

## THIS WEEK:

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## Motions for Mistrial; Right to Remain Silent

*Bernier v. State, A19A2464 (3/10/20)*

Appellant was convicted of one count each of child molestation and aggravated child molestation. The facts, briefly stated, showed that in the early morning hours of February 1, 2014, at approximately 2:30 a.m., the victim, H. S., awoke to find appellant, her stepfather, in her bed. H. S.'s mother worked the night shift and was not home at the time. H. S. felt appellant kneeling on the mattress, and she believed he had his cell phone out, as she "heard buttons" and "saw flashes." Appellant pulled down H. S.'s shorts and touched the area under her shorts with "his hands and his face." He then pulled up her shorts and tried to turn her over. At that point, she sat up in bed, and appellant "shot up off the bed[.]"

At trial, the State called several witnesses, including H. S. and her mother, both of whom testified that, before H. S. went to bed on the evening of the incident, at approximately 11 p.m., appellant "made" her drink a glass of orange juice before bed. H. S. testified that, when appellant gave her the orange juice, he said it was "a fear factor thing," and was daring her to drink the full glass. H. S. explained that she had not given this information to the police or at her forensic interview because she did not think it was relevant, but she mentioned it later because "every detail, it matters." On cross-examination, she testified that it was an unusual thing for appellant to do, so it "raised an antenna" in her mind.

After H. S. and the mother's testimony, defense counsel moved for a mistrial based on their testimony about appellant giving H. S. orange juice, asserting that it "came completely as a surprise" to the defense. The prosecutor explained that he had only just heard about the orange juice detail the week prior from the mother and H. S., who had reviewed her recorded interview and written a note about the orange juice the day before trial, which the prosecutor immediately provided to defense counsel. The trial court found that the lateness in giving the information to the defense did not change the defense's case in any meaningful way, and denied the motion for mistrial. Further, to the extent that the new

information might affect appellant's decision to testify in his own defense, the court noted that it would give the defense additional time if necessary for him to make his decision.

Appellant testified at trial and presented an affirmative defense of involuntary intoxication. Specifically, appellant contended he had no memory of sexually assaulting H. S. and that such a thing never would have happened had he not been under the influence of Ambien.

Appellant contended that the trial court erred in denying his motion for mistrial after the State's witnesses testified that appellant gave H. S. orange juice on the evening before the incident, and appellant was not given this information until the day before trial. Specifically, appellant contended that the court's ruling — that any harm caused by the testimony could be refuted by appellant testifying that he did not tamper with the orange juice — infringed on his Fifth Amendment right to remain silent. But, the Court found, appellant's argument was belied by the record.

Although the trial court denied appellant's motion for mistrial, it did not do so solely because any harm could be remedied by appellant's testifying in response. The primary reason the court denied the motion for a mistrial was because it did not believe that the lateness of receiving the information about the orange juice affected the defense's position or strategy at trial. Moreover, although the State attempted to imply that appellant had tampered with H. S.'s orange juice, there was no other evidence to support the implication. Thus, the court reasoned that the defense could argue that the State had not proved anything concretely, no matter what the State was implying.

Furthermore, the trial court did suggest that, if appellant chose to testify, he could deny the implication. But the court also stated that if appellant chose not to testify, defense counsel could make the argument in other ways. Appellant would have had to decide whether to testify regardless of when his attorney received the information. When defense counsel suggested that the issue may affect appellant's decision to testify, the trial court stated that it would give the defense additional time for appellant to make his decision. In any event, appellant cited no authority to support his argument that the trial court's ruling implicated his Fifth Amendment rights, or that the orange juice testimony should have been excluded as it might have impacted his decision to testify. To the contrary, the Court found, even if appellant was forced to choose between asserting a defense based upon his own testimony or remaining silent, that is a choice that is inherent in any defendant's decision whether to testify, and does not violate a defendant's constitutional rights. Accordingly, the Court found no reversible error based on the trial court's denial of appellant's request for a mistrial.

## **Record Restriction; Clerks of Court**

*Doe v. State, A19A2378 (3/11/20)*

In 2002, appellant was acquitted of aggravated assault with intent to rape and three counts of child molestation. Thereafter, in 2018, he filed a petition to seal the records of the clerk of court under OCGA § 35-3-37 (m) in which he asserted by way of an affidavit, that he was unable to get employment in his profession as an auto mechanic because the records are publicly available. Following two hearings on the matter, the trial court denied appellant's motion, concluding that he had not shown by a preponderance of the evidence that the public availability of his records resulted in harm to his privacy that clearly outweighed the public's interest in the criminal history record information being available.

The Court noted that pursuant to OCGA § 35-3-37 (m) (2), the trial court must order the clerk of court to restrict the records of the petitioner if the court finds by a preponderance of the evidence that 1) the criminal history record information (CHRI) has been restricted by GCIC and 2) the harm otherwise resulting to the privacy of the individual clearly outweighs the public interest in the CHRI being publicly available. And here, the Court found, although it was undisputed that appellant met the first requirement of OCGA § 35-3-37 (m) (2) because the GCIC had already restricted the record of his arrest for the offenses at issue, he still needed to show by a preponderance of the evidence that the harm resulting to his privacy clearly outweighed the public's interest in the availability of the records in order for the trial court to order their restriction. To satisfy the preponderance-of-the-evidence standard, appellant was required to demonstrate that the superior weight of evidence upon the issues involved, which, while not enough to free the mind wholly from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other.

But, the Court found, the record showed that appellant provided no *detailed* or *specific* information as to the impact his arrest record had on his ability to acquire employment as an auto mechanic—e.g., no dates of his search for employment and no names and addresses of companies to which he had applied. Instead, appellant broadly and vaguely asserted by way of an affidavit that he was "denied many [auto-mechanic] jobs due to [his] record" and that he was hindered in supporting his family "by [his] record" because "the only work [he is] able to get is lawn maintenance and landscaping." And the Court noted, while it was true that appellant did not testify, the blame for this cannot lie solely with the trial court, which obviously dismissed the proffer of testimony because appellant's counsel never indicated that his client would testify in greater detail than the vague statements already contained in the affidavit. Nor did counsel ask that appellant be permitted to testify at the second hearing or proffer any additional details. Finally, appellant did not submit a new or amended affidavit prior to the second hearing so as to provide specific details about his alleged efforts to acquire employment as an auto mechanic.

Thus, the Court concluded, setting aside any lack of supporting documentation from potential employers, which the trial court apparently required, appellant's vague and conclusory affidavit was the only evidence he submitted, and it lacked sufficient detail and specificity to meet the burden of showing by a preponderance of the evidence that his privacy interests clearly outweighed the public's interest in the records. Accordingly, the trial court did not abuse its discretion in denying appellant's motion.

## **Accomplices; Jury Instructions**

*McFadden v. State, A19A2035 (3/11/20)*

Appellant was convicted of two counts of cruelty to children in the first degree, two counts of aggravated battery, aggravated assault, and two counts of giving a false name, address, or date of birth. The evidence showed, in part, that the mother of the two-year-old victim was in a contentious relationship with appellant.

Appellant argued that the trial court committed plain error by failing to charge the jury on the law requiring corroboration of accomplice testimony because there was at least slight evidence that the mother was his accomplice, and thus, her testimony was not sufficient absent corroboration to establish a fact. The Court disagreed.

The Court found that the trial court instructed the jury that "[t]he testimony of a single witness, if believed, is sufficient to establish a fact. Generally, there's no legal corroboration requirement of a witness, provided you find the evidence to be sufficient." Under OCGA § 24-24-8, however, if "the only witness is an accomplice, the testimony of a single witness shall not be sufficient [though] corroborating circumstances may dispense with the need for the testimony of a second witness[.]" Appellant did not request that the accomplice-corroboration charge be given to the jury, nor did he object to its omission.

The Court noted that in *Vasquez v. State*, 306 Ga. 216, 229-231 (2) (c) (2019), the Supreme Court determined that because the defendant had made a tactical choice to argue that the later-alleged accomplice was the sole perpetrator of the crimes, the defendant had intentionally relinquished his right to an accomplice-corroboration instruction and could not establish plain error. And here, the Court found, although there was slight evidence that appellant and the mother could have had an accomplice relationship, defense counsel testified at the motion for new trial hearing and explained that the strategy she and appellant pursued was that appellant was not involved in causing the victim's injuries or in covering up any crime in any capacity. His theory of the case was that the mother was solely responsible for the child's injuries and that the mother was not a credible witness, as established by the multiple statements she gave to police, including repeatedly lying about the reasons for her first visit to the hospital. Accordingly, the Court held, like the defendant in *Vasquez*, appellant intentionally relinquished the right to have the accomplice-corroboration instruction presented to the jury, and therefore, appellant could not establish plain error.

## Search & Seizure; Window Tint Violations

*State v. Williams*, A19A1893, A19A1894 (3/12/20)

Williams and Jones ("defendants") were charged with multiple counts of VGCSA as a result of a traffic stop. Both defendants moved to suppress the evidence and after the court granted the motion, the State appealed. Very briefly stated, the evidence showed that an officer observed a Mercedes travelling in the same direction as his patrol vehicle. The officer "noticed [his] reflection in the mirror — the windows of [his] patrol car," which told him "[t]hat the window tint was too dark." The officer slowed down and got behind the Mercedes, which immediately turned into the entrance of a local airport and then turned around to go back in the opposite direction away from the airport. However, the officer continued watching the Mercedes and because the Mercedes brake lights kept coming on, the officer suspected that the Mercedes was looking for a place to turn around again. So the officer waited and as he predicted, in a couple of minutes, the Mercedes returned, travelling in the same direction as when the officer first observed the vehicle. The officer conducted a traffic stop. When the driver rolled down his window, the officer smelled raw marijuana. A subsequent search revealed various amounts of controlled substances.

The State argued that the trial court erred by granting the defendants' motions to suppress. The Court agreed. To justify a traffic stop, an officer must have an articulable suspicion of wrongdoing. An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. A traffic offense provides the necessary facts for such reasonable suspicion, and when an officer witnesses a traffic offense, a resulting traffic stop does not violate the Fourth Amendment, regardless of the officer's motives for initiating the stop. Thus, the Court stated, an officer's belief that a suspect's window tint violates OCGA § 40-8-73.1 is sufficient to justify an investigatory stop, even if the officer later determines from a field test that the window tint did not in fact violate the statute. And here, the trial court found that the officer testified that he stopped the vehicle "based on a supposed window tint violation as codified in OCGA

§ 40-8-73.1 (b)" and that the officer testified that he "could see himself in the window's reflection." Therefore, the Court concluded, these findings were sufficient to justify the traffic stop.

Furthermore, the Court found that the trial court also erred by suppressing the evidence based on its determination, pursuant to OCGA § 40-8-73.1 (c) (6) (D) that "there was no credible evidence that the window tint was placed on this vehicle after being delivered by the manufacturer." But, the Court stated, this exception does not require that police determine whether the windows were darkened before factory delivery or as permitted by federal law before stopping a vehicle for a window tint violation, nor does it mean that an officer's failure to do so requires suppression of evidence found during a search subsequent to such a stop based on a lack of probable cause. Accordingly, the trial court erred by granting the defendants' motion to suppress.

## **Obstruction of a Law Enforcement Officer; Criminal Trespass**

*Tisdale v. State, A19A2109 (3/12/20)*

Appellant was convicted of misdemeanor obstruction of a law enforcement officer, but acquitted of felony obstruction and criminal trespass. The facts, very briefly stated, showed that appellant was a "citizen-journalist" who attended candidate debates, meet and greets, and other events held for candidates running for political office. Appellant video recorded and posted the events, unedited and without commentary, onto her website and other social media platforms.

In 2014, she attended a political rally for several candidates for office which was held at a privately owned farm. Appellant introduced herself to an owner, explained her purpose for being there and then sat on the front row and filmed without incident. However, when one speaker complained to an event organizer, a staffer came up to appellant and asked her to stop filming. Appellant responded that she had permission from the owner and continued recording. A captain with the sheriff's office then told appellant that the property owner had requested that she stop filming or leave the farm. When appellant responded, "no," the captain informed her that her third option was to go to jail. After appellant still failed to comply, the captain grabbed appellant out of her seat and forcefully removed her from the venue and she was subsequently arrested.

Appellant contended that the trial court erred by denying her motion in arrest of judgment because the indictment failed to allege the commission of a crime. Specifically, she argued that because the indictment did not allege that the captain "properly identified" himself as a representative of the property owner, and further accused her only of refusing the captain's "request" (as opposed to command) to leave the property, she could admit to each allegation it contained and not be guilty of a crime. The Court disagreed.

The indictment accused appellant of "knowingly and willfully obstructing and hindering [the captain] in the lawful discharge of his official duties by refusing to leave . . . when asked to do so by [the captain], who was an authorized representative of the property owner in making that request. . . ." Thus, the Court found, an admission by appellant to the conduct alleged is an admission to the essential elements of the crime of misdemeanor obstruction of an officer. Furthermore, it was within the province of the jury to determine whether the captain properly identified himself as a law enforcement officer or representative of the property owners and/or whether he sufficiently communicated his instructions to appellant. Finally, the Court noted, nothing in the criminal trespass statute, OCGA § 16-7-21 (b) (3), requires that a

property owner or his or her authorized representative command - as opposed to request - that an unwanted guest depart in order for the crime to be committed when the guest refuses to do so. Therefore, the Court concluded, the trial court did not err in denying appellant's motion in arrest of judgment.

Appellant also argued that the trial court committed plain error by instructing the jury that it was not required to find her guilty of criminal trespass at the time the captain asked her to leave. The Court again disagreed. Georgia law is well established that it is not necessary for the State to prove the underlying offense that causes the officers to act; it is only necessary to prove the elements of the obstruction statute, i.e., that the act constituting obstruction was knowing and willful, and that the officer was lawfully discharging his official duties. The charge, therefore, was not erroneous and the trial court did not commit plain error by giving it.

## **DUI; Rule 417**

*State v. Johnson, A19A2320 (3/12/20)*

On Feb. 7, 2015, Johnson was arrested for DUI (less safe) and refused to submit to the State-administered testing that was requested. While that case was pending, Johnson was pulled over again on November 10, 2015. He was arrested for DUI (less safe) and again refused to submit to the State-administered testing that was requested. In both of these cases, the State sought to introduce a prior DUI arrest by filing a notice of intent to produce other act evidence pursuant to OCGA §§ 24-4-404 and 24-4-403, as well as a separate notice of intent to introduce other act evidence pursuant to OCGA § 24-4-417. Specifically, the State sought to introduce a 2010 arrest for DUI (less safe), which resulted in Johnson pleading guilty to reckless driving in 2012. Following a single hearing on all notices, the trial court, relying on *Olevik v. State*, 302 Ga. 228 (2017), refused to permit introduction of the prior 2010 DUI arrest under either OCGA §§ 24-4-417 or 24-4-404. The State appealed.

The State first contended that the trial court erred in refusing to admit the prior 2010 arrest pursuant to OCGA § 24-4-417 on the ground that the Georgia and United States Constitutions prohibit its admission. The Court agreed.

The Court found that *Olevik* and *Elliott v. State*, 305 Ga. 179 (2019) make clear that evidence of a defendant's invocation of the right against self-incrimination by refusing to consent to a State-administered breath test is inadmissible. But, neither the United States nor Georgia Supreme Courts have found admission of a refusal to consent to blood testing to implicate the right against self-incrimination. Accordingly, such evidence is not constitutionally inadmissible. Also, *Olevik* and *Elliott* concern a defendant's constitutional right not to incriminate himself or herself, rather than the constitutional right to be free from unreasonable searches and seizures. Although DUI cases often involve questions concerning a defendant's rights under the Fourth Amendment or Paragraph XIII, especially concerning the ability of the State to obtain a non-consensual breath or blood sample, these questions are wholly separate from a defendant's constitutional right to avoid self-incrimination.

Thus, the trial court properly concluded that evidence of Johnson's refusal to submit to a State-administered breath test was inadmissible, but then improperly failed to analyze whether evidence of the existence of the arrest and other attendant circumstances were otherwise admissible pursuant to OCGA § 24-4-417. Additionally, the trial court incorrectly found that the Georgia and United States Constitutions preclude admission of Johnson's refusal to submit to blood testing.

Accordingly, the Court held, because the trial court failed to perform the legal analysis required in this context, the trial court's refusal to admit evidence of the prior DUI pursuant to OCGA § 24-4-417 was vacated and remanded for a hearing and a ruling based on a proper analysis and relevant findings.

Next, the State contended that the trial court abused its discretion by denying its motion to offer evidence of the prior DUI arrest pursuant to OCGA § 24-4-404. The Court again agreed.

Although the trial court also excluded evidence of Johnson's prior DUI arrest pursuant to OCGA § 24-4-404, the Court found that it was clear that the trial court did so solely on the incorrect basis that admission of the evidence was unconstitutional without considering the applicability of Rule 404 or conducting the relevant three-factor test. While the abuse-of-discretion standard presupposes a range of possible conclusions that can be reached by a trial court with regard to a particular evidentiary issue, it does not permit a clear error of judgment or the application of the wrong legal standard. Accordingly, the Court vacated the trial court's refusal to admit the evidence pursuant to OCGA § 24-4-404 and remanded the case to the trial court for reconsideration on this issue as well.

## **Jury Deliberations; Notes from Juries**

*Murphy v. State, A19A2105 (3/13/20)*

Appellant was convicted of third-degree forgery (OCGA § 16-9-1 (d)) and theft by taking. During its deliberations, the jury sent the trial court a note that stated: "11-1 guilty on both counts. At an impasse. Suggestions[?]" The trial court informed counsel and appellant of the note and paraphrased its contents. The trial court and counsel discussed the trial court's intended response and after receiving counsel's input, the trial court instructed the jury to continue deliberations.

Appellant argued that the trial court violated his right to counsel by failing to "divulge in full" the note's contents, specifically the eleven-to-one vote split. And, because he did not make this objection to the trial court he argued that the trial court's actions constituted plain error.

The Court stated that the failure of the trial court to inform counsel of the contents of a jury note and to seek comment or input in the formulation of the court's response constitutes a violation of a defendant's right to counsel. A trial court must have jurors' communications submitted to the court in writing; mark the written communication as a court exhibit in the presence of counsel; afford counsel a full opportunity to suggest an appropriate response; and make counsel aware of the substance of the trial court's intended response in order that counsel may seek whatever modifications counsel deems appropriate before the jury is exposed to the instruction.

But the numerical division between guilt and innocence during a jury's deliberation is not normally available to a defendant and a trial court may omit that information when informing counsel of the contents of a jury note. Thus, assuming without deciding that plain-error review applies to this type of challenge, the Court found no obvious error because the trial court communicated the substance of the note to counsel, informed counsel of his intended response, expressly sought comment and input from counsel, incorporated that input into the response ultimately given to the jury, and later marked the jury note as an exhibit and put it into the record.

## Mistrials; Manifest Necessity

*Brown v. State, A19A2359 (3/13/20)*

Appellant, Jasmine Brown, was charged with two counts of battery and four counts of reckless conduct. At the outset of the jury trial, defense counsel invoked the rule of sequestration, and the trial court instructed any witnesses in the case to leave the courtroom. The State then presented its case-in-chief and rested. As the defense prepared to call its two witnesses, who were located in a conference room adjacent to the courtroom, the judge indicated that the door to the conference room had not been closed. The judge sent the jury to the jury room, brought the two defense witnesses into the courtroom, and asked them how long they had been in the conference room. Both witnesses indicated that they had been in the room approximately two hours. The judge asked if they had been able to hear her voice from the conference room. One of the witnesses said, "A little, but I wasn't paying attention." And the other witness replied, "It goes, but it wasn't clear." The judge then asked the prosecutor if she had a motion. The prosecutor did not make a motion, but she said that there was a question about whether the rule of sequestration had been violated and noted that one of the witnesses was also charged with offenses arising out of the alleged altercation. When the prosecutor continued discussing that witness, the trial judge cut her off and sua sponte declared a mistrial.

Appellant subsequently filed a plea in bar, claiming that the trial judge had improperly declared a mistrial and thus any subsequent prosecution of the case against her is barred by double jeopardy. After a hearing, the trial judge denied the plea in bar.

Appellant contended that the trial court erred in denying her plea in bar because the double jeopardy provisions of the federal constitution, the Georgia Constitution, and the Georgia Code prohibit another trial on the same charges after the mistrial. In a 2-1 decision, the Court agreed.

The Court stated that protection against double jeopardy recognizes the valued right of a criminally accused, once her jury has been sworn and impaneled and thus jeopardy has attached, to have her trial proceed to acquittal or conviction before that tribunal. The trial judge, therefore, must always temper the decision whether or not to abort a trial by considering the importance to the defendant of being able, once and for all, to conclude her confrontation with society through the verdict of a tribunal she might believe to be favorably disposed to her fate. For these reasons, to avoid barring a second trial, the court may declare a mistrial without a defendant's consent or over her objection only when taking all the circumstances into consideration, there is a manifest necessity for doing so, which means a high degree of necessity.

Here, the Court found, there was no showing that the State's right to a fair trial was prejudiced by the alleged violation of the rule of sequestration. In fact, the Court stated, there was no evidence that the rule was actually violated. The record showed only that at some point the two defense witnesses could hear the judge's voice from the conference room. But there was no evidence of any specific testimony that was overheard, no evidence as to what the two defense witnesses' own testimony would have been, and no showing that their testimony would have been shaped to match the testimony of others. Thus, under these circumstances, the Court found that declaring a mistrial was an inappropriate sanction.

Furthermore, the Court stated, even assuming that the trial judge was authorized to infer that the two defense witnesses could have heard testimony from the witness stand, there still was no evidence of any prejudice to the State from any presumed overhearing of testimony. In other words, there was no evidence showing that either of the defense witnesses would have changed their testimony to match that of other witnesses. Absent such prejudice, there was no manifest necessity for the judge's sua sponte declaration of a mistrial. Instead, the trial court should have chosen an intermediate option, such as allowing cross-examination of the witnesses regarding the possible violation and instructing the jury that a violation of the rule should be considered in evaluating their credibility. Accordingly, because the extreme and unnecessary sanction of a mistrial was improperly declared, the Court reversed the judgment of the trial court denying appellant's plea in bar on grounds of double jeopardy.

## **Criminal Contempt; Summary Proceedings**

*In re Adams, A19A1723 (3/13/20)*

Attorneys Adams and Khansari represented Jasmine Brown at her criminal trial. At the outset of the jury trial, defense counsel invoked the rule of sequestration, and the trial court instructed any witnesses in the case to leave the courtroom. The State then presented its case-in-chief and rested. As the defense prepared to call its two witnesses, who were located in a conference room adjacent to the courtroom, the judge indicated that the door to the conference room had not been closed. The judge sent the jury to the jury room, brought the two defense witnesses into the courtroom, and asked them how long they had been in the conference room. Both witnesses indicated that they had been in the room approximately two hours. The judge asked if they had been able to hear her voice from the conference room. One of the witnesses said, "A little, but I wasn't paying attention." And the other witness replied, "It goes, but it wasn't clear." The judge then asked the prosecutor if she had a motion. The prosecutor did not make a motion, but she said that there was a question about whether the rule of sequestration had been violated and noted that one of the witnesses was also charged with offenses arising out of the alleged altercation. When the prosecutor continued discussing that witness, the trial judge cut her off and sua sponte declared a mistrial.

After the jury left, the trial judge summarily held Adams and Khansari in direct contempt of court based on her findings that the two witnesses had violated the judge's order of sequestration and that the attorneys were responsible for such violations. After announcing her holdings of contempt, the judge denied Adams' request that both he and Khansari be afforded a hearing at a later date and representation by counsel. Instead, the judge gave the attorneys an opportunity to make a statement regarding her finding of contempt, and after both Adams and Khansari denied being in contempt, the judge reiterated her earlier holding and fined each of them \$175.

Appellants contended that the trial court's summary contempt proceeding violated due process. In a 2-1 decision, the Court agreed.

The Court stated that in determining whether an alleged contumacious act was committed in the presence of the court for the purpose of imposing summary punishment, the Supreme Court has stressed the importance of confining summary contempt orders to misconduct occurring in court. Where misconduct occurs in open court, the affront to the court's dignity is more widely observed, justifying summary vindication. In this regard, although OCGA § 15-1-4 (a) (1) provides that a court may impose summary punishment for alleged contemptuous conduct committed so near to the presence of

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the court as to obstruct the administration of justice, it has held that this statement must yield to the fundamental constitutional right to due process of law. Thus, typically, an alleged contumacious act may only be said to have occurred in the presence of the court, warranting summary contempt proceedings, if the act was committed in open court.

On the other hand, where the alleged contumacious acts are committed outside the court's presence, the considerations justifying expedited procedures do not pertain. Thus, summary adjudication of indirect contempt is prohibited, and due process requires that a person who is tried for indirect criminal contempt is entitled to more normal adversary procedures. Among other things, he or she must be advised of charges, have a reasonable opportunity to respond to them, and be permitted the assistance of counsel and the right to call witnesses.

And here, the Court found, the alleged conduct was committed outside the judge's presence and required extensive findings of fact to determine exactly what each attorney did or did not do with regard to sequestering the witnesses; to determine whether either of the two defense witnesses actually heard testimony of other witnesses from the conference room, and if so, precisely what testimony was heard; and to determine if there was in fact a violation of the sequestration order, and if so, whether either or both attorneys had any knowledge of it. Thus, summary adjudication was improper and due process required that each attorney's contempt hearing be conducted by another judge. Accordingly, the findings of contempt against them was reversed.

Appellants also contended that the evidence was insufficient to support their convictions. In a 2-1 decision, the Court again agreed.

The Court stated that criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. To prove a criminal contempt, there must be proof beyond a reasonable doubt not only that the alleged contemnor violated a court order, but also that he did so willfully.

And here, the Court found, the evidence was insufficient to support their convictions. The record showed at most that the two witnesses could hear the judge's voice at some point while they were in the conference room, although there is no evidence that any particular comments by the judge were in fact heard by either of the witnesses. Moreover, there was no evidence that they heard the testimony of any other witnesses. Even if a rational trier of fact could infer from the fact that the two witnesses could hear the judge's voice that they also could have possibly heard the voices of testifying witnesses, there was no evidence as to any specific testimony that was actually overheard and certainly no evidence that the defense witnesses heard anything that would have shaped their own testimony or resulted in fabrication and collusion. Indeed, there was not even any evidence as to what the two defense witnesses own testimony would have been. Thus, the Court held, because there was not evidence beyond a reasonable doubt that the defense witnesses violated the order of sequestration directed toward them and the other witnesses, appellants could not be found in contempt beyond a reasonable doubt for being responsible for such a purported violation.

And, the Court further found, even if there was sufficient evidence that either of the two defense witnesses had violated the order of sequestration, there was not evidence beyond a reasonable doubt that either appellant willfully assisted or was otherwise responsible for any such violation. At most, the record showed that both attorneys knew that their two witnesses were in the conference room and that Adams had directed the defense witnesses there for sequestration in order to separate them from the State's witnesses (the underlying criminal case arose out of a confrontation between two groups of people).

But there was no evidence that either attorney knew of any trial testimony being overheard by their witnesses. In short, the Court concluded, there simply was not evidence beyond a reasonable doubt that either appellant willfully violated the sequestration order. Accordingly, the trial court's judgment finding them in contempt was reversed.

## **Service Dogs; Excluding Public from Courtroom**

*Jones v. State, A19A2224 (3/13/20)*

Appellant was convicted of three counts each of sodomy and sexual battery, two counts of aggravated sodomy, and one count of battery arising from five separate incidents involving college-aged men. Appellant contended that the trial court erred in allowing a service dog to accompany O. Y., one of appellant's victims, while he testified because the dog's presence generated sympathy in the jury, which prejudiced his defense. The Court disagreed.

The Court stated that the use of service animals for witnesses with mental, psychological, or emotional conditions appeared to be a matter of first impression in Georgia. A trial court has the responsibility under OCGA § 24-6-611 (a) to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to: (1) make the interrogation and presentation effective for the ascertainment of the truth; (2) avoid needless consumption of time; and (3) protect witnesses from harassment or undue embarrassment.

Georgia has long recognized that a trial court is vested with considerable discretion in its conduct of court proceedings. This considerable discretion includes discretion to make reasonable accommodations for the comfort and care of witnesses with special needs. Although Georgia courts have not addressed this issue, the Court noted that other states have held that it is in within a trial court's discretion to permit a witness to use a service animal.

And here, the Court found, the trial court investigated the matter outside the jury's presence and took evidence on the witness's condition, the need for the service animal, and the service animal's training. The court also consulted with counsel to employ procedures designed to minimize the dog's presence and visibility to the jury. Under these circumstances, the Court found that the trial court acted within its discretion in allowing O. Y.'s dog to accompany him during his testimony. Moreover, the Court found, appellant failed to show that he was harmed by the trial court's decision. Given the procedures the trial court followed to minimize the dog's presence, the Court stated that it could not assume that the dog had any impact on the jurors, much less that it engendered sympathy in them for O. Y.

Appellant also contended that the trial court created structural error when the State's victim's advocate prevented members of the public from entering the courtroom during the testimony of C. B., another victim. The record showed that during C. B.'s testimony, defense counsel informed the trial court that some people had been excluded from the courtroom, and the trial court conducted an inquiry into the matter. The record reflected that three interns from the public defender's office had entered the courtroom during C. B.'s testimony when a victim's advocate employed by the district attorney's office tapped them on the shoulder and asked them to step outside, which they apparently did. The advocate told the interns that C. B. had expressed concern about having too many people in the courtroom while he testified. When one of the interns asked whether it was an open courtroom, the advocate agreed that it was and told them that it was their choice whether to go back into the courtroom. The interns later chose to return to the courtroom. After questioning the advocate,

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the trial court admonished her that it is inappropriate to restrict access to the courtroom without first bringing the issue up before the trial court and counsel.

The Court stated that it is a well-established principle that the improper closure of a courtroom is a structural error that must be remedied even without any showing of direct harm. Here, however, the courtroom was never closed to anyone; rather, three interns exited the courtroom voluntarily at the advocate's request. In speaking with the interns, the advocate acknowledged that it was an open courtroom and that they could re-enter it at will, which they did. Under these circumstances, the Court found that the courtroom was not improperly closed and thus no constitutional violation occurred.