Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING MAY 15, 2020
Issue 20-20

THIS WEEK:

- **First Degree Vehicular Homicide; Constitutional Challenges**
- **Jury Charges; Cross-Examination**
- **Ineffective Assistance of Counsel; Pretrial Identifications**
- **Jury Charges; Good Character**
- ***Miranda*; Invocation of Right to Remain Silent**
- **Affirmative Defenses; Jury Instructions**
- **Continuances; Motions for New Trial**
- **Ineffective Assistance of Counsel; Statute of Limitations**
- **Spousal Witness Privilege; Rule 503**

First Degree Vehicular Homicide; Constitutional Challenges

State v. Holland, S20A0082 (4/6/20)

Holland was charged under OCGA § 40-6-393 (b) with first-degree vehicular homicide predicated on the offense of hit-and-run. The trial court granted his motion to dismiss, declaring OCGA § 40-6-393 (b) unconstitutional under the equal protection and due process clauses of the federal and state constitutions. The State appealed.

The Court stated that where a criminal statute does not discriminate on racial grounds or against a suspect class, equal protection and due process concerns are satisfied if the statute bears a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory. And here, the Court found, § 40-6-393 does not discriminate on racial grounds or against a suspect class. The Court therefore applied the rational basis test, the most lenient level of judicial review. Under this test, a statute is presumptively valid, such that the claimant bears the burden of proof.

The Court found that maintaining public safety and welfare, including protecting the public while traveling on Georgia's roads and highways, is plainly a legitimate legislative purpose. Consequently, the case turned on whether the statute bears a reasonable relationship to that purpose. The Court found that it does.

The Court noted that before 2008, the crime of first-degree vehicular homicide predicated on hit-and-run included as an element that the defendant's actions in leaving the scene were a contributing cause of the victim's death. See OCGA § 40-6-393 (a) (1999). In 2008, the General Assembly deleted that element. Holland's constitutional challenge asserted that the absence of that element renders the statute irrational, when other versions of first-degree vehicular homicide still include an element of causation as a result of the traffic violation.

The State argued that requiring drivers who cause serious traffic accidents to remain at, or immediately return to the scene, and provide or summon aid, and encouraging this conduct by threatening serious punishment, can decrease the severity

1590 Adamson Parkway, Fourth Floor, Morrow, Georgia 30260 ▪ (770) 282-6300 ▪ www.pacga.org ▪
Facebook: https://www.facebook.com/GAProsecutors ▪ Twitter: https://twitter.com/GAProsecutors
Instagram: https://www.instagram.com/gaprosecutors/
LinkedIn: https://www.linkedin.com/company/prosecuting-attorneys-council-georgia/

of victims' injuries or even save victims' lives. The requirement that drivers stay on the scene and provide identification can also simplify resolution of any related civil claims and conserves law enforcement resources. The Court found that this is a reasonable, and not arbitrary or discriminatory, explanation for subjecting hit-and-run drivers who cause a fatal accident to prosecution for first-degree vehicular homicide, even if the State cannot prove that the failure to comply with the requirements of OCGA § 40-6-270 (a) was a contributing cause of the victim's death. Therefore, Holland failed to show that the General Assembly's determination was irrational. Accordingly, the Court held, the trial court erred in concluding that OCGA § 40-6-393 (b) is unconstitutional on substantive due process grounds.

The Court then addressed whether the statute was unconstitutional on equal protection grounds. The Court stated that an equal protection challenge to a criminal statute is examined under the rational basis test unless the statute discriminates on racial grounds or against a suspect class. An equal protection claimant must establish that he is similarly situated to members of the class who are treated differently from him and that there is no rational basis for such different treatment. In general, for equal protection purposes, criminal defendants are similarly situated if they are charged with the same crime.

Here, the trial court found OCGA § 40-6-393 (b) unconstitutional on equal protection grounds because it treats those charged with first-degree vehicular homicide based on a hit-and-run differently from those charged with first-degree vehicular homicide based on any other singular traffic violation. In particular, although a conviction for first-degree vehicular homicide under OCGA § 40-6-393 (a) requires the State to prove that the defendant caused another's death through the underlying traffic violation, the State does not need to prove that the defendant's act of leaving the scene without fulfilling his obligations under OCGA § 40-6-270 (a) was a contributing cause of the victim's death in order to secure a conviction for first-degree vehicular homicide under OCGA § 40-6-393 (b).

However, the Court found, the trial court's conclusion that those charged with first-degree vehicular homicide based on a hit-and-run are similarly situated to those charged with first-degree vehicular homicide based on another singular traffic violation was probably wrong; the different bases for vehicular homicide criminalize different conduct. Furthermore, the Court found that Holland's equal protection claim failed for essentially the same reason his substantive due process claim failed — he did not show that that the different approach taken in OCGA § 40-6-393 (b) lacks a rational basis when compared to the approaches taken to the other types of vehicular homicide. The same reasons that make the statute rationally related to a legitimate public interest also make the different statutory approach the General Assembly adopted in 2008 reasonable. Accordingly, the Court held, the trial court erred by concluding that OCGA § 40-6-393 (b) is unconstitutional on equal protection grounds.

Jury Charges; Cross-Examination

Hudson v. State, S20A0218 (4/6/20)

Appellant was convicted of malice murder, possession of a firearm during the commission of a felony, and making a false statement. The facts, briefly stated, showed that one afternoon appellant, Allen, and others were sitting in chairs under a tree drinking beer on the outskirts of the parking lot of their employer. There was a discussion about obtaining more beer. In that conversation, Allen said, referring to appellant, "I'm trying to get this mother f**ker to take me to the store." Appellant, instantly angered, responded "I'm not gone be a mother f**ker. You know my mother just died." Allen replied, "Man, leave your momma out of this. You know we're just kidding." A few minutes later, appellant walked to his car,

where he sat talking to his brother on his cell phone. Appellant got out, went to the trunk and "fumbled around" for a short period, and got back in his car. Appellant then returned to his trunk, grabbed a gun, and walked back over to Allen and the others. Upon reaching the group, appellant, while still on the phone, told Allen he would kill him if he did not leave in five minutes; Allen ignored him. Appellant waited five minutes, then kicked Allen out of his chair. At that point, Allen jumped up and appellant took a swing at him; Allen swung back. The two men fought for a few minutes, until two shots were fired and Allen fell to the ground. The first shot missed Allen, but the next hit him in the neck. Appellant said to Allen, "I told you I was gone kill your mf-ing behind if you didn't leave." Appellant then got into his car and drove away.

Appellant contended that the trial court erred in failing to give his requested charge on insanity. He contended the charge was authorized by witness testimony that he was "acting crazy," and testimony that he urinated in a trashcan at the police station. The Court disagreed.

The Court stated that a defendant is presumed to be sane. To establish the affirmative defense of insanity, the defendant must show by preponderance of the evidence that he was legally insane, that is, at the time of the act, omission, or negligence constituting the crime, the person did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence, or that, because of mental disease, injury, or congenital deficiency, he acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime. The delusional compulsion must be one that, if it had been true, would have justified the defendant's actions.

Although the jury heard testimony that appellant was "acting crazy" at the time of the alleged offense and urinated in a trashcan at the police station, there was no evidence that he was legally insane or operating under a delusion. The trial court determined that the testimony merely described appellant as enraged, not criminally insane. And other evidence, including evidence that appellant told his brother where his money was before shooting Allen, lied to police about being at his employer, and turned his back from the cameras while urinating in the trash can, suggested that appellant could tell right from wrong. Thus, the Court concluded, in the absence of any evidence of legal insanity or delusion at the time the crime was committed, the trial court did not err by declining to give the requested jury instruction.

Appellant also argued that the trial court erred and denied him his constitutional right of confrontation when it limited his cross-examination of the investigating detective. Specifically, appellant argued that he should have been allowed to cross-examine the detective about whether the detective asked him if he had any mental conditions or a mental illness that would preclude him from talking to the detective. Appellant contended that the detective's testimony on this point would have been relevant to the defense of insanity because the question was not a question required by the *Miranda* warnings and was an unusual question for an officer to ask. The Court again disagreed.

The only evidence introduced at trial in support of an insanity defense was testimony that appellant was acting "crazy" and urinated in a trashcan. There was no evidence of legal insanity or a mental delusion to warrant a charge on insanity. The Court stated that lay testimony that appellant was acting "crazy," urinated in a trashcan, and was asked an unusual question about mental illness by a police officer does not constitute even slight evidence of legal insanity or a delusion, much less the preponderance of the evidence necessary to establish the affirmative defense. Therefore, the Court held, because the record did not support a conclusion that any additional evidence elicited through the proposed line of questioning would have affected the jury's verdict, any error was harmless.

Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING MAY 15, 2020
Issue 20-20

Ineffective Assistance of Counsel; Pretrial Identifications

Roseboro v. State, S20A0159 (4/6/20)

Appellant was convicted of malice murder and other crimes in connection with the shooting death of Jackson and the aggravated assault of Ellison. The facts, briefly stated, showed that Anderson arranged to buy drugs from Ellison. Jackson drove his car with Ellison in the passenger seat to the meeting place. A grey car was already there. Appellant and Anderson got out of the car and approached the passenger's side of Jackson's car, where Ellison was sitting. While Jackson had his head down, sorting the drugs, appellant shot Jackson in the head and Ellison in the neck.

Appellant argued that his trial counsel was ineffective for failing to move to suppress a photo identification made by Ellison. The record showed that at the motion for new trial hearing, the lead prosecutor in appellant's case testified that she met with Ellison in her office two or three weeks before trial. During the meeting, the prosecutor gave Anderson's cell phone to Ellison and asked Ellison if he recognized anyone other than Anderson in the phone's pictures. The prosecutor never asked Ellison to identify appellant or the shooter in the case, and no conversation occurred while Ellison was looking through the photos stored on the phone. At some point, Ellison showed the prosecutor a photo from the phone that depicted three males, one of whom was Anderson, and identified the "darker-skinned male," whom the prosecutor knew to be appellant, as the shooter. The prosecutor did not say anything in response to Ellison's identification of appellant as the shooter. At the motion for new trial hearing, she testified that she "did not believe this was a photographic lineup" and that she handed Ellison the phone because she was "wondering if he recognized anyone in the phone." She also acknowledged that a third suspect had been in the car with Anderson and appellant on the night of Jackson's murder whom had never been "explored" or "arrested."

The Court stated that when trial counsel's failure to file a motion to suppress is the basis for a claim of ineffective assistance, the defendant must make a strong showing that the damaging evidence would have been suppressed had counsel made the motion. Here, for the identification evidence to be excluded, trial counsel would have been required to demonstrate that (1) the identification procedure used was impermissibly suggestive and (2) there was a substantial likelihood of misidentification. An unduly suggestive procedure is one which leads the witness to the virtually inevitable identification of the defendant as the perpetrator, and is equivalent to the authorities telling the witness, "This is our suspect."

Appellant pointed to the prosecutor's alleged noncompliance with OCGA § 17-20-2, which requires law enforcement agencies to adopt written policies for photo lineups (as well as "live lineups" and "showups"), to argue that the prosecutor showing Ellison photos on Anderson's phone was impermissibly suggestive. However, the Court stated, even assuming that OCGA § 17-20-2 applied here and that the prosecutor failed to comply with it, noncompliance with the statute would not result in the automatic exclusion of Ellison's identification. And although appellant specifically argued that the prosecutor did not read an admonition form to Ellison prior to handing him Anderson's phone; that there was an insufficient amount of "fillers" in the phone's pictures; and that in Ellison's identification photograph, appellant was "the only individual fully framed in the center" of the photo and was "making an obscene gesture," none of those circumstances amounted to an unduly suggestive lineup procedure in which the prosecutor led Ellison to a virtually inevitable identification of appellant as the perpetrator. Indeed, the failure to read an admonition form or the fact that a defendant

1590 Adamson Parkway, Fourth Floor, Morrow, Georgia 30260 ▪ (770) 282-6300 ▪ www.pacga.org ▪
Facebook: https://www.facebook.com/GAProsecutors ▪ Twitter: https://twitter.com/GAProsecutors
Instagram: https://www.instagram.com/gaprosecutors/
LinkedIn: https://www.linkedin.com/company/prosecuting-attorneys-council-georgia/

may appear in multiple photos or be in a different position than other individuals in a photo array does not constitute an impermissibly suggestive lineup.

Therefore, the Court found, appellant failed to show how any action by the prosecutor was unduly suggestive, and would have inevitably led Ellison to identify appellant out of all the phone's pictures. Consequently, the Court concluded, appellant failed to demonstrate that the identification procedure used by the prosecutor was impermissibly suggestive. And it is well established that if the court does not find that the lineup was suggestive then it need not reach the issue of whether there was a substantial likelihood of misidentification. Moreover, because appellant did not make a showing that had a motion been filed, the evidence would have been suppressed, the trial court's conclusion that trial counsel was not deficient was affirmed.

Jury Charges; Good Character

Martin v. State, S20A0273 (4/6/20)

Appellant was convicted of felony murder and other crimes. The record showed that the trial court charged the jury on appellant's good character, as requested by appellant's trial counsel, with language closely tracking the suggested Pattern Charge 1.37.10, Suggested Pattern Jury Instructions, Volume II: Criminal Cases (4th ed.). However, trial counsel also asked that the trial court include in its charge on good character additional language from a note to that charge in the suggested pattern jury instructions, which reads: "*Note: The committee feels the above charge is complete and adequate for the principle of Good Character. However, in view of* State v. Hobbs, 288 Ga 551 (2010) *(pre-new evidence code), in order to be safe consider adding the following*: (Good character is not just a witness credibility issue, nor is it an excuse for crime. However, you may consider it as weighing on the issue of whether or not the defendant is guilty of the charges in the indictment.)" Appellant contended that trial counsel rendered constitutionally ineffective assistance by failing to object to the trial court's decision to not include this additional language in its jury charge on good character. The Court disagreed.

Specifically, appellant contended that—despite the Court's conclusion in *Williams v. State*, 304 Ga. 455 (2018), that a jury charge that was "substantially identical" to the very same jury instruction on a defendant's good character given in this case properly explained how evidence ought to be considered by the jury, and the Court's holding that the instruction did not constitute plain error—trial counsel's duty to her client still required her to object when the trial court did not include in the jury instruction the language in the "note" that referenced *Hobbs*. Appellant argued that the language contained in that note was the only language that could have informed the jury that "good character, in and of itself, is a substantive fact which may raise a reasonable doubt in the mind of the jury." See *Hobbs*, 288 Ga. at 553. But, the Court found, like the defendant in *Williams*, appellant cited to no authority that supported his proposition that the pattern charge is inadequate. Moreover, appellant failed to acknowledge that in *Williams*, the Court distinguished *Hobbs* because it involved an earlier version of the pattern charge and involved a trial court altogether failing to give the pattern jury charge, and that both bases for distinguishing *Hobbs* from *Williams* were true here. Nor did appellant acknowledge more recent cases from the Court. See, e.g., *Jackson v. State*, 305 Ga. 614, 620-621 (825 SE2d 188) (2019) (citing *Williams* to support holding of no plain error in giving pattern charge on defendant's good character without additional language stating that "good character is a substantive fact which itself creates reasonable doubt as to the defendant's guilt"). Thus, the Court concluded, because it was not error for the trial court to give the jury instruction and because deficient performance is not

shown by counsel's failure to raise a meritless objection to a jury charge, appellant's claim of ineffective assistance of counsel failed.

Miranda; Invocation of Right to Remain Silent

Ensslin v. State, S20A0252 (4/6/20)

Appellant was convicted of malice murder and other crimes in connection with the shooting death of Willis. The relevant evidence, very briefly stated, showed that appellant lived with Willis and was dating Malone, who had never met Willis. Appellant shot Willis with a gun he surreptitiously borrowed from Malone, then stole Willis's truck, trailer and two four-wheelers. When the police first questioned appellant, he denied any involvement or knowledge of the murder or thefts. He asked Malone to lie to the police about his whereabouts at the time of the murder and she did.

When appellant was thereafter arrested for the theft of the four-wheelers, he stated he would not talk to GBI agent Farmer, but would talk to Sgt. Morgan from the sheriff's office. Morgan advised appellant of his *Miranda* rights. Appellant then told Morgan that Malone confessed to him that she killed Willis and concocted a story as to how the murder occurred. About 38 minutes into the interview, appellant told Morgan he was done talking and wouldn't say anymore. Morgan then left the interview room and a minute later returned with Agent Farmer. Agent Farmer asked appellant if he wanted to speak to him and appellant said no. Agent Farmer then told appellant that Malone loved him and questioned whether appellant wanted to pass this off on her. Appellant then admitted that he killed Willis, but that he acted in self-defense.

Appellant contended that the trial court erred by ruling that the improper admission at his trial of the statements that the investigators elicited after he invoked his right to remain silent during his last interview was harmless beyond a reasonable doubt. The Court disagreed.

The Court stated that when a person in the custody of law enforcement officers unambiguously and unequivocally invokes his right to remain silent in connection with their investigation, the interrogation must cease immediately. If the interrogation continues after the defendant has invoked his right to remain silent, the admission at trial of his subsequent statements is constitutional error. In deciding appellant's motion for new trial, the trial court correctly ruled that appellant unequivocally invoked his right to remain silent about 38 minutes into his final interview when he said, "You know, that's it. I ain't got nothing else to say. . . . If you're going to charge me, you take me and charge me." Appellant then continued to invoke his right to silence numerous times by repeating that he had nothing else to say, by telling Sergeant Morgan, "No," when asked "You don't want to talk to me anymore?," and by telling Agent Farmer "I don't want to talk to nobody. Like I said, if you're going to charge me, charge me. And let's go." Thus, the Court found, the investigators blatantly violated appellant's constitutional right to remain silent by continuing to interrogate him about Willis's shooting until he admitted killing him.

But, the Court stated, even an error of constitutional magnitude may be deemed harmless if the State can prove beyond a reasonable doubt that the error did not contribute to the verdict, such as when the evidence at issue is cumulative of other properly-admitted evidence or when the evidence against the defendant is overwhelming.

However, appellant argued, the Court should not consider his own testimony in the harmless error analysis because he was compelled to testify by the court's error at trial in admitting the challenged statements. But, the Court found, appellant failed to show that the ruling admitting his statements was the primary factor in his decision to testify. To the contrary, the record showed that appellant likely would have testified even if the challenged statements had been suppressed. Therefore, the Court held, because the record established that appellant likely would have testified even if the challenged statements had been suppressed, his claim that he was compelled to testify by the trial court's error was unsupported and speculative, and thus, the Court could properly consider his testimony in the harmless error analysis.

And here, the Court found, it was clear that the challenged statements were cumulative of appellant's testimony admitting that he killed Willis but claiming self-defense, rendering their admission harmless beyond a reasonable doubt. Furthermore, the Court stated, even if it did not consider appellant's testimony, the other evidence against him was overwhelming. Accordingly, the Court concluded that the trial court's error in admitting the challenged statements at trial was harmless beyond a reasonable doubt.

Affirmative Defenses; Jury Instructions

Pennington v. State, A18A0154 (3/23/20)

Pennington was convicted of trafficking in methamphetamine (OCGA § 16-13-31 (f) (1)) and possession with the intent to distribute a controlled substance near a school (OCGA § 16-13-32.4). The Court of Appeals affirmed his conviction, finding that the trial court did not err by failing to instruct the jury on an affirmative defense to prosecution for possession with intent to distribute near a school, reasoning that Pennington was not entitled to the charge on the affirmative defense because he had not admitted the act. *Pennington v. State*, 346 Ga. App. 586, 591 (3) (2018). The Supreme Court granted certiorari and reversed the Court of Appeals. The Supreme Court held that a "criminal defendant is not required to 'admit' anything, in the sense of acknowledging that any particular facts are true, in order to raise an affirmative defense [and that the Court of Appeals had] erred in affirming the trial court's denial of Pennington's request for a jury instruction on the affirmative defense . . . solely on the basis that Pennington did not admit that he possessed with intent to distribute methamphetamine near a school. *Pennington v. State*, 306 Ga. 854, 855-56 (2019). The Supreme Court then remanded the case back to the Court of Appeals.

The evidence showed that Pennington lived in a shed on property adjacent to an elementary school, less than 100 feet away from the school property. Acting on a tip, and with Pennington's consent, law enforcement officers searched the shed and found what appeared to be an active methamphetamine lab, equipment and substances used in methamphetamine production, traces of methamphetamine residue on a glass pipe and in a used plastic baggie, and numerous empty, unused plastic baggies of a type used in the distribution or storage of drugs.

The Court noted that OCGA § 16-13-32.4 (g) provided an affirmative defense to the offense if "the prohibited conduct took place entirely within a private residence, that no person 17 years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct was not carried on for purposes of financial gain." To authorize a requested jury instruction, there need only be slight evidence to support the charge. And here, the Court found, there was at least slight evidence at trial that 1) Pennington's possession of methamphetamine took place entirely within the shed which was his residence; 2) no minors were present in the shed when Pennington possessed

methamphetamine; and 3) Pennington did not possess methamphetamine for the purpose of financial gain. Thus, because there was slight evidence to support the affirmative defense, the trial court erred in refusing to give this requested charge to the jury. And, the Court concluded, because it could not say that it was highly probable the trial court's failure to instruct the jury on the statutory affirmative defense to the offense of possession of methamphetamine near a school did not contribute to the jury's verdict on that charge, Pennington was entitled to a new trial on this conviction.

Continuances; Motions for New Trial

Robertson v. State, A20A0403 (3/24/20)

Appellant was convicted of terroristic threats and aggravated assault. The relevant facts, briefly stated showed that after trial counsel filed a timely motion for new trial, appellate counsel was appointed on June 21, 2018 and filed an entry of appearance on July 30, 2018. On Feb. 11, 2019 the court set the motion for a hearing on March 5, 2019. Appellate counsel moved for a continuance due to her caseload of 37 active cases. The court denied the motion, but then at the March 5 hearing, after consultation with appellate counsel, continued the hearing until July 9, 2019.

On June 24, 2019 appellate counsel filed a second motion for continuance, again on the ground that she was not adequately prepared — specifically, that "she had not had sufficient time" to identify or hire a private investigator or a medical expert. The Court again denied the motion. On July 9, appellate counsel appeared and asked for "additional time" to obtain an evaluation of her client for PTSD, given that she "ha[d] not had the opportunity to arrange that." Appellate counsel also asked for a sentence modification. After the trial court denied the motion for new trial, appellate counsel noted that she "ha[d] not filed an amended motion for new trial" and that the original motion was "on the general grounds." The trial court agreed with this statement, and the hearing ended.

Appellant contended that the trial court abused its discretion when it denied his second motion for continuance of the hearing on his motion for new trial. The Court disagreed. First, the Court noted, appellate counsel never amended appellant's motion for new trial to include a claim that trial counsel was ineffective for reasons including, for example, failing to investigate appellant's PTSD, as she would have been required to do in order to preserve any such issue. But, even if the trial court had been presented with such a claim, appellate counsel would have been required to offer "'more than mere speculation'" at the hearing on the motion for new trial that a potential witness might have assisted appellant's case at trial.

Second, the record showed that although appellate counsel had been assigned to the case for more than a year, she had not undertaken any significant preparation in appellant's case as of the March 5 hearing, when the first continuance was granted. The trial court was also authorized to conclude that, particularly in light of appellate counsel's agreement to the July 9 hearing date, the circumstances described in appellant's second motion, including a wished-for investigation of his PTSD, did not amount to any material change justifying a continuance. Therefore, the Court concluded, there was no abuse of discretion here. And, the Court added, any issue as to appellate counsel's own performance must await review by a habeas court.

Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING MAY 15, 2020
Issue 20-20

Ineffective Assistance of Counsel; Statute of Limitations

Slack v. State, A19A2091 (3/26/20)

Appellant was convicted of aggravated child molestation, child molestation, and cruelty to children in the first degree. The victim (V. S.) made her outcry when she was 16; she was 17 years old at the time of the trial in 2013. She testified that the criminal acts occurred during 2002 and 2003.

Appellant argued that trial counsel was ineffective in failing to request a jury instruction on the statute of limitation with regard to the child-cruelty charge (Count 3) because the indictment did not include any tolling language as to that count. The Court agreed.

The Court noted that the first two counts of the 2013 indictment, which charged aggravated child molestation and child molestation, alleged certain conduct occurring between September 2002 and December 2003 against V. S., "a child under the age of sixteen (16) years[.]" The third count, however, alleged that, during this same 2002-2003 timeframe, appellant "maliciously cause[d V. S.], *a child under the age of 18*, cruel and excessive mental pain by repeatedly engaging in sexual activity with [her]." (Emphasis added). Because the first two counts alleged conduct against a child under age 16, they invoked the tolling provisions of OCGA § 17-3-2.1 (a). The language of the third count did not invoke the tolling provision, and was subject to dismissal as the indictment was not filed within seven years of the charged conduct. This is so even though the previous two counts included the tolling language.

In criminal cases, the statute of limitation runs from the time of the criminal act to the time of indictment. Where an exception is relied upon to prevent the bar of the statute of limitation, it must be alleged and proved. The State bears the burden at trial to prove that a crime occurred within the statute of limitation, or, if an exception to the statute is alleged, to prove that the case properly falls within the exception.

Thus, the Court stated, because the State did not allege that the statute of limitation for child cruelty was tolled because V. S was under the age of 16, such proof was inadmissible. And, as no exception was alleged in the indictment, the State was incapable of proving an exception to toll the applicable seven-year statute of limitation, as such proof was inadmissible. Thus, even though the evidence at trial was undisputed that V. S. was between seven and eight years old at the time of the abuse, this evidence was inadmissible to prove that the statute of limitation for Count 3 was tolled.

At the motion for new trial hearing, appellant's trial counsel testified that she was generally familiar with tolling provisions, that she believed they should be included in the indictment, that she was unsure whether it was sufficient to allege that the victim was under age 18, and that she had no strategic reason not to request a jury instruction if there was a valid statute of limitation defense. Although decisions of counsel made based on a misunderstanding of the law are not automatically deficient, a defendant can carry his burden of showing deficiency if, under the circumstances, the challenged action cannot be considered a sound trial strategy. And here, the Court found, a reasonable trial counsel would not have made the same strategic decision if she properly understood the law.

As to prejudice, the Court stated that because the State failed to allege tolling as to Count 3, it could not prove it at trial. Thus, the evidence that the child cruelty took place in 2002 and 2003, more than ten years before the indictment was

1590 Adamson Parkway, Fourth Floor, Morrow, Georgia 30260 ▪ (770) 282-6300 ▪ www.pacga.org ▪
Facebook: https://www.facebook.com/GAProsecutors ▪ Twitter: https://twitter.com/GAProsecutors
Instagram: https://www.instagram.com/gaprosecutors/
LinkedIn: https://www.linkedin.com/company/prosecuting-attorneys-council-georgia/

filed, supported a theory that the charge was barred by the seven-year statute of limitation. Had the jury been properly instructed, there was a "reasonable probability" that, but for trial counsel's deficient performance, the outcome of the trial would have been different. Accordingly, the Court reversed appellant's child cruelty conviction.

Spousal Witness Privilege; Rule 503

Morgan v. State, A20A0281 (3/27/20)

Appellant was acquitted of malice murder, felony murder and possession of a knife in the commission of a felony, but convicted of family-violence aggravated assault. The evidence showed that appellant was living with her boyfriend and her three daughters. The couple got into a fight during a party at a third party's house. When they got back to their home, appellant stabbed her boyfriend to death.

Before trial, the State proffered evidence of two prior bad acts in the form of testimony from witnesses including her husband, Antonio. At trial, Antonio invoked the spousal witness privilege codified in OCGA § 24-5-503, and trial counsel objected to the introduction of his testimony concerning appellant's prior bad acts on this basis, but trial counsel affirmatively withdrew the objection later on the ground that both prior acts, which occurred in 2002 and 2003, were before the couple's 2006 marriage.

Appellant argued that her trial counsel was ineffective when he advised Antonio and the trial court that Antonio could not claim the spousal witness privilege. The Court disagreed.

The Court noted that the spousal witness privilege is codified in OCGA § 24-5-503. The spousal witness privilege belongs to the witness spouse, not the accused, such that only the witness spouse can assert or waive the privilege. The privilege is in effect only during a valid marriage and ends with divorce or death. Thus, the Court found, trial counsel misunderstood the law when he concluded that Antonio was not entitled to invoke the spousal privilege. Morgan was not "charged with a crime against" Antonio; on the contrary, the indictments forming the basis of the "proceedings" to which the privilege could apply arose from the 2014 knife attack on the deceased victim, not on Antonio. OCGA § 24-5-503 (b) (2). Further, "[t]he alleged crime" at issue in those proceedings — again, the 2014 knife attack — did not occur "prior to the lawful marriage" of Morgan and Antonio, which occurred in 2006 and had not been terminated by death or divorce by the time of trial. OCGA § 24-5-503 (b) (4). Therefore, the Court found, trial counsel performed deficiently when he concluded that Antonio could be compelled to testify against appellant, his wife, in this criminal proceeding arising from events taking place during their marriage, and when he waived Antonio's claim of the privilege on this basis.

Next, the Court considered whether appellant suffered prejudice as the result of counsel's error. Appellant contended her acquittal on the murder and knife possession charges against her supported her assertion that the evidence that she committed aggravated assault on the deceased victim was not overwhelming. However, the Court found, that contention ignored the facts that appellant had a history, established by contemporaneous witnesses and police reports, of violence toward her romantic partners; that her assaults characteristically involved both calls for assistance from male friends, injuries including bruises and bloody wounds raised by beatings with a deadly weapon and/or bites, and robbery; that she urged her male relatives that they should come to her aid in punishing this victim "before [she] handle[d] it [her]self"; and that she admitted to stabbing the victim. There was no conflict here between the jury's implicit determination that appellant

did not intend to kill the victim and its determination that she did have the intent to assault him with a deadly weapon, and the record did not support an explanation of the assault by anyone but appellant herself. And, appellant did not contest the sufficiency of the evidence against her on appeal.

Furthermore, the record showed that evidence concerning appellant's 2003 attack on a former boyfriend was admitted in the form of testimony from not only Antonio but also his cousin, as well as a contemporary police report. In light of this evidence, the Court concluded that appellant could not show prejudice from trial counsel's error in abandoning Antonio's claim of the spousal witness privilege, which assured the admission of what was merely cumulative evidence and was therefore harmless.