1870 (3/10/20)*

Appellant was convicted of trafficking in methamphetamine. He contended that the trial court erred in denying his motion to suppress. The Court disagreed.

The evidence, briefly stated, showed that investigators came into contact with a confidential source while investigating another case. The confidential source informed the investigators about a Hispanic male known as "Manuel," whom she identified as a supplier of methamphetamine. The investigators had never met or used the confidential source before that day. With the investigators listening in, the confidential source called "Manuel" and requested four ounces of

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methamphetamine. A price was negotiated and “Manuel” agreed to deliver the methamphetamine to a house on Williamsport Dr. The confidential source informed investigators that “Manuel” drove a black Honda and a silver Expedition. One investigator and the confidential source set up at a gas station near the Williamsport Drive address. Another investigator set up a couple of doors down from the address. The confidential source identified the black Honda and the driver as they passed, and the investigator informed the other investigator closest to the house. Less than a minute later, that investigator observed the vehicle pull into the driveway of the house specified by the confidential source. The investigator approached and removed appellant from the vehicle and handcuffed him for officer safety. No one else was in the vehicle. The investigator identified himself and asked appellant his name, to which appellant replied “Manuel.” He then asked appellant if he had any guns or drugs in the vehicle, to which appellant replied that there were no guns but there were drugs in the vehicle. A subsequent search of the vehicle yielded the four ounces of methamphetamine.

Appellant argued that the trial court erred in holding that he was temporarily detained and not arrested at the time he was removed from his vehicle and handcuffed. He further contended that law enforcement lacked probable cause to arrest because the confidential source had no track record from which to determine her credibility. The Court disagreed because the officers had probable cause to arrest.

When probable cause is based, at least in part, upon information supplied by an informant, the State must demonstrate that the information is reliable. There is no rigid test with which to judge the reliability of informant information. Rather, probable cause is determined by the totality of the circumstances surrounding (1) the basis of the informant's knowledge and (2) the informant's veracity or reliability. A deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability. Thus, the Court stated, when, like here, the reliability of a confidential source previously unknown by law enforcement has not been established, that deficiency can be corrected by the corroboration of the information, thereby providing a substantial basis for finding probable cause. But for the corroboration to be meaningful, the corroborating information must include a range of details relating to future actions of third parties not easily predicted or similar information not available to the general public.

And here, the Court found, although the confidential source had no prior history with law enforcement officers from which to establish her reliability, the information she provided was such that the investigators were able to corroborate it in a meaningful way. Specifically, the confidential source identified appellant as a drug supplier by the name of “Manuel”; set up a drug transaction in the presence of the investigators while they listened to the telephone exchange; offered a description of the make and color of appellant's vehicles prior to the scheduled drug transaction; and supplied the exact address of the location where the drugs would be delivered. The investigators were with the confidential source as she personally identified appellant and his vehicle — which matched her prior description — as he passed them en route to the agreed upon destination. And another investigator personally observed appellant, in the vehicle as described, pull into the driveway of the designated residence.

The Court found that this information provided by the confidential source included a range of details related to appellant's future actions that would not have been easily predicted or otherwise available to the general public and were meaningfully corroborated by the investigators; thus, her reliability was sufficiently established. Furthermore, these same facts gave the investigators probable cause to arrest appellant under the totality of these circumstances presented. Therefore, the Court concluded, the trial court did not err in denying appellant's motion to suppress on the basis of an unlawful arrest.

## Immunity from Prosecution; Defense of Self and Others

*State v. Jenkins, A19A2413 (3/10/20)*

Jenkins ("the defendant") was charged with two counts of aggravated assault and one count of possession of a firearm during the commission of a felony. Following his indictment, the defendant filed a motion for immunity from prosecution under OCGA § 16-3-24.2 on the basis that he reasonably believed his actions of shooting two men were necessary to prevent imminent death or great bodily injury to another person. The trial court granted the motion, and the State appealed.

The evidence, very briefly stated, showed that the defendant and two friends —Gwyn and "Mack" — went to a restaurant around 7 p.m. The defendant consumed multiple alcoholic beverages while there, and he socialized with Williams and another patron, Hencely. At one point, Williams and Hencely left the restaurant to race their vehicles; the defendant remained at the bar. Soon thereafter, the men, including Williams's brother —Jackson, who arrived before the race — returned to the bar and continued to drink.

Shortly before midnight, everyone in the group proceeded into the parking lot, where Hencely and Williams began to argue about the race, "scuffling around like they're fighting." Both Jackson and the defendant retrieved hand guns and fired; the defendant shot Jackson and Williams in the leg, and a bullet from Jackson's gun grazed the defendant's shoulder. The defendant and Mack fled in the defendant's truck, and Jackson and Williams went to a nearby hospital, where they received medical treatment and met with a detective.

After the immunity hearing, at which the evidence was highly contested, the trial court granted the motion for immunity, finding that "the [d]efendant was justified in his belief that it was necessary to defend third parties against Mr. Jackson's imminent use of unlawful force. The defendant has met his burden, showing by a preponderance of the evidence, that he is entitled to immunity from prosecution pursuant to OCGA § 16-3-21."

First, the Court addressed the aggravated assault against Jackson. The Court first noted that the trial court resolved the issues of fact and made a credibility determination in favor of the defendant, finding that Jackson was the first person to wield a gun and that he "became aggressive with the firearm, waving it around and pointing it at the two men involved in the fight," notwithstanding conflicting evidence to the contrary. Because there was evidence in the record to support this credibility determination and these factual findings, as well as the court's conclusion that "the [d]efendant was justified in his belief that it was necessary to defend third parties against . . . Jackson's imminent use of unlawful force" the Court stated that it must accept them. Thus, construed in a light most favorable to the trial court's ruling, with respect to the charge of aggravated assault against Jackson, the evidence was sufficient for the trial court to determine that the defendant met his burden of proving that he was entitled to immunity from prosecution pursuant to OCGA § 16-3-24.2.

However, as to the aggravated assault against Williams, the Court found that there was no evidence to support the trial court's grant of immunity as to the charge of aggravated assault against Williams. The undisputed evidence showed that the defendant initially shot at and hit Williams, who was unarmed and standing 20 to 30 feet away from Jackson, who the defendant maintained was wielding the gun. Furthermore, the defendant was not even aware that he shot Williams until a detective so advised him. Notably, the trial court did not make a finding that the defendant was justified in shooting Williams, instead concluding only that "the [d]efendant was justified in his belief that it was necessary to defend third

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parties against Mr. Jackson's imminent use of unlawful force." And the factual findings and credibility determinations that the trial court did make and which the Court is required to accept because they are supported by the record — that Jackson retrieved his gun before the defendant did and then pointed it towards others — did not support a conclusion that the defendant reasonably believed at the time he fired his gun at Williams that his action was necessary to prevent death or great bodily injury to a third person. Accordingly, the Court concluded, the trial court erred by granting immunity to the defendant as to the defendant's charge of aggravated assault against Williams.

Finally, the Court stated, because it reversed the trial court's grant of pretrial immunity as to the aggravated assault charge against Williams, the grant of pretrial immunity as to the charge of possession of a firearm during the commission of a felony must also be reversed.