Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING JULY 10, 2020
Issue 28-20

THIS WEEK:

Juveniles; Restitution

In re N. T., A20A0118 (5/26/20)

After sixteen-year-old appellant entered an admission to stabbing a neighbor in the head with a kitchen knife, a juvenile court adjudicated him delinquent for aggravated assault. Following the adjudication, the juvenile court entered a restitution order, requiring appellant to pay restitution in the amount of $28,516.16.

Appellant argued that the juvenile court erred in appointing his delinquency attorney to serve as his guardian ad litem during the restitution hearing, despite the attorney's objection. Specifically, the juvenile court (1) failed to determine whether an appropriate parent, guardian, or legal custodian was available to serve his best interest; (2) failed to ascertain whether the appointment of a guardian ad litem was in his best interests; and (3) prevented counsel from performing her required duties to him as guardian ad litem, namely assessing his best interests and determining whether a conflict existed between her duty as counsel and his best interests. The Court disagreed.

First, the law allows the juvenile court to appoint a guardian ad litem when a delinquent child appears before the court without his or her parent, guardian, or legal custodian. In appellant's view, the juvenile court was required to find his parents incapable or unwilling to participate in order to appoint a guardian ad litem, but the statute does not require such a finding; it is enough that the child appears without his or her parent, guardian, or legal custodian. An here, the Court found, the transcript of the restitution hearing reflected that appellant's parents were not present even though the State had served them with notice of the hearing. Additionally, both parents were present during the disposition hearing when the juvenile court continued the restitution hearing for thirty days, and, therefore, should have known that the restitution hearing was imminent.

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Second, there is no requirement that the juvenile court ascertain whether a representative from DJJ (appellant's legal custodian) was present in the courtroom and/or capable or willing to make decisions in his best interests. A juvenile court is given broad discretion to appoint a guardian ad litem if it is otherwise in a child's best interests to do so, even in the presence of a parent, guardian, or legal custodian. While the juvenile court did not make the specific findings identified by appellant, a trial judge is presumed to know the law and presumed to faithfully and lawfully perform the duties devolved upon it by law. Thus, the Court presumed that the juvenile court concluded that appellant's delinquency attorney would best serve as his guardian ad litem during the restitution hearing for the purpose of assisting the court in determining what was in his best interests irrespective of DJJ's presence and/or representative capabilities.

Finally, the Court found that appellant failed to show that an actual conflict existed. An attorney can serve as both a guardian ad litem and legal representative "*unless or until there is conflict of interest* between the attorney's duty to such child as such child's attorney and the attorney's considered opinion of such child's best interests as guardian ad litem." (Emphasis supplied.) OCGA § 15-11-104 (b). Aside from arguing that counsel's hasty appointment as guardian ad litem precluded counsel from assessing whether a conflict of interest existed, appellant failed to identify what if any conflict of interest existed or how he was harmed by the dual appointment. And the Court stated, without such a showing, his argument failed.

Next, appellant did not dispute the amount of the hospital bill, but contended that the juvenile court erred in ordering $28,516.16 in restitution because he lacked the present and future ability to pay. Specifically, citing *Britt v. State*, 232 Ga. App. 780, 781 (2) (1998), and *Pruitt v. State*, 230 Ga. App. 334 (1) (1998), he argued that he had never been able to obtain employment, could not earn an income while he is in DJJ custody, had no assets, and has limited intellectual functioning as evidenced by an IQ of 69 and third-grade reading and math skills. The Court again disagreed.

While the psychological evaluation of appellant reflected that he had dropped out of high school and that his full scale IQ is 69, the psychological evaluation did not conclude that he was incapable of working or that any mental impairments would prevent him from working. Appellant was attending school while in DJJ custody, and, in fact, testified during the disposition hearing that he will do better in school, to which the juvenile judge replied, "I believe there may be some truth to that." Appellant also testified at the restitution hearing that he has experience with computers, and that he had been looking for a job as a software engineer, repairing systems for schools, and that he wanted to do that kind of work "now and [in the] future."

The juvenile court concluded that appellant would be a legal adult soon, that he was currently in school, and that there was nothing preventing him from "learn[ing] a number of different skills so that he can have a future and … earning capacity." Additionally, the juvenile court's statement during the disposition hearing reflected that the court found credible appellant's promise that he would do better; the psychological evaluation bolstered this determination, concluding that appellant "may be responding well to the structure of school" and that "he desires to do better . . . and wants to make his family proud of him in the future." As to appellant's claim that he does not have the future earning capacity to pay restitution, OCGA § 17-14-10 no longer requires the ordering authority to consider that factor.

Finally, the Court was not persuaded by appellant's reliance on *Britt* and *Pruitt*. While the Court did vacate the restitution orders in both of those cases, it did so because nothing in the respective transcripts indicated that the ordering authorities considered the factors as required by OCGA § 17-14-10. And here, the Court found, the transcript revealed just the

opposite. Accordingly, as OCGA § 17-14-5 (b) expressly authorizes restitution as a condition or limitation of the probation of delinquent or unruly juveniles, and as the nature and amount of restitution was supported by a preponderance of the evidence, there was no error and the Court affirmed the juvenile court's order of restitution.

DUI; Right to Independent Testing

Henry v. State, A20A0501 (5/27/20)

Appellant was convicted of DUI (per se) and failure to dim lights, and he was acquitted of DUI (less safe) and failure to maintain lane. The relevant evidence showed that the officer read appellant the age-appropriate implied consent notice, after which appellant asked the officer "[s]o you're gonna let me do the breathalyzer one more time?" The trooper responded that "[w]e're past that bridge. We're past it." The officer read appellant the implied consent notice again, after which appellant said "so you are saying I can take, my blood, my blood, my doctor can do my blood test and all that?" The officer responded to appellant's question by stating, "I need a yes or a no right now. I did not ask anything about your doctor. I said the State. Yes or no." Appellant's response on the dash camera video was inaudible. The officer then asked appellant "[i]s that a yes?", and appellant's response was again inaudible on the dash camera video. Although it was not discernable on the video, the trooper testified that appellant consented to a blood test in a soft voice.

Appellant contended that his trial counsel was ineffective for failing to object to the introduction of the blood test result because he was denied the independent testing he requested. The Court agreed.

The Court stated that an accused's right to have an independent test performed does not attach until the State performs its test, but the right to request an independent test may be exercised when the accused is read his informed consent rights. An accused's right to have an additional, independent chemical test or tests administered is invoked by some statement that reasonably could be construed, in light of the circumstances, to be an expression of a desire for such test. If an individual requests an independent test but is unable to obtain it, the results of the State-administered test cannot be used by the State as evidence against him unless the failure to obtain the test is justified.

Here, the Court found, after appellant was read the implied consent notice and asked to consent to a blood test for the second time, he asked the trooper, "so you are saying I can take, my blood, my blood, my doctor can do my blood test and all that?" The trooper responded to appellant's question by stating, "I need a yes or a no right now. I did not ask anything about your doctor. I said the State. Yes or no." Appellant's statement was arguably ambiguous as to whether appellant sought to have his doctor perform an independent blood test or whether he sought to forward the blood collected by the State for subsequent testing by his doctor. Instead of answering appellant's question or attempting to clarify what appellant meant, the officer ignored appellant's request and made no attempt to accommodate it. Under our current law, the trial court would have had to resolve any ambiguity in appellant's statement in his favor. Accordingly, the Court found, appellant made a strong showing that, had his counsel filed a motion to suppress the blood test result, it would have been granted, and thus, trial counsel was deficient for failing to so move.

Next, the Court addressed the prejudice component of the *Strickland v. Washington* test and concluded that appellant in fact suffered prejudice. Appellant was convicted of DUI (per se). But, without the results of the blood test, the State would have been unable to establish the elements of the claim to convict him. Thus, the Court reversed his DUI conviction.

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Sufficiency of the Evidence; Rule of Sequestration

Mule v. State, A20A0458 (5/28/20)

Appellant was convicted of reckless driving. The evidence showed that appellant drove at a high rate of speed through a school parking lot reserved for school buses and that one of the buses only avoiding hitting appellant's car by slamming on the bus's brakes.

Citing OCGA § 17-4-23 (a), appellant argued that the trial court erred in denying her motion for directed verdict. Specifically, she argued, the evidence was insufficient to sustain her conviction because the traffic citation and her "non-custodial arrest" were based upon what the school resource officer was told by others and not his personal observation of the incident. But, the Court noted, although appellant was initially issued a traffic citation for reckless driving, two months later the State charged her with the crime by accusation. She was not prosecuted under the citation, but under the superceding accusation. And, the evidence was sufficient for a rational trier of fact to find her guilty beyond a reasonable doubt of the crime of reckless driving as charged in the accusation. Thus, the Court found no error.

Appellant also argued that two school bus drivers, Stultz and Harmon, violated the rule of sequestration and that the court erred in denying her request to strike their testimony. The Court found that after the matter was brought to the trial court's attention, a spectator at the trial testified that she had observed Stultz and Harmon conversing in the hallway after Stultz testified and before Harmon testified. A second spectator testified that she had also observed the two having a conversation and that she overheard Stultz tell Harmon, "you need to tell them how you slammed on the brakes on the school bus." Stultz was called back to the stand and admitted to having a conversation with Harmon and other bus drivers in the hallway outside of the courtroom. She explained that she and the bus drivers discussed what they had witnessed at the school on the day of the incident, and that she told them she wished she had remembered certain details while on the stand. However, Stultz denied otherwise discussing with them her earlier testimony.
Appellant asked the trial court to strike the testimony of Stultz and Harmon and to give a curative instruction. The court declined to strike their testimony, but agreed to give the jury a curative instruction.

OCGA § 24-6-615 provides that at the request of a party or on the court's own motion, the court "shall order witnesses excluded so that each witness cannot hear the testimony of other witnesses." The purpose of the sequestration rule is to prevent the shaping of testimony by one witness to match that of another, and to discourage fabrication and collusion. But the failure of a witness to comply with the sequestration rule does not of itself render his testimony inadmissible, although it may affect the weight of the testimony. And, where the improper communication occurs outside the courtroom and the trial court is assured that the communication will not affect the witnesses' testimony, the appropriate remedy is for the trial court to admit the testimony and, if requested by opposing counsel, to charge the jury that it can consider the violation in assessing the witnesses' credibility. Thus, the Court concluded, since the trial court gave such a charge here, the court did not abuse its discretion in how it handled the communication between Stultz and Harmon. Moreover, the Court noted, appellant pointed to no authority, and it found none, requiring a more severe sanction under these circumstances.

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Sentencing; Due Process

Cobb v. State, A19A2170 (6/1/20)

Appellant was convicted of two counts of child molestation and one count of sexual battery for each of his two daughters, for a total of six counts (Counts 1-3 concerning the older daughter and Counts 4-6 concerning the younger). The trial court merged the sexual battery counts into the child molestation counts and sentenced appellant to 10 years on Count 1, 20 years with 10 to serve concurrently on Count 2, and an additional 20 years (10 running consecutively) on Counts 3 and 4, for a total of 30 years with 20 to serve. After appellant moved for a new trial, the State conceded that as to Count 4 (concerning the touching of the younger daughter's genitals), the evidence was insufficient. The trial court directed a verdict on that count, denied the motion for new trial in other respects, and imposed the same total sentence by increasing the sentence on Count 3 (concerning the touching of the older daughter's genitals) from 10 years to serve to 20 years with 10 to serve, for the same total (after resentencing) of 30 years with 20 to serve.

Citing federal authority including *United States v. Dunnigan*, 507 U. S. 87 (113 SCt 1111, 122 LE2d 445) (1993), Appellant argued that the trial court deprived him of due process when it determined that his testimony had been found untrue and was thus an aggravating factor in his sentence. The Court disagreed. First, *Dunnigan* is inapposite because the federal court there was required, under federal sentencing guidelines, to make specific findings of fact before it could enhance a defendant's sentence based on his untruthful testimony at trial.

Second, the Court noted that appellant characterized his daughters' testimony at trial as "inaccurate and deceptive," and he was not obligated to take the stand in his own defense. The record showed, moreover, that before being sentenced, appellant "beg[ged] for mercy from the Court," insisting that he "love[d] [his daughters] more than anything on earth." The trial court then found as follows: "[I]f you testify as you did in this case and the jury chooses not to believe you, then under the law … it would be considered that you didn't tell the truth. *The jury found that you didn't tell the truth*. That's essentially where we stand. And so your defense was that … you were telling the truth and that the victims were not. And that's reprehensible."(Emphasis supplied.) The trial court then imposed its sentence. Given this record, the Court stated that the trial court did not err when it took proper account of the jury's implicit finding as to appellant's credibility and imposed a sentence within the statutory range in order to deter others from committing child molestation or attacking their victims' credibility at trial.

Appellant also argued that the trial court was vindictive when it re-imposed the same sentence of 30 years with 20 to serve even after directing a verdict of acquittal as to Count 4. The Court again disagreed.

The Court stated that in *State v. Hudson*, 293 Ga. 656 (2013) our Supreme Court adopted the "aggregate approach" to sentences imposed after a successful post-conviction challenge to some but not all counts of that conviction. But, appellant contended, there should be a distinction between cases in which counts are held on appeal to have failed or merged and those, as here, where a directed verdict is entered after trial. However, the Court saw no basis for such a distinction. Both categories involve the "elimination of some of the original counts," "related" and "stemming from a single course of conduct," *Hudson*, 293 Ga. at 660 — here, a father's molestation by touching of both of his daughters in the same household over the same fourteen-month period. Further, any distinction between directed verdicts and successful challenges on appeal might deter the State from making a meritorious concession of insufficiency in the trial court rather

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than awaiting reversal on appeal. Thus, the Court found no error or vindictiveness in the trial court's resentencing when, as here, the aggregate sentence remained the same as before the resentencing on Count 3.

Finally, the State conceded that the trial court erred when it sentenced appellant on Count 1 to ten years in prison with no probation pursuant to former OCGA § 17-10-6.2 (b) (2017). Therefore, the Court vacated appellant's sentence on Count 1 and remanded for resentencing.

Out-of-Time Appeals; Pro Se Incarcerated Defendants

Hopper v. State, A20A0538 (6/1/20)

Appellant was convicted of rape, child molestation, enticing a child for indecent purposes, and furnishing alcohol to a minor. The relevant procedural history, briefly stated, showed that appellant filed a pro se notice of appeal from the denial of his motion for new trial, but the Court of Appeals dismissed it as untimely. Appellant then filed a motion for an out-of-time appeal, contending that he did not receive notice of the order denying his motion for new trial because it was sent to Calhoun State Prison while he was temporarily housed in the Fulton County Jail, and that the time to file a notice of appeal had already expired by the time he was returned to prison and received the order. The trial court denied the motion, finding that although appellant did not receive the order, it was his choice to represent himself.

The Court stated that pursuant to OCGA § 15-6-21 (c), a trial court is required to notify the attorney of a losing party or a pro se criminal defendant of its judgment. A lack of notice could furnish a basis for the grant of an out-of-time appeal in that the defendant was deprived of his right to appeal, which is of constitutional dimensions. The issue is whether a defendant received notice and delayed taking action, in which case he has forfeited his right to appeal, or whether there was no timely notice, in which case either the judgment should be set aside and a new judgment entered from which a timely appeal might be taken or an out-of-time appeal should be considered.

If a defendant actually received notice of an order and delayed taking action, he has forfeited his right to appeal. If, however, he did not receive timely notice, he was entitled to request an out-of-time appeal. The judicial inquiry on a motion for an out-of-time appeal is whether the appellant was responsible for the failure to file a timely direct appeal. An out-of-time appeal is not authorized if the delay was attributable to the appellant's conduct. But, if the defendant was not responsible for his failure to file a timely notice of appeal, the trial court should have granted his motion for an out-of-time appeal.

Therefore, the Court found, notwithstanding appellant's waiver of his presence at the hearing on his motion for an out-of-time appeal, the trial court explicitly found that appellant did not receive a copy of the order until the date to timely appeal had passed and that his failure to file a timely notice of appeal was not his fault because he lacked notice. Under these circumstances — appellant was being temporarily held at the Fulton County Jail and had not yet been returned by prison officials to Calhoun State Prison, where the trial court apparently sent the order denying his motion for new trial, until more than 30 days after the trial court issued the order — the trial court erred by concluding that appellant's election to proceed pro se effectively waived his right to receive timely notice of the order or to pursue an out-of-time appeal. Consequently, because appellant was not responsible for his failure to file a timely notice of appeal, the trial court erred by denying his motion for an out-of-time appeal.

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Rule 404 (b); Prior Armed Robbery

Westbrook v. State, A20A0579 (6/3/20)

Appellant was convicted of armed robbery, violation of the Georgia Street Gang Terrorism and Prevention Act ("GSGTPA"), and possession of a firearm during the commission of a felony. The evidence, briefly stated, showed that in 2014, King, appellant's nephew, entered two convenience stores within a short time of one another, robbed them, and then fled. Appellant was waiting outside in the getaway car. King committed the armed robberies as a way of gaining membership into the Gangster Disciples and appellant was his "recruiter."

Appellant contended that the trial court erred by admitting evidence of his prior guilty plea to armed robbery in 2000 under OCGA § 24-4-404 (b). The Court disagreed. First, the Court noted that appellant's involvement was limited to recruiting King to do the robberies, supplying him with a firearm, and acting as a driver — he did not personally enter the stores and steal the money. Based on this, appellant argued that King acted of his own accord and that appellant was both ignorant of King's plan and intent to rob the stores when he gave King a ride in his vehicle, and appellant testified that he was intimidated by the fact that King had a gun: "you can fight a man, but you can't beat a bullet." Therefore, the Court found, appellant's motive and intent in giving King a ride were squarely at issue in the trial, and the earlier armed robbery required a comparable intent to rob that appellant was accused of having in this case. Thus, the State met its burden to show a permissible purpose for admitting the 2000 conviction other than appellant's character.

Second, although there was no evidence that appellant himself was the gunman or robber, showing his actual participation, rather than mere presence, was crucial to the State. Thus, the Court stated, while robbing a convenience store at gunpoint may not be tantamount to rocket science, familiarity with the commission and planning of the offense certainly renders one less naive about the perpetrator's conduct and demeanor leading up to one. For example, after King committed the first robbery and shot at the clerk, appellant proclaimed ignorance about King's conduct and intent when he drove King to a second location to commit the second robbery. The evidence that appellant had prior experience with armed robbery, including the shrewdness to steal the store surveillance tape in 1999, was highly probative of his intent as he drove King to the second location and parked strategically nearby to afford a discreet getaway. The prior robbery shared many of the same traits, including the type of establishment and the type of weapon, and there was little in the execution of the acts that distinguished them from each other, aside from the fact that appellant apparently acted alone in the 1999 robbery. And, the Court added, that appellant in this case acted as the wheelman instead of the gunman did not alter the intent shared by both cases, i.e., to rob the store of its cash. Also, the lack of recency of the 1999 robbery was attenuated by the fact that appellant was incarcerated for at least 10 of the intervening 17 years.

With respect to the undue prejudicial effect, the character of the prior offense was the same as the armed robbery in this case, so there was no chance of improperly impugning appellant's character with an unrelated offense. Further, when the evidence of the 2000 conviction was presented, the jury learned that appellant had already admitted his guilt and been convicted and served a prison sentence for his earlier conduct, making it less likely that the jury would want to punish appellant for this past conduct rather than the charged crimes. Finally, the Court found there was independent, properly admitted evidence that appellant was a gang member seeking to recruit others by committing crimes, so evidence that appellant had committed another crime was not highly prejudicial, given this record. Accordingly, the trial court was within its discretion to find that the probative value was not substantially outweighed by undue prejudicial effect.

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Jury Charges; Elements of the Offense

Oates v. State, A20A0282 (6/3/20)

Appellant was convicted of rape, statutory rape and child molestation. He contended that the trial court erred by failing to properly instruct the jury on the definition of child molestation. The Court noted that
OCGA § 16-6-4 (a) provides in relevant part: "(a) A person commits the offense of child molestation when such person: (1) Does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person." The trial court instructed the jury that a person commits the offense of child molestation when he "does an act to a child less than 16 years of age with intent to arouse the sexual desires of the person." Appellant contended that the trial court's failure to include the word "indecent" in the instruction was harmful as a matter of law.

The Court found that because appellant failed to object to the charge, its review was limited to whether the charge amounted to plain error and the Court found that it did not. It was undisputed that the written copy of the jury charge that the trial court gave the jury for deliberations included the word "indecent" in the definition of child molestation. Likewise, the copy of the indictment that the court gave the jury for deliberations included the word "indecent" in the child molestation count. The trial court instructed the jury that the State had the burden of proving every material allegation of the indictment, and that the court would be providing copies of the indictment and instructions to the jury for use during deliberations. Thus, the Court found, the trial court's written and oral instructions as a whole adequately informed the jury of the charges. The burden was on appellant, not the State, to show that the error likely affected the outcome of the trial. And here, the Court could find no evidence that the jury misunderstood the instructions on child molestation. Accordingly, the Court concluded that appellant failed to show that the error likely affected the outcome of the trial.

Jury Charges; Elements of the Offense

Brown v. State, A20A0337 (6/3/20)

Appellant was convicted of trafficking in marijuana, possession of marijuana with intent to distribute (two counts), conspiracy to commit a violation of the Georgia Controlled Substances Act, and possession of a firearm by a convicted felon. He argued that the trial court committed plain error by failing to instruct the jury that his knowledge of the specific weight of the marijuana was not an essential element of the offense. The Court disagreed.

With respect to the trafficking count, the court instructed the jury by reading the indictment: "[T]he grand jury accuses [appellant] . . . with the offense of trafficking in marijuana, for that the said accused on the 8th day of March, 2017, said date being a material element of the offense, …. did unlawfully then and there knowingly possess more than 10 pounds and less than 2,000 pounds of marijuana, contrary to the laws of this State.

Based on OCGA § 16-13-54.1, the court also instructed the jury that: "As to the element of weight of marijuana alleged . . . the State likewise has the burden of proof. But, when an offense measures . . . marijuana by weight or quantity, the defendant's knowledge of such weight or quantity shall not be an essential element of the offense, and the State shall not

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have the burden of proving that a defendant knew the weight or quantity of the . . . marijuana in order to be convicted of an offense."

Relying on the wording of the indictment, appellant argued that the trial court committed plain error by not instructing the jury that the State had to prove that he knew the amount of marijuana he possessed.

As a threshold matter, the Court found that it is clear that under OCGA § 16-13-54.1, appellant's knowledge of the weight of marijuana that he possessed was not a material element of the crime of trafficking. Even so, it is true that, as appellant argued, an unnecessary description of an unnecessary fact averred in an indictment need not be proved, but in criminal law even an unnecessarily minute description of a necessary fact must be proved as charged. If the indictment sets out the offense as done in a particular way, the proof must show it so. No averment in an indictment can be rejected as surplusage which is descriptive either of the offense or of the manner in which it was committed. All such averments must be proved as laid.

In this case, however, the indictment did not add a specific knowledge element or description; rather, it stated that appellant's possession had to be knowing. This was demonstrated by the language of the indictment, which expressly made the date of the offense a material element of the offense but did not make the specific knowledge of weight a material element — ". . . for that the said accused on the 8th day of March, 2017, said date being a material element of the offense, ….. did unlawfully then and there knowingly possess more than 10 pounds . . . of marijuana, contrary to the laws of this State." The separation of the date from the descriptor "knowingly" showed that the indictment did not impose a knowledge element specific to the weight of marijuana. Consistent with this, the trial court's instructions properly recounted the elements of the offense and explained that specific knowledge of the weight was not an element of the offense. There was no risk that the jury would conclude that an otherwise material element did not have to be proved. Accordingly, because there was no "clear or obvious" legal defect in the proceedings, appellant failed to demonstrate plain error warranting reversal.

Forfeiture by Wrongdoing; Merger

Lopez v. State, A20A0425 (6/3/20)

Appellant was convicted of two counts of family violence battery and two counts of family violence simple battery, and the trial court sentenced him to 48 months in prison. The victim was appellant's wife, Mallory. Appellant argued that the trial court erred by admitting into evidence statements made by Mallory under the forfeiture by wrongdoing exception to the hearsay rule.

The Court stated that notwithstanding a criminal defendant's Sixth Amendment right to confront the witnesses against him, the common-law doctrine of forfeiture by wrongdoing permits the introduction of statements made by a witness who has been detained or kept away by the means or procurement of the defendant. In other words, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation. Hence, OCGA § 24-8-804 (b) (5) provides: "The following shall not be excluded by the hearsay rule if the declarant is unavailable as a witness: . . . A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." To admit a statement against a defendant under the rule of forfeiture-by-

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wrongdoing, the State must show (1) that the defendant engaged or acquiesced in wrongdoing, (2) that the wrongdoing was intended to procure the declarant's unavailability, and (3) that the wrongdoing did procure the unavailability. If the trial court finds by a preponderance of the evidence that a party has acted with the purpose of making a witness unavailable to testify against him, a trial court does not abuse its discretion in allowing the unavailable witness's statements to be admissible at trial against the party who caused the witness's absence.

And here, the Court found, after Mallory failed to appear for trial, the State sought to admit into evidence several statements made by her to police and other witnesses on the night of the incident, in addition to statements made by her during jail calls with appellant in which she recounted the details of the incident. In support of its motion, the State presented testimony from an investigator who testified that Mallory had been served with a subpoena to appear for trial. While serving Mallory with the subpoena, Mallory told the investigator that "her blood would be on her hands," that she would not attend the trial, and that she would rather be jailed. The State also entered into evidence recordings of jail calls between Mallory and appellant which were made after his arrest. In one call, appellant repeatedly told Mallory that the State would not be able to proceed against him if she did not cooperate with the prosecution. In that same call, appellant told Mallory that "just because they subpoena you doesn't mean you have to show up[,]" and that she would not be arrested if she did not appear and testify at trial. Appellant also told Mallory that he hoped she came to court so that he could spit in her face.

The Court concluded from this evidence that all three factors were proven by a preponderance of the evidence to admit Mallory's statements into evidence under the forfeiture by wrongdoing rule. First, appellant engaged in wrongdoing by pressuring Mallory with the notion that she did not have to comply with the subpoena to appear for trial and by repeatedly telling her that the State would not be able to proceed with the case without her. Second, appellant's wrongdoing was intended to procure Mallory's unavailability because he repeatedly told her that the State would not be able to proceed with the case against him if she did not cooperate. Finally, appellant's wrongdoing did procure Mallory's unavailability because, although under subpoena, Mallory did not appear for trial.

Appellant also contended that the trial court erred by failing to merge three of his convictions into one conviction for family violence battery. The Court agreed.

The doctrine of merger precludes the imposition of multiple punishments when the same conduct establishes the commission of more than one crime. For separate offenses charged in one indictment to carry separate punishments, they must rest on distinct criminal acts. If they were committed at the same time and place and were part of a continuous criminal act, and inspired by the same criminal intent, they are susceptible of only one punishment.

Here, the Court found, Count 1 charged appellant with family violence battery based upon his act of chipping his wife's tooth, Count 2 charged appellant with family violence battery based on his wife's swollen eye, Count 3 charged appellant with family violence simple battery based on appellant's act of striking his wife's leg, and Count 4 charged appellant with family violence simple battery based on appellant's act of grabbing his wife by the throat. In Mallory's statements to police about the incident, she said that she and appellant had been fighting, and that during the fight appellant hit her legs, grabbed her by the arms, and pushed her down on the bed. She also said that appellant "held her down by the top of her chest to her throat" and that he then hit her in the face. Mallory also told another witness that she suffered a chipped tooth during the fight. Therefore, although Mallory suffered different injuries for each battery and simple battery offense, because

the offenses were part of a continuous criminal act, committed at the same time and place and inspired by the same criminal intent, the trial court erred by failing to merge appellant's convictions for Count 2, Count 3, and Count 4 of the indictment into his conviction for Count 1. Accordingly, the Court vacated the convictions of family violence battery (Count 2), family violence simple battery (Count 3), and family violence simple battery (Count 4), and remanded the case to the trial court for resentencing.

Search & Seizure; Sufficiency of Search Warrant Affidavit

State v. Cartee, A20A0423 (6/3/20)

Cartee was indicted for trafficking in marijuana, possession of marijuana with intent to distribute, and possession of a firearm during the commission of a felony. He filed a motion to suppress arguing that the search warrant was not supported by probable cause. The trial court granted the motion and the State appealed.

The relevant facts, very briefly stated, showed that an investigator received a call from an anonymous tipster stating that there was a marijuana grow operation in the basement of Cartee's home. But, the tipster said the last time she had "actually physically seen the [marijuana] grow" was two years prior. The investigator drove by the home and confirmed that the home had a basement. The investigator then arranged for a "trash pull" for the residence. On the day of the trash pull, the investigator saw a trash can had been placed onto the street, touching the appellant's mailbox. However, the investigator did not conduct any surveillance on the day of the trash pull, and could not specify when the trash can had been placed onto the street, who put the trash can out by the mailbox, or who put any of the trash into the trash can. The investigator did not see any other trash cans out on that part of the street on the day of the trash pull. Inside the trash can, the investigator found clippings, stems, seeds, and leaves indicative of a marijuana grow operation. Based on this information, the investigator secured a search warrant for Cartee's home.

The State argued that the trial court erred by finding that the search warrant was not supported by probable cause. Specifically, the State argued that the anonymous tip, supported by and combined with the results of the trash pull, provided sufficient evidence to support the search warrant. The Court disagreed.

First, the Court found that the record authorized the trial court's determination that the tipster's report was not sufficient for the magistrate judge to find probable cause, especially where the investigator testified that he admittedly had doubts about the reliability of some of the information provided by the tipster. As the trial court noted, the investigator did not surveil the house to determine if there were excessive visitors to support a thriving marijuana trafficking operation or other suspicious activity, nor did he seek out Cartee's daughter mentioned by the tipster to ask about her participation in the marijuana grow. Additionally, the investigator provided no information as to the tipster's identity, how she was aware of the criminal activity, or what her motives for reporting the crime were. Thus, the anonymous tip did not show sufficient reliability to establish probable cause on its own.

Also, information used to create probable cause to issue a warrant may become stale by the passage of time between when a condition was observed and when the search warrant is issued. The question is one of reasonability: Is the lapse of time so long that it is no longer reasonable to believe that the same conditions described in the affidavit remain at the time a warrant is issued? Here, where the affidavit stated that the tipster had witnessed the marijuana grow operation "within the

past two years[,]" and the investigator clarified at the hearing that the tipster reported it had been at least two years since she had been inside the house, the trial court did not err in concluding that the information provided was stale, thus reaffirming the conclusion that the anonymous tip did not provide probable cause without additional supporting evidence.

Nevertheless, the Court noted, although the anonymous tip in this case did not support a finding of probable cause on its own, this information could not be viewed in a vacuum. Rather, the Court must look to the totality of the circumstances to determine if there was probable cause to justify the warrant. And here, the State contended, the trash pull provided additional information that supported the probable cause finding under a totality of the circumstances. The Court again disagreed.

The investigator testified that he conducted no surveillance before the trash pull, and was not sure how long the trash can had been out on the street, who put the trash can out onto the street, or who had actually put the marijuana clippings into the trash can. Additionally, the unique layout of Cartee's street further undermined confidence that the trash came specifically from Cartee or his residence, as (1) some of the driveways on the road serve more than one residence, (2) at least one neighbor of Cartee's used his driveway to park a vehicle, (3) there were at least four other houses that were located closer to where the trash can was found than Cartee's house, and (4) the trash can examined by the investigator was the only one out on the street on the day of the trash pull, and it was unclear if neighbors might share the trash can. Finally, there was no identifying information found among the marijuana trash that would identify specifically from what person or address it originated. Thus, the Court found, under these facts as found by the trial court, it was reasonably possible that the marijuana trash came from another nearby person or address.

Therefore, based on the combination of unique facts presented, the Court held that the trial court was authorized to conclude that the results of the trash pull conducted here did not create a sufficient nexus between the evidence discovered and Cartee's specific residence. And, given the deficiencies of the anonymous tip, the magistrate did not have a substantial basis for concluding that marijuana and items used for growing and distributing marijuana would be found at the residence. Thus, the Court affirmed the trial court's order granting Cartee's motion to suppress.