

THIS WEEK:

- **Indictments; Jury Charges**
- **Theft by Receiving; Sufficiency of the Evidence**
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- **Statute of Limitations; Ineffective Assistance of Counsel**
- **Search & Seizure; Search Warrants**
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- **Affirmative Defenses; Jury Charges**
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- **Jury Charges; Ineffective Assistance of Counsel**

Indictments; Jury Charges

Mitchell v. State, A20A0754 (4/21/20)

Appellant was convicted of two counts of first-degree vehicular homicide (Cts. 3 & 5), as well as one count each of hit-and-run (Ct. 4), reckless driving (Ct. 6), and duty upon striking an unattended vehicle (Ct. 7). She argued that the 15-year felony sentence imposed for the first-degree vehicular homicide offense (Count 3) was void because the indictment charged the lesser misdemeanor offense of second-degree vehicular homicide. Specifically, appellant argued that the indictment failed to allege the element of knowledge for the predicate offense of hit-and-run under OCGA § 40-6-270 (b), as required for first-degree vehicular homicide under OCGA § 40-6-393 (b). The Court disagreed.

Count 3 of the indictment charged appellant “with the offense of HOMICIDE BY VEHICLE IN THE FIRST DEGREE in violation of [OCGA] 40-6-393 (b) for the said accused person, ... while driving a motor vehicle, to wit: a 2013 Lexus RX350, on Arizona Avenue, did, without malice aforethought, cause an accident which caused the death of [the victim], a human being, through a violation of [OCGA] § 40-6-270 (b), Hit and Run, as alleged on Count Four[.]”

The Court stated that an indictment is sufficient when it tracks the language of the applicable provision of the vehicular homicide statute, OCGA § 40-6-393 (b), which itself cites OCGA § 40-6-270 (b) without setting out all of the elements of hit and run, and it describes the circumstances of the crime. Here, because Count 3 of the indictment tracked the statutory language of OCGA § 40-6-393 (b), with a cite to the underlying hit-and-run statute of OCGA § 40-6-270 (b) and description of the circumstances surrounding the vehicular homicide incident, it was sufficient to set forth the first-degree vehicular homicide offense. And because the trial court’s imposition of a 15-year felony sentence fell within the statutory range prescribed by OCGA § 40-6-393 (b), it was proper.

Next, appellant argued that the trial court erred in failing to give her requested charge on the sole defense of accident. She contended that the accident defense applied to the first-degree vehicular homicide charge in Count 5 and the reckless driving charge in Count 6 of the indictment. Again, the Court disagreed.

The Court noted that appellant's first-degree vehicular homicide and reckless driving charges are strict liability offenses, meaning that they can be committed without a culpable mental state. A jury charge on the defense of accident to a strict liability traffic offense is available only where there is evidence, however slight, that the defendant did not voluntarily commit the prohibited act. The defense must be based on evidence that the prohibited act was committed involuntarily, for example, because of an unforeseeable physical ailment or external force.

Appellant contended that she presented at least slight evidence raising the defense of accident through the testimony of her expert in accident reconstruction. Her expert testified that appellant had put the car in reverse and started to come out of the parking space, but that it was "unintentional" for the car to come out in the manner in which it did. Appellant's expert nevertheless conceded that he did not know "if there was something going on with [appellant's] car" at the time of the incident and that none of the reference materials he relied upon indicated any sudden acceleration problems with appellant's vehicle.

The Court stated that although an expert may testify to his opinion, when the basis of his opinion is given and it appears that it is wholly speculative or conjectural, it must follow that his opinion is without foundation and has no probative value. Speculation and conjecture by an expert is still speculation and conjecture, and will not support a verdict. Therefore, the Court concluded, because there was no evidence supporting a theory that the car operated involuntarily, appellant's expert's suggestion was wholly speculative and was insufficient to give rise to a jury charge on accident.

Theft by Receiving; Sufficiency of the Evidence

Newsome v. State, A20A0276 (4/24/20)

Appellant was convicted of armed robbery, aggravated assault, possession of marijuana with intent to distribute, possession of marijuana less than an ounce, and theft by receiving stolen property (a handgun).

The evidence, briefly stated, showed that the victim asked one of appellant's codefendants to sell him some marijuana. The codefendant got into the victim's passenger seat and instructed to victim to drive to another location where appellant and a second codefendant got into the backseat of the victim's car. Appellant then pointed a gun at the victim and robbed him. Appellant and his two codefendants ran to another vehicle driven by appellant's third codefendant. The victim still had his cell and followed the fleeing vehicle and called 911. An officer heard the report, spotted the fleeing vehicle and stopped it. The handgun was found lying in plain sight on the console between the front seats.

Appellant argued that the evidence was insufficient to show he knew or should have known that the gun was stolen. The Court agreed.

Here, the owner of the handgun testified that on July 5, 2015, she reported that her handgun had been stolen from her storage facility. She also testified that she had not given anyone permission to take her handgun. The robbery occurred almost a year later in June 2016. Although the victim placed the gun in appellant's possession and control during the

robbery and also identified the weapon at trial, there was no evidence offered as to whether appellant knew or should have known that the gun was stolen. Thus, the Court found, while the evidence showed appellant's possession of a gun that had been stolen, the State failed to establish additional circumstances from which a jury could have inferred that appellant knew or should have known that the gun was stolen. Consequently, the Court concluded, because there was no evidence of appellant's knowledge of the provenance of the handgun, the evidence was insufficient to enable a rational trier of fact to find appellant guilty beyond a reasonable doubt of theft by receiving stolen property.

Rape Shield Statute; Manifest Necessity for Mistrial

Chisholm v. State, A20A0312 (4/24/20)

Appellant was charged with rape and aggravated sodomy. At trial, defense counsel argued during his opening statement that the sexual interaction between appellant and the victim was consensual. The victim testified that on January 19, 2017, when she was 16 years old, she was walking home in the evening when appellant, an adult neighbor, approached her. Appellant suggested that the two take a shortcut through a ditch-like path, and the victim agreed, despite feeling uncomfortable. Appellant asked her “a lot of questions,” which she answered, but she began to feel apprehensive when he stopped her in a secluded area. The victim testified that appellant then kissed her, had her lay on the ground on his shirt, held her down by her wrists so that she couldn't move, covered her mouth with his hand, and penetrated her with his penis against her will.

On cross-examination, defense counsel asked the victim if they had discussed things of a sexual nature while on the street. When the victim said “yes,” defense counsel then asked, “He mentioned — asked if you were a virgin for example. Correct?” The victim again said yes, to which defense counsel asked, “And you told him no?” The prosecutor immediately objected and moved for a mistrial. Defense counsel requested curative instructions. The court considered the matter and granted the mistrial. Thereafter, appellant filed a plea of former jeopardy, which the court denied.

Appellant first contended that the trial court erred by denying his plea of former jeopardy because his cross-examination of the victim did not violate the Rape Shield Statute codified in OCGA § 24-4-412 (a) (2018). The Court disagreed. The Court found that the Rape Shield Statute barred defense counsel's question about the victim's “nonchastity” because it related to her past sexual behavior, and it did not fall within the single statutory exception set forth in OCGA § 24-4-412 (b) (2018) because it did not “directly involve the participation of the accused.” The Court further found appellant's argument that the question was admissible for other purposes, including impeachment, credibility, and evidence of motive and state of mind of both the victim and appellant was meritless because if evidence of the witness's past sexual behavior falls outside the scope of the sole statutory exception contained in the former Rape Shield Statute, it is inadmissible, and appellate courts cannot write additional exceptions into the statutory framework.

Next, appellant contended that the trial court erred by denying his plea of former jeopardy because there was no manifest necessity to declare a mistrial and that limiting instructions would have cured any violation of the Rape Shield Statute. The Court again disagreed. The Court stated that it, the Georgia Supreme Court, and the Eleventh Circuit have held that the introduction of evidence prohibited by the Rape Shield Statute gives a court grounds to find manifest necessity for a mistrial. Furthermore, a single unanswered question by defense counsel about the victim's sexual history may alone give rise to the manifest necessity for a mistrial.

And here, the Court noted, after concluding that defense counsel's question to the victim was improper, the trial court initially proposed giving the jury a curative or limiting instruction. Only after hearing argument, recessing to research the issue and to give counsel the opportunity to do the same, and receiving additional research, did the trial court decide to grant the mistrial, rejecting any possible alternative. Given the nature of the question, defense counsel's suggestion that the victim told appellant that she was not a virgin, the prejudice to the State's case, the trial court's careful consideration of the law, facts, and possible alternatives, the Court found no abuse of the trial court's broad discretion in declaring a mistrial.

Statute of Limitations; Ineffective Assistance of Counsel

Pauley v. State, A20A0271, A20A0272 (4/27/20)

Appellant was convicted of rape, three counts of aggravated assault, and false imprisonment for crimes involving T. T.; kidnapping, rape, aggravated sexual battery, false imprisonment, and terroristic threats with respect to his ex-wife, L. C.; and kidnapping, rape, aggravated battery, false imprisonment, and terroristic threats related to another ex-wife, M. W. As to M. W., the evidence showed that the offenses were committed in August 2008, but M. W. did not report to authorities that appellant had sexually abused her until late 2014. The State indicted appellant with the offenses relating to M. W. in May 2015.

Appellant contended that the State erred in prosecuting him on four of the counts related to M. W., kidnapping, aggravated battery, false imprisonment, and terroristic threats, because they were barred by the applicable statute of limitation. The Court noted objections to defects in an indictment can be waived, except when the defects are so great that the accusation is absolutely void. However, when a claim that an accusation or indictment is absolutely void is not properly asserted in the trial court, it can be reviewed on appeal only through a habeas corpus proceeding.

And here, appellant first raised this issue in his motion for new trial. The record contained no indication that appellant filed a general demurrer or a motion in arrest of the judgment in order to challenge the statute of limitation with respect to the charges involving M. W. But, a motion for new trial is not the proper method to attack the sufficiency of an indictment and does not provide a basis for an appellate court to review the indictment. Consequently, the Court held, appellant's challenge to the statutes of limitation with respect to the charges involving M. W. was not properly before the Court.

Nevertheless, appellant contended, to the extent his statute of limitation defense was waived with respect to the charges of kidnapping, aggravated battery, false imprisonment, and terroristic threats involving M. W., based on the lack of a timely challenge to the indictment, his trial counsel rendered ineffective assistance by failing to preserve this issue. The Court agreed.

A motion in arrest of judgment or habeas corpus are the only remedies available when no demurrer to the indictment is interposed before judgment is entered on the verdict. Therefore, a motion for new trial is ordinarily not the proper method to attack the sufficiency of the indictment. But, the Court noted it has made an exception in cases such as this one when the motion for new trial raises the ground of ineffective assistance of counsel.

The Court found that the indictment alleged that these four crimes occurred on August 5, 2008, but the indictment was not filed until May 2015, after the expiration of the four-year limitation period outlined in OCGA § 17-3-1 (c). It is axiomatic that the statute of limitation period for charging an individual for a crime begins running at the time of the criminal act. But, under certain circumstances, however, the State may file an indictment after the statutory limitation period for the alleged crime has expired. In such cases, the State must specifically allege in each count of the indictment the applicable tolling provision or exception to the statute of limitation in order to show that the charged offense is not time-barred.

And here, the State included language in the indictment with respect to the relevant counts explaining that the charges were not time-barred because "said offense[s] [were] unknown to the state and the grand jury prior to November 1, 2014[.]" However, the Court found, M. W. unequivocally testified that she knew that appellant was the perpetrator of the crimes against her back in 2008. As a result, M. W.'s knowledge was imputed to the State on that date and the period of limitation commenced on this date. The face of the 2015 indictment showed that it was filed after the expiration of the four-year statute of limitation on the kidnapping, aggravated battery, false imprisonment, and terroristic threats charges involving M. W. Therefore, the Court concluded, since the indictment did not allege that the limitation period had been tolled, the indictment was fatally flawed as a matter of law. As a result, because the record showed that the State failed to meet its burden to prove that these four charges were brought within the applicable statute of limitation, trial counsel was deficient in failing to file a general demurrer or a motion in arrest in the judgment seeking to dismiss these four counts. Moreover, the Court found, this deficiency prejudiced appellant because if his counsel had timely raised the statute of limitation issue, these charges would have been dismissed. Accordingly, the Court reversed appellant's convictions for kidnapping, aggravated battery, false imprisonment, and terroristic threats involving M. W. based on the expiration of the statute of limitation, but affirmed appellant's remaining conviction for rape involving M. W., and also affirmed all of his convictions involving T. T. and L. C.

Search & Seizure; Search Warrants

Landers v. State, A20A0018 (4/29/20)

Appellant was arrested on two counts of aggravated child molestation and two counts of aggravated sodomy. The record, briefly stated, showed that while officers were effecting the arrest warrants, appellant allegedly "put his hand into one of his pants pockets in order to discard what [officers] believed might be a weapon." Appellant was stopped, handcuffed, and searched incident to his arrest. The search revealed a portable storage device in his pocket. In 2018, an investigator obtained a search warrant for the device. After appellant moved to suppress the warrant based on lack of probable cause, the investigator obtained a second warrant in 2019. The affidavit in support of the 2019 search warrant was identical to that supplied in 2018 except for an additional paragraph describing the investigator's prior involvement investigating child sex crimes (not involving appellant) and his opinion that based on his experience and training, such offenders often store evidence of their crimes on electronic storage devices.

Appellant then amended his motion, arguing that neither the 2018 search warrant nor the 2019 search warrant were supported by probable cause. He also argued that the 2019 search warrant was improper because of the delay in obtaining the warrant. The trial court denied the motion to suppress, finding that although the 2019 search warrant may have

clarified any probable cause, it was not necessary because the 2018 search warrant was supported by probable cause. The trial court certified its ruling for immediate review, and the Court granted appellant's application for interlocutory appeal.

Appellant contended that the trial court erred in holding that the 2018 warrant to search the portable storage device was supported by probable cause. The Court agreed.

The Court noted that because the magistrate only considered the evidence in the warrant applications in issuing the search warrants, its analysis was confined to the four corners of those documents. And here, the Court found, the affidavit in support of the 2018 search warrant did not establish any connection between the charged crimes of aggravated child molestation and aggravated sodomy and any content that might be on the portable storage device. The 2018 affidavit did not provide any information relating to evidence that could be found on the portable storage device, such as testimony from an alleged victim that appellant photographed certain acts. Furthermore, the affidavit in support of the 2018 warrant did not include any information that there was a link between an act of child molestation or aggravated sodomy and the likelihood of locating evidence or contraband on the digital storage device, such as the investigator's statement in the 2019 affidavit that based on his experience and training, child molesters often stored evidence of their crimes on digital storage devices. In fact, the Court found, the only statement to come close to establishing a nexus between the charged crimes of aggravated child molestation and aggravated sodomy and the contents of the portable storage device was the following statement: "Due to [appellant] attempting to discard the storage device upon seeing law enforcement [the investigator] believes that there may be evidence on the storage device that is crucial to the ongoing investigation." However, a suspicion or strong reason to suspect is an insufficient foundation for a finding of probable cause. Thus, the investigator's belief that there may be evidence of aggravated child molestation and aggravated sodomy on the portable storage device, as expressed in the affidavit, amounted to no more than a suspicion or strong reason to suspect. Consequently, the 2018 affidavit did not provide the magistrate with a substantial basis for concluding that probable cause existed to issue the 2018 search warrant. Accordingly, the Court stated that it was constrained to hold that the trial court erred in holding that the 2018 search warrant was supported by probable cause.

The trial court's order was vacated and the case remanded with the direction that the trial court consider the effect of the delay between the 2018 and 2019 search warrants and whether the investigator's 2019 affidavit cured the defect with the 2018 affidavit.

Restitution; Waiver of Right to a Hearing

Wilson v. State, A20A0405 (4/29/2020)

Appellant was convicted of theft by taking. The evidence showed that appellant agreed to do landscaping work for the victim and they agreed upon a price of \$10,200.00 which the victim paid up front. Appellant did a little work on the property and then never returned to complete the work.

He argued that the trial court erred in ordering restitution without conducting a restitution hearing or properly considering the factors listed in OCGA § 17-14-10 (a). The Court disagreed.

The record showed that after the trial court judge announced that he found appellant guilty, the judge asked the prosecutor and appellant's counsel whether they were ready to proceed with sentencing. Both sides said that they were ready. The trial court judge asked the prosecutor whether she had a recommendation. She responded with a sentence recommendation and proposed certain conditions of probation, including restitution. She recommended that an appropriate restitution amount was \$10,100, given the testimony that appellant had completed some of the landscaping work.

Appellant's counsel responded, noting the amount of time appellant had been in custody already, and then stating that, "Obviously, that the restitution is going to be an issue. [Appellant] . . . stated he believes that something closer to \$5,000 would be owed back, given what he lost to the money that he put forth towards the project." Next the judge gave appellant himself the opportunity to make a statement. The judge then announced the sentence, stating that "[r]estitution will be in the amount of \$10,000."

The Court held that appellant waived any error in the trial court's failure to conduct a separate restitution hearing. When the parties disagree about the amount of restitution prior to sentencing, OCGA § 17-14-7 (b) calls for a restitution hearing. But a defendant can waive any error in the decision of the trial court to decide the question of restitution as a part of the sentencing hearing, rather than in a separate and distinct hearing. And here, the judge asked the prosecutor and appellant's counsel whether they were ready to proceed with sentencing and appellant's attorney said he was ready. Appellant's attorney knew that restitution was an issue, yet he did not present or request to present evidence on the issue of restitution at the time; nor did he request a separate hearing on the issue of restitution. Accordingly, the Court found that appellant waived any error in the decision of the trial court to decide the question of restitution as a part of the sentencing hearing, rather than in a separate and distinct hearing.

Nevertheless, appellant argued, the trial court erred by failing to consider the factors outlined in OCGA § 17-14-10 (a) before ordering restitution. The Court again disagreed. When a trial court orders restitution, it must consider the amount of the victim's loss, which is the State's burden to prove. OCGA §§ 17-14-7 (b), 17-14-10 (a) (4). The court must also consider the other factors listed in OCGA § 17-14-10 (a). And here, the Court found, the State met its burden of proving the victim's loss by presenting evidence of the amount the victim had paid appellant and the value of the work appellant had completed. Appellant presented no evidence as to his financial circumstances or his ability to pay. Given his failure to meet his burden, the Court concluded that the trial court did not err in this regard.

Affirmative Defenses; Jury Charges

McClure v. State, A18A0324 (4/29/20)

Appellant was convicted on two counts of aggravated assault. On direct appeal, the Court held that appellant was not entitled to any instruction on the affirmative defenses of justification because he failed to admit to the elements of aggravated assault as charged. *McClure v. State*, 347 Ga. App. 68, 70-71 (2) (2018). The Supreme Court reversed, holding that a criminal defendant need not "admit" anything, in the sense of acknowledging that any facts alleged in the indictment or accusation are true. Rather, in asserting an affirmative defense, a defendant may accept certain facts as true for the sake of argument, and the defendant may do so for the limited purpose of raising the specific affirmative defense at issue. *McClure v. State*, 306 Ga. 856, 864 (1) (2019). The case was then remanded to the Court of Appeals to reconsider in light of the Supreme Court's decision.

The evidence, briefly stated, showed that the two victims (a male and female) went to appellant's house to pick up a female friend. Appellant and the victim were arguing outside when they arrived. Appellant went into the house and came back with a rifle (later determined to be a BB rifle) and pointed it at the two victims. At trial, appellant testified that he retrieved the weapon because the male victim threatened him. He further testified that he did not point the weapon at either victim, but instead, kept it over his shoulder at all times.

As to the defense of habitation, the Court ruled 2-1 that the trial court did not err by not giving a jury charge on this defense. The Court found that although the victims were parked outside of appellant's house, the record was devoid of any evidence that the victims directed any threats towards appellant's house or attempted to enter or attack his house in any way.

However, all three Judges found that the trial court erred by not giving a charge of justification in the defense of self. Here, appellant testified that after getting into an argument with his friend, the victims arrived and his friend threatened to have the male victim "get [appellant]." It was dark and appellant was unsure of the amount of people in the vehicle. Appellant observed one of the victims exit the vehicle, and he testified that he "didn't know what was going on and whether people were jumping out or what." Appellant further testified that he went inside to get his BB gun because he was in fear and he thought the victims were going to hurt him "after what [his friend] said." Accordingly, under the facts and circumstances of this case, slight evidence existed to justify a charge on justification in the defense of self.

Furthermore, the Court found that it could not say that it is highly probable that the failure to give the requested charges did not contribute to the verdict. The evidence against appellant was not overwhelming, and he laid out his theory of the case — including justification — during opening statement but then was refused the jury instruction on that point. Thus, the Court found, the trial court's refusal to give this requested instruction deprived the jury of the necessary tools to evaluate the charges against appellant and to reach a verdict. Accordingly, the Court reversed appellant's convictions, and the case was remanded for a new trial.

Search & Seizure; Inventory Search

Bowler v. State, A20A0262 (4/30/20)

Appellant was convicted of possessing methamphetamine and drug related objects. He contended that the trial court erred in denying his motion to suppress. The evidence showed that an officer first observed that appellant's car was not in a proper parking space, but was parked on the side of a 24-hour convenience store where it could not be seen from inside the store. The officer investigated and appellant initially told the officer he would only be there for approximately fifteen minutes and would then leave for his home near the Tennessee border. The officer then drove off. But, four hours later, at two o'clock in the morning, the officer saw that the vehicle was still there and had fogged up windows, which was suspicious to the officer since it was June. Appellant was sweating profusely, breathing heavily, and acting nervously when the officer approached the car. Appellant changed his earlier story about needing to rest and offered different claims as to why he was there, first claiming that his battery was dead and then claiming that he had argued with his girlfriend. Additionally, appellant gave conflicting information about where he lived. The officer arrested appellant for loitering,

impounded his vehicle, conducted an inventory search of the car, and found a plastic baggy and a syringe filled with a substance that field-tested positive for methamphetamine.

Appellant contended that the trial court erred in finding that the officer had probable cause to arrest for loitering. The Court disagreed. The Court found that prior to the arrest, the officer gave appellant the opportunity to explain his presence and conduct. Given the inconsistencies in appellant's explanations and under the totality of the circumstances known to the officer, the Court found that the officer was justified in believing that appellant had committed the offense of loitering. Accordingly, the Court concluded that probable cause existed for appellant's arrest and the trial court properly denied his motion to suppress.

Next, appellant contended that even if probable cause existed for the arrest, there was no reason to impound and conduct an inventory of his vehicle. The Court again disagreed. Justification for an inventory search is premised upon the validity of the impoundment of the vehicle. Impoundment of a vehicle is valid only if there is some necessity for the police to take charge of the property. In each instance, the ultimate test for the validity of the police's conduct is whether, under the circumstances then confronting the police, their conduct was reasonable within the meaning of the Fourth Amendment. The test is whether the impoundment was reasonably necessary under the circumstances, not whether it was absolutely necessary.

And here, the Court found, appellant was the sole occupant of the vehicle, which was parked improperly on the side of the store during early morning hours. According to the officer's testimony, there was no one to release the car to, so it was necessary to impound it and conduct an inventory search in order to protect the police department from any liability. Under these circumstances, the officer's conduct was reasonable since no one remained to take custody of the vehicle and remove it from the side of the building. Thus, the Court held, because the officer had legitimate grounds for an inventory search, the evidence seized during the search was properly admitted, and the trial court did not err by denying the motion to suppress on this ground either.

Jury Charges; Ineffective Assistance of Counsel

White v. State, A20A0616 (4/30/20)

Appellant was indicted for aggravated battery, aggravated assault, criminal damage to property, and two counts of aggravated stalking. The jury convicted him only of aggravated battery for biting off a portion of the victim's finger.

In response to a question from the jury, the trial court gave the jury the following pattern definition of malice for the offense of aggravated battery: "Malice is not ill will or hatred. For the purpose of this code section, malice means an actual intent to cause the particular harm produced, that is, bodily harm, without justification or excuse. Malice is also the wanton and willful doing of an act with an awareness of a plain and strong likelihood that such particular harm may result. Intention may be shown by the circumstances connected with *the offense*." (Emphasis supplied).

Appellant contended that the use of the phrase "the offense," presumed the existence of a crime and thus constituted an improper comment on the evidence by the trial court. The Court disagreed. Considering the jury charge as a whole, the Court found that the trial court did not intimate its opinion that the evidence showed that an offense had been committed.

Prosecuting Attorneys' Council of Georgia

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Instead, the trial court merely stated the definition of malice for aggravated battery. Furthermore, the trial judge specifically instructed the jury that “[b]y no ruling or comment that the court has made during the progress of the trial [has the court] intended to express any opinion [up]on the facts of [this] case, [upon] the credibility of the witnesses, [upon] the evidence[,] or [upon the guilt or innocence of the defendant].” Thus, the Court concluded, the trial court did not err by referring to “the offense” in the definition of malice.

Next, appellant argued that his trial counsel rendered ineffective assistance of counsel. Specifically, appellant contended that his counsel was ineffective in failing to object to the self-defense charge because feminine pronouns were used in the charge, so the jury would not know that it applied to him. But, the Court found, it was apparent that the pronouns were used in a generic sense and it may be assumed that a jury of average intelligence would take into consideration the defendant's sex in applying the court's charge on the law. And here, the Court found, the jury clearly would recognize the self-defense charge applied to the male defendant who had raised such a defense without the necessity of the court explaining it. Since the instruction was neither confusing nor prejudicial, appellant's claim of ineffective assistance failed.