

## THIS WEEK:

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## Right of Cross Examination; Prior Statements

*Barton-Smith v. State, S20A0941 (9/8/20)*

Appellant was convicted of murder and other crimes. The evidence, very briefly stated, showed that the victim was looking to buy a gun. He and his friend, Lance, were told to go to a certain location where they picked up appellant. Appellant directed them to another location. Appellant and the victim got out of the car and walked between two townhouses and out of Lance's view. The victim was then shot and killed and the money he intended to use to purchase the gun was stolen.

Appellant argued that the trial court improperly interrupted his lawyer's cross-examination of Lance about Lance's prior statements to the police. The evidence showed that, after the shooting, Lance was interviewed multiple times by different police officers, both at the scene of the crime and at the police station. On direct examination, Lance admitted that he initially lied to the police about the reason he and the victim were in the area in which the shooting occurred. On cross-examination, when appellant's lawyer began questioning Lance about his prior statements to the police, the trial court interjected, telling defense counsel, "You can ask him if he remembers something he said in a statement, you can let him look at it." Shortly thereafter, the trial court interjected again, stating, "If you're asking him questions he supposedly told somebody, he needs the right to refresh his recollection before you cross him is my understanding. Now you keep asking him questions and I think you need to show him that. Did you say this? Did you say this, yes or no?" The trial court then adjourned for the day.

The following day, the trial court told the defense lawyer that she could cross-examine Lance however she wished, as long as the cross-examination was conducted in a fair manner and not by "ambush." The trial court also requested that the defense lawyer identify which particular police interview she was talking about when asking Lance about his prior statements. The defense lawyer then continued her cross-examination, questioning Lance extensively about his prior statements to the police.

Appellant contended that the trial court's interruptions interfered with his Sixth Amendment right to confrontation and his right to a "thorough and sifting" cross examination. The Court disagreed. Although a defendant is guaranteed an opportunity for effective cross-examination, the trial court retains considerable discretion to regulate the manner and scope of the cross-examination. The Court found the trial court's interjections as attempts to prevent Lance from being confused by his inability to recall which statement he made to which officer, given that he had given multiple statements to multiple officers more than two years before the trial. These interjections did not hinder appellant's attempts to test Lance's credibility. As such, the trial court's interjections did not amount to an abuse of discretion

Nevertheless, appellant argued, the trial court's interjections were unwarranted because they were not consistent with OCGA § 24-6-613 (a). But, the Court stated, even if the trial court was mistaken when it suggested that Lance had a right to have his prior statements shown to him, this misimpression was harmless. After discussing the issue with the parties outside the jury's presence, the trial court made no definitive ruling in this regard—the court did not actually require defense counsel to show Lance his prior statements. The trial court simply ruled—a ruling well within its discretion—that the cross-examination needed to proceed in a fair manner and that, when questioning Lance about his prior statements to the police, counsel should identify the particular police interview to which she was referring. Subject to these reasonable parameters, the trial court imposed no restrictions on the scope of appellant's cross-examination, telling his lawyer that she could cross examine Lance "until the cows come home." And, the Court noted, appellant did not identify any question or information that his lawyer was precluded from asking or eliciting as a result of the trial court's ruling.

Finally, appellant asserted that he was prejudiced by the trial court's interruptions because, after the trial proceedings ended for the day, Lance had a chance to review the videotape of his police interview, the prosecution had additional time to prepare him for cross-examination, and as a result, Lance appeared more confident in his testimony the following day and exhibited a greater recollection of events. However, the Court stated, to the extent this is a cognizable harm susceptible of a remedy on appeal, it was not caused by any error of the trial court, but instead, it simply was a consequence of the trial court's decision to adjourn proceedings for the day. And nothing suggested that the court abused its discretion in doing so.

## **Expert Testimony; Ultimate Issue**

*Robinson v. State, S20A0812 (9/8/20)*

Appellant was convicted of felony murder of a four-year-old victim and other crimes committed against the victim and her younger sister, N. H. At trial, Dr. Evans testified as an expert in pediatrics and child abuse pediatrics. Specifically, Dr. Evans testified that she had observed bite marks on N. H., one on the left thigh and two on the left calf; that the bite radius was larger than a child's bite radius; and that the finding of an adult bite mark on a child shows an aggressive act. Defense counsel objected to the testimony, arguing that whether the bite marks on N. H. showed an aggressive act or a playful act was for the jury to decide and that the opinion testimony went to the ultimate issue. After Dr. Evans testified outside the presence of the jury as to the basis for her opinion, which included her professional experience with children with bite marks, the trial court ruled that it would allow her testimony. She then opined that the finding of an adult bite mark on a child indicates an aggressive act, and that a bite mark demonstrating "a perfect outline of teeth and bruising" shows that the bite was committed with force and was not incidental.

Appellant contended that the trial court erred in allowing Dr. Evans to opine that the bite marks she observed on N. H. were intentional, aggressive, and evidence of child abuse. He argued that her opinion was inadmissible because it addressed matters that were not outside the ken of the average juror and because it improperly embraced an ultimate issue. The Court disagreed. Dr. Evans's testimony was beyond the ken of the average layperson, who would be not able to make an equally intelligent judgment about the bite marks, including the force necessary for an adult to leave a bite mark on a child and whether such marks were indicia of an intentional act.

Nor did Dr. Evans's testimony improperly address an ultimate issue. Generally, "testimony in the form of an opinion or inference otherwise admissible shall not be objectionable because it embraces an ultimate issue to be decided by the trier of fact." OCGA 24-7-704 (a). The exception to the rule is set forth in OCGA § 24-7-704 (b): "No expert witness testifying with respect to the mental state or condition of an accused in a criminal proceeding shall state an opinion or inference as to whether the accused did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone."

Whether the *accused* committed an intentional act to harm the victim is a different question than whether *someone* likely committed an intentional act to harm the victim. And here, the Court found, Dr. Evans's testimony encompassed the intentional and aggressive nature of the bite marks but did not identify appellant as having inflicted them. Therefore, the Court held, her testimony was not improper.

## Fatal Variances; Impeachment by Contradiction

*Scott v. State, S20A0880 (9/8/20)*

Appellant was convicted of malice murder and other offenses. The evidence, briefly stated, showed that the victim was a drug dealer. Appellant went to the victim's apartment and purchased marijuana. However, appellant returned a sometime later, claimed the victim shorted him on the amount of marijuana, and shot him. Brown, a neighbor of the victim, saw appellant leave the victim's apartment earlier in the afternoon and return to the apartment around 7:00 p.m. Brown heard gunshots a few minutes after appellant's return.

Appellant argued that there was a fatal variance between the indictment and the evidence presented at trial, because he was charged with attempted purchase of marijuana while the evidence at trial established a completed drug transaction. The Court stated that in determining whether there is a fatal variance between the indictment and the trial evidence, the focus is on whether there has been such a variance as to affect the substantial rights of the accused. Generally, there is no fatal variance if the allegations inform the accused as to the charges against him so as to enable him to present his defense and not be taken by surprise by the evidence at trial, and are adequate to protect the accused against another prosecution for the same conduct. And here, the Court found, appellant did not even alleged how the indictment impaired his ability to present a defense or that he would be subjected to prosecution for a completed offense, as opposed to the attempted purchase. Indeed, "[a] person may be convicted of the offense of criminal attempt if the crime attempted was actually committed in pursuance of the attempt but may not be convicted of both the criminal attempt and the completed crime." OCGA § 16-4-2. Thus, because appellant could have been convicted of criminal attempt when the attempted crime was actually successfully completed, he could not show that he was surprised by the trial evidence. And because OCGA § 16-

4-2 precludes a conviction for both the criminal attempt and the completed crime based on the same conduct, appellant also could not show that he could be subjected to another prosecution for the same offense. Therefore, his fatal variance claim failed.

Appellant also contended that he received ineffective assistance when his counsel failed to challenge Brown's credibility about his ability to legally carry a firearm. Specifically, at trial, Brown testified on direct examination that he grabbed his gun after hearing gunshots and that he had a license to carry the gun. On cross-examination, trial counsel again asked Brown about his authorization to carry a firearm but even though trial counsel possessed documents at the time suggesting that Brown was on first-offender probation, she did not use it to disprove Brown's testimony that he was authorized to legally carry a firearm.

The Court noted that OCGA § 24-6-621 provides that "[a] witness may be impeached by disproving the facts testified to by the witness." But this statutory provision does not provide a party with an unlimited ability to impeach a witness by contradiction. A party may not use extrinsic evidence to impeach a witness by contradiction on a matter collateral to the material issues at trial. And here, although disproving Brown's ability to legally carry a firearm may have been relevant to his credibility, proving such a discrepancy did not relate to a material issue in the case. Brown's testimony was material only as to whether he saw appellant enter the victim's apartment and heard gunshots a few seconds later. Any discrepancy about whether or not Brown was legally entitled to carry a firearm on the day of the shooting was purely collateral. As a result, trial counsel was not deficient for failing to use Brown's first-offender record to disprove his claim that he was authorized to legally carry a firearm.

## **Sentencing; Merger**

*Marshall v. State, S20A0697 (9/8/20)*

Appellant was convicted of malice murder of one victim, attempted murder of another victim and other related crimes. He contended that the trial court improperly sentenced him as a three-time recidivist, that the trial court plainly erred by relying on two of his out-of-state convictions in sentencing him as a recidivist, and that the trial court committed two merger errors at sentencing.

The Court first addressed the merger issues. The Court noted that after appellant was found guilty of, among other counts, malice murder and three counts of felony murder, he was sentenced for malice murder, and the felony murder counts were vacated by operation of law. Nevertheless, the trial court purported to merge the predicate felony counts of burglary, aggravated assault, and felon-in-possession (Counts 6, 9, and 12) into the vacated felony murder counts. And, although appellant did not contest these mergers on appeal, the trial court erred in merging these counts since the felony murder convictions were statutorily vacated. Instead, the felon-in-possession count (Count 12) should have merged into the possession of a firearm by a convicted felon during the commission of another felony count (Count 13), and the aggravated assault (Count 6) should have merged into the malice murder conviction, not the vacated felony murder count. However, because these merger errors made no practical difference and the State did not raise these issues by cross-appeal, the Court declined to correct them here.

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However, the Court noted a different issue with respect to the burglary count. Although the State did not raise this issue on cross-appeal, the State argued that in the order denying appellant's motion for new trial, the trial court concluded that it had improperly merged appellant's conviction for burglary under Count 9 with the vacated felony murder conviction in Count 4 and set a date for resentencing. But, before the resentencing hearing could take place, appellant filed a notice of appeal divesting the trial court of jurisdiction. The Court declined to exercise its discretion under these circumstances to correct the merger error, but stated that nothing in its opinion should be read to preclude the trial court from doing so pursuant to OCGA § 17-10-1 (f) upon return of the remittitur.

Additionally, appellant argued, and the State conceded, that the possession of a firearm during the commission of a felony count (Count 11) should have merged into the possession of a firearm by a convicted felon during the commission of another felony count (Count 13). The Court therefore vacated appellant's conviction and five-year sentence for possession of a firearm during the commission of a felony (Count 11).

Appellant also contended that the trial court erred by merging the aggravated battery count into the attempted murder count because *Zamudio v. State*, 332 Ga. App. 37, 48 (7) (2015), required the opposite — that the attempted murder count merge into the aggravated battery count. However, the Court stated, *Zamudio* was overruled by its decision in *Priester v. State*, \_\_\_ Ga. \_\_\_, \_\_\_ (3) 2020 Ga. LEXIS 465 (Case No. S20A0444, decided June 29, 2020), which held that aggravated battery merges into the greater offense of attempted murder when the crimes are predicated upon the same conduct, as they were here.

Appellant also contended that the trial court erred in sentencing him as a recidivist under OCGA § 17-10-7 (c) because two of the four convictions proffered by the State did not constitute “crimes which if committed within this state would be felonies,” as required by OCGA § 17-10-7 (c). The record showed that at the presentence hearing, after the State tendered into evidence certified copies of four Alabama felony convictions, trial counsel conceded that, “in light of the fact that the State did file its recidivist notice and the verdict, we do understand that there's not much discretion the Court has. There's no argument for the defense to make in regards to sentencing[.]” Thus, the Court found, because appellant did not raise this claim in the trial court, either at the presentence hearing or in his motion for new trial, and his trial counsel affirmatively waived any objection to using the Alabama felony convictions by stating the defense had no argument to make against recidivist sentencing, this argument was waived.

Nevertheless, relying on *von Thomas v. State*, 293 Ga. 569, 573-74 (2) (2013), appellant argued that his claim was not waived because it “challenges ‘the effect or use of the prior convictions’” and is therefore like a challenge to the sufficiency of the evidence supporting his recidivist sentences. But, the Court found, because appellant did not contest that two of his four prior Alabama convictions qualified as felonies for purposes of recidivist sentencing, he could not show that the State failed to meet the requirements for recidivist sentencing under OCGA § 17-10-7 (a). That subsection provides that where a convicted felon has at least one prior qualifying felony conviction, he “shall be sentenced to undergo the longest period of time prescribed for the punishment of the subsequent offense of which he or she stands convicted[.]” Therefore, appellant could not contest that a sentence of life in prison for malice murder and a 30-year sentence for criminal attempt to commit murder were mandated under OCGA § 17-10-7 (a).

And, the Court found, although the trial court further sentenced appellant to life without parole for murder, the court did not have to rely on OCGA § 17-10-7 (c) to impose that condition. Subsection (c) mandates that a defendant previously

convicted of three qualifying felonies serve the maximum sentence for all subsequent felonies without parole, but OCGA § 16-5-1 (e) (1) expressly authorizes a sentence of life without parole for a malice murder conviction, regardless of the defendant's prior criminal history. Thus, under these circumstances where the trial court was permitted by other statutes to impose the sentences that it did, even if the trial court labored under the mistaken impression that appellant was not eligible for parole under OCGA § 17-10-7 (c), that would amount to a mistake of law but would not result in a void sentence. Accordingly, because appellant's sentences fell within the statutory range of punishment for the crimes of which he was convicted, his sentences were not void and thus, appellant was required to raise any sentencing errors in the trial court to preserve them for review on appeal. In this instance, appellant's trial counsel not only failed to object, he affirmatively waived any objection to the use of the Alabama felonies, and therefore, the Court concluded, appellant waived his claim that the trial court improperly used two of the Alabama felonies to support the recidivist sentences.

Finally, appellant contended that the trial court committed plain error by failing to inquire whether his Alabama felony convictions would be felonies if committed within this state. However, in Georgia, plain-error review is confined to the sentencing phase of a trial resulting in the death penalty, a trial judge's expression of opinion in violation of OCGA § 17-8-57, and a jury charge affecting substantial rights of the parties as provided under OCGA § 17-8-58 (b), and, for cases tried after January 1, 2013, with regard to rulings on evidence, a court is allowed to consider plain errors affecting substantial rights although such errors were not brought to the attention of the court. Therefore, the Court stated, absent a specific provision by the General Assembly, it declined to extend plain-error review to other categories of claimed error.

## **Depositions to Preserve Testimony; Right of Confrontation of Witnesses**

*State v. Hines, A20A0950 (8/5/20)*

Hines and Watkins were charged with committing the offense of exploitation of an elder person by deceiving Myra Ford to believe that they were her granddaughters and consequently obtaining checks drawn on her account. The record showed that during the investigation, Ford gave an audio recorded interview with law enforcement. After formal charges were filed, the State filed an emergency motion to preserve Ford's testimony by deposition, under OCGA § 24-13-130, stating that a deposition was necessary because Ford was approximately 85 years old and in poor health. The trial court granted the motion, scheduled the State's direct examination of Ford for July 28, 2017, and ruled that the defendants' attorneys had the option to cross-examine Ford either immediately after the State's direct examination or within two weeks thereafter.

The Court found that Ford's videotaped deposition showed that she was severely infirm and struggled to understand and answer questions. Indeed, Ford rarely even acknowledged the questioner, with whom it appeared that she never made eye contact; her demeanor for nearly the entire deposition suggested that she was unaware that questions were being asked of her; and nearly all of the very few responses she was able to give were difficult or impossible to hear.

The State sought a pre-trial ruling on the admissibility of the audio recording of Ford's law enforcement interview, arguing that admission of the recording would not violate the Confrontation Clause because, although the defendants' attorneys were not, of course, present at the investigative interview, they were given an opportunity to cross-examine Ford at her deposition, but did not do so. The State asserted that because Ford was able to acknowledge the interview at her deposition, it did not matter that she could not remember the details of the interview. The defendants responded that the Confrontation Clause barred admission of the interview because their attorneys did not have an opportunity to cross-

examine Ford about the interview at the deposition, where she was virtually nonresponsive and not competent to acknowledge anything that was shown to her. The trial court agreed with the defendants and the State appealed.

The Court found that the trial court was authorized to find that the defendants did not have an adequate opportunity to effectively cross-examine Ford about her interview statements. Ford was nonresponsive throughout her deposition and was essentially unable to acknowledge or respond to questions regarding whether she remembered the interview or any other matters in the case. Due to Ford's inability to acknowledge or respond to such questions, the defendants had no opportunity whatsoever for effective cross-examination about her interview.

Nevertheless, the State argued, this case was analogous to other cases holding that the admission of the prior statement of a witness, who is present at trial but does not recall the statement or the reasons for giving it, does not violate a defendant's right to confront the witness. The Court disagreed. Here, by contrast, Ford could not meaningfully respond to questions, much less state one way or another whether she remembered giving the interview statements. Therefore, the defendants did not have an adequate opportunity to cross-examine her about the interview — including her memory of it — and this case was more analogous to cases holding that the Confrontation Clause bars the admission of a prior statement of a witness who completely refuses to testify when called at trial. In other words, like a witness who refuses to testify at trial, Ford was “unavailable for any cross-examination” at her deposition in light of her inability to acknowledge or respond to questions. Accordingly, the Court held, because the trial court was authorized to find that the defendants did not have an adequate opportunity to cross-examine Ford about her testimonial statements in the interview, the trial court did not err in ruling that the interview was inadmissible.

## **Prior Acts of Molestation against Family Members; Rule 608**

*Reyes v. State, A20A1445 (8/6/20)*

Appellant was convicted of three counts of child molestation and one count of sexual battery against a child under the age of 16. He contended that the trial court erred by precluding him from questioning witnesses about the victim's family members' sexual abuse history in order to show bias. The Court disagreed.

The record showed that appellant sought to cross-examine the victim and her sister along with other family members about prior alleged molestations of and by members of the girls' family. Appellant proffered that there had been allegations of child molestation against the father of the victim's sister, and that the victim's grandmother and mother had previously reported their own sexual abuse. Appellant argued that the victim's sister was “hypersensitive” to sexual abuse issues and the prior abuse showed prejudice against him. The trial court denied appellant's request, finding that the evidence was not relevant.

The Court stated that although a defendant is entitled to a thorough and sifting cross-examination, a trial court has broad discretion in determining the scope and relevancy of that examination. And OCGA § 24-6-608 provides very specific, limited methods for attacking or supporting the credibility of a witness by evidence in the form of opinion or reputation.

Relying on *Letlow v. State*, 222 Ga. App. 339 (474 SE2d 211) (1996), appellant contended that evidence of the victim's family members' own allegations of child molestation would have supported his defense theory that the victim was

“hypersexualized” and fabricated the allegations against him. The Court noted that in *Letlow*, the Court held that pursuant to OCGA § 24-9-68, “a prior act of molestation committed against the child of a witness is relevant to show any possible bias against an accused child molester that the witness may entertain, unconsciously or deliberately.” *Id.* at 342-343 (2). OCGA § 24-9-68, a provision of the old Evidence Code, provided that “[t]he state of a witness's feelings towards the parties and his relationship to them may always be proved for the consideration of the jury.” This provision was carried over to the new Evidence Code as OCGA § 24-6-622 (“[t]he state of a witness's feelings towards the parties and the witness's relationship to the parties may always be proved for the consideration of the jury”).

But here, the Court found, appellant did not seek to question the witnesses regarding these allegations in an effort to show bias or prejudice on the part of the witnesses, in contrast to *Letlow*. Rather, appellant sought to cast doubt on the credibility of the victims through the testimony of these witnesses. Accordingly, *Letlow* and OCGA § 24-6-622 did not govern the issue. Thus, because OCGA § 24-6-608 (b) places the decision whether to admit specific instances of conduct within the trial court's discretion, the Court could not say under these circumstances that it was an abuse of discretion to preclude questioning as to these allegations.

## **Rule 404 (b) Evidence; Due Process**

*Hendrix v. State, A20A0923 (8/10/20)*

Appellant was convicted of armed robbery and aggravated assault. At trial, the court allowed the State to present other acts evidence of another robbery that occurred two weeks after the armed robbery for which appellant was on trial. The court admitted the evidence under Rule 404 (b) to show appellant's intent and modus operandi.

Appellant contended that the trial court's admission of the other act evidence pursuant to OCGA § 24-4-404 (b) was an abuse of discretion. However, he did not contend that the evidence failed to satisfy the three-part test for admissibility. Instead, he argued that the trial court should have considered the ABA Standards on Joinder before ruling that the other act was admissible.

The Court found that the ABA Standards on Joinder of Offenses provide that where two or more offenses have been joined for trial solely on the ground that they are of the same or similar character, a defendant has the right to a severance of the offenses. Appellant contended that the standards required the trial court to exclude the other act evidence because both the case-in-chief and the case based upon the other act were pending on the same trial calendar. Consequently, he argued, he essentially had a trial on — and was forced to defend against — both this case and the other act case at the same time. But, the Court noted, appellant cited no authority requiring the trial court to apply the ABA Standards on Joinder where, as here, the offenses were *not* joined for trial. Further, the trial court properly instructed the jury that it could consider the other act evidence only to the extent it may show appellant's intent and modus operandi, and that appellant was only on trial for the offenses charged in the indictment and not for any other acts.

Appellant also contended that the admission of the other act evidence denied him due process and affected his decision to testify. He argued that although he was advised by counsel not to testify, he wanted to testify but would have been cross-examined concerning the other act and would have to later defend against it with no chance of being acquitted. However, the Court stated, a defendant's constitutional rights are not violated by the defendant having to make a choice whether or

not to testify where a similar transaction (now "other crimes, wrongs, or acts") that is the basis for another pending case is admitted. And, the Court noted, appellant again cited no authority that other act evidence must be excluded because its admission could impact a defendant's decision regarding whether to testify. Accordingly, the Court held that the trial court did not abuse its discretion in admitting the other acts evidence.

## **Search & Seizure; Fourth Amendment Waivers**

*Watson v. State, A12A1165 (8/12/20)*

Appellant was convicted of multiple counts of VGCSA. He contended that the search of his camper and truck violated the Fourth Amendment because it was conducted without consent or a warrant. The trial court denied the motion, finding that at the time of the search, appellant was out on bond and that the bond contained a Fourth Amendment waiver.

The Court stated that bonds in both felony and misdemeanor cases may contain conditions so long as the conditions are reasonable under the facts and circumstances of the case. This is consistent with the principle that where a person charged with a crime is released on bail prior to trial, he remains in the constructive custody of the law. And here, the Court found, because appellant was released on bond for multiple charges, including felony theft by receiving stolen property, it was a reasonable exercise of the court's function to balance appellant's Fourth Amendment rights with public safety interests.

The Court also noted that appellant did not dispute that he signed the order containing the waiver. The waiver was not hidden with a myriad of other conditions in a multi-page order. Instead, the waiver was highlighted on the one-page order by a title section that states "WAIVER OF FOURTH AMENDMENT RIGHTS", which was centered, written in caps, bold type and underlined. Furthermore, the trial court was entitled to find appellant not credible in his claims that he did not understand he was waiving his Fourth Amendment rights by signing the order. Thus, the Court concluded, because the trial court was not required to believe appellant's testimony that he was unaware of the Fourth Amendment waiver, and the imposition of the waiver as a condition of appellant's bond was reasonable, the trial court did not err in denying the motion to suppress.

## **Expert Opinion; Right of Confrontation**

*Stewart v. State, A20A1433 (8/13/20)*

Appellant was convicted of armed robbery. He contended that the trial court erred by allowing a forensic biologist with the GBI to testify that DNA evidence linked him to the crime. Specifically, he argued that such testimony violated his right to confrontation because the witness at trial was not the same biologist who performed the testing on the DNA sample. The Court disagreed.

Relying on *Bullcoming v. New Mexico*, 564 U.S. 647 (131 SCt. 2705, 180 LE2d 610) (2011), the Court found that although the forensic biologist did not directly supervise her former co-worker's analysis of the DNA samples, she did conduct an extensive peer review of that analysis. She testified to reviewing all of her former co-worker's notes, procedures, and results "at every step." She further testified to checking the instrument case files to ensure the controls worked and that her analysis of the co-worker's results matched the conclusions he reached in his final report. She also explained that she conducted this peer review of her former colleague's work shortly after his initial analysis. Moreover, she noted that

her review was not merely a rubber stamp but was conducted so as to allow her to reach her own independent conclusions. Given these circumstances, the Court concluded the reviewing forensic biologist's testimony was sufficient to satisfy the Confrontation Clause and not the sort of "surrogate testimony" forbidden by *Bullcoming*. Accordingly, the Court held that the trial court did not err in ruling this testimony admissible.

## Juveniles; Trial as an Adult

*Mumphrey v. State, A20A0878 (8/14/20)*

Appellant, a sixteen year old, committed acts, which if they had been committed by an adult, would have constituted two counts of criminal trespass, three counts of obstruction of an officer, and one count each of burglary in the first degree, criminal attempt to commit felony burglary, simple battery and criminal damage to property. The State then moved that the case be transferred from juvenile court to superior court. After a hearing, the trial court granted the State's motion.

Appellant contended the juvenile court abused its discretion in finding that the offenses he is charged with weigh in favor of the transfer to superior court because they are not designated felonies. However, the Court noted, appellant failed to cite to any legal authority that a juvenile court cannot consider a crime to be serious unless it was a designated felony and the Court declined to do so. And, the Court found, the juvenile court's finding that appellant's offenses were serious in nature was supported by the evidence.

Pursuant to OCGA § 15-11-562 (a) (11), appellant contended that the juvenile court abused its discretion in finding that he was not amenable to rehabilitation because not all of the treatment options available to him. through the juvenile court system had not yet been exhausted. The Court disagreed. Here, the juvenile court found that appellant had a history with the juvenile court and had been through a majority of the juvenile court's rehabilitative programs, including counseling, probation, drug testing, and house arrest, but continued to violate the conditions of his probation by continuing to offend. Thus, the Court held, the trial court did not abuse its discretion by concluding that appellant would not benefit from further treatment and rehabilitative programs offered by the juvenile court.

Finally, appellant contended, the juvenile court erred by failing to conduct a balancing test of the juvenile's amenability to treatment by the interests of the community. However, the Court found, no such balancing test is mandated by the current version of OCGA § 15-11-562. Georgia case law has held that such a balancing test is required when the State seeks a transfer to superior court under a theory that, even though the juvenile might be amenable to treatment within the juvenile court system, the seriousness of the crime warrants it. But here, the trial court's order concluded that appellant would not be amenable to further treatment as a juvenile and thus, a balancing test was not required.

Nevertheless, the Court found, although the juvenile court's order addressed all of the criteria set forth in OCGA § 15-11-566 (a) - (b), it failed to specifically dismiss appellant's case from the jurisdiction of the juvenile court. Accordingly, the Court remanded the case for entry of a specific dismissal order pursuant to OCGA § 15-11-566.