

## THIS WEEK:

- **Restitution; Fair Market Value**
- **Child Molestation; Units of Prosecution**
- **Motions for New Trial; General Grounds**
- **Cultural Norms; Opinion Testimony**
- **Search & Seizure; Motions to Suppress**
- **Ineffective Assistance of Counsel; Plea Deals**

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## Restitution; Fair Market Value

*Summers v. State, A20A0366 (6/30/20)*

Appellant pled guilty to two counts of burglary and two counts of theft by taking. The evidence showed that appellant broke into two of her neighbors' houses and stole various pieces of jewelry. At the restitution hearing, the two victims, Beegan and Pittman, testified as to the fair market value of their respective stolen jewelry. Following the hearing, the trial court found that the total fair market value of the stolen jewelry was \$76,538, and it ordered appellant to pay that amount in restitution, with \$1,688 to be paid to Beegan and \$74,850 to be paid to Pittman.

Appellant contended that the State failed to present sufficient evidence as to each piece of jewelry. The Court disagreed. First, as to Beegan, the Court noted that Beegan did not offer any particular specific opinion as to the fair market value of these two items of jewelry at the time of the theft. However, the Court concluded that typical items of jewelry, such as the ones at issue here, fall within the category of everyday common items with which the average person has some knowledge and experience in terms of their value and market characteristics. Thus, the State need not offer any opinion evidence as to value and so long as the evidence contains facts upon which the factfinder may legitimately exercise their own knowledge and ideas, the question of value is properly left to the factfinder. And here, in addition to the cost price, Beegan testified as to the age and condition of these two pieces of jewelry. From these circumstances, the trial court could legitimately come to its own conclusion as to the fair market value of the jewelry at the time of the theft, and it apparently concluded that the jewelry had not depreciated in value from the time of purchase. Since there was no contrary evidence in the record showing that items of jewelry do depreciate in value over time, the Court found that the preponderance of the evidence supported the amount of restitution the trial court ordered as to Beegan.

Pittman testified that she visited a jewelry store to assist with the valuation of her stolen jewelry. Pittman testified that she went “[t]hrough their estate jewelry what matched—you know, came close to the size of the piece, as well as if it was white, gold, platinum, or yellow gold. The pieces that they were unaware of or unsure of, I went through an estate—estate jeweler” so as to come up with a value for each of the twenty-one pieces of jewelry.

As an initial matter, the Court added up the total value of stolen jewelry to which Pittman testified, and arrived at a sum of \$84,030, which was a difference of \$9,180 from the \$74,850 that the State argued for in the trial court (and which

amount the trial court accepted). The State did not explain in detail how it arrived at its total sum, nor did it explain which pieces of jewelry were included or excluded from its calculation. From this record, the Court could not tell how the State and the trial court arrived at that number. Nevertheless, because the discrepancy was in appellant' favor, the Court stated that reversal was not automatically required.

The Court then concluded that the preponderance of the evidence supported the value of the jewelry for which Pittman obtained, and testified to, an express estimate from the jewelry store or the separate estate jeweler, as such estimate constituted opinion evidence from a source that dealt in the trade of buying and selling jewelry. The Court further concluded that a preponderance of the evidence supported the value of the three pieces of jewelry for which Pittman provided appraisal values from 2005 (two square-cut emeralds and a Patek Phillipe watch), as Pittman accompanied such values with descriptions of the items and how the condition of these items affected the value. Based on this evidence about the jewelry's condition, the trial court, as factfinder, could determine from this testimony about the jewelry's condition whether the value had materially changed between the 2005 appraisal and the theft. Thus, the Court found, by its own calculations, the total value of these items was \$75,760, which was more than the \$74,850 the trial court ordered due to Pittman. Therefore, the Court stated, it need not go further and analyze the evidence regarding the remaining pieces. Consequently, the Court concluded that a preponderance of the evidence supported the amount of restitution ordered to both Beegan and Pittman.

## **Child Molestation; Units of Prosecution**

*Scott v. State, A18A0751 (6/30/20)*

The Supreme Court remanded this case for the Court of Appeals to determine and apply the unit-of-prosecution analysis to assess whether multiple counts of child molestation, occurring within a relatively short time frame and in a single uninterrupted course of conduct, can support multiple convictions and sentences under OCGA § 16-6-4 (a) (1). See *Scott v. State*, 306 Ga. 507, 508 (1) (2019). The evidence at trial showed that on the night of February 6, 2011, the victim, who was then 11 years old, awoke to see appellant standing next to her bed; as she put her head back down to go back to sleep, she felt appellant reach under her clothes to fondle her breasts, buttocks and anal area, and vagina, inserting his finger into both her anus and vagina. When the victim then got out of bed to use the bathroom, appellant picked the lock on the bathroom door and opened it to watch the victim urinate, despite her telling him three times to get out. Three of the child molestation counts were based on the bedroom incident: Count 2 of the indictment was based on appellant's touching the victim's breasts, Count 3 on his touching her buttocks, and Count 4 on his touching her vagina. The final count (Count 5) was based on the bathroom incident. Appellant was convicted of Counts 2-5 and sentenced on each count.

Appellant contended that the trial court erred in failing to merge his child molestation convictions on Counts 2, 3, and 4, arguing that all of those counts arose out of the same conduct, and therefore, the trial court should have imposed only one conviction and sentence. The Court agreed.

Initially, the Court noted that neither it nor the Supreme Court of Georgia had yet to apply the unit-of-prosecution analysis to determine whether multiple counts of child molestation, occurring within a relatively short time frame in a single course of conduct, can result in multiple convictions and sentences under OCGA § 16-6-4 (a) (1). The Court stated that if the legislature fails to denote the unit of prosecution in the statute, as is the case here, courts must resolve the

ambiguity and are constrained to do so in favor of the defendant charged with having violated the statute. And here, based on a plain reading of the statute, the Court found that it could not say for certain that, as written, OCGA § 16-6-4 (a) (1) provides for a separate conviction and punishment for each separate invasion to a victim's body during a single uninterrupted course of conduct. Further, the State presented no evidence to establish that appellant molested the victim in three completed acts separated by a meaningful interval of time or with distinct intentions. Although the victim testified that appellant touched her breasts, vagina, and buttocks while she was in bed, she did not testify as to how much time, if any, elapsed between the touches.

Nevertheless, the Court stated, despite its conclusion, it is mindful that there are reasons legislators may want to treat child molestation differently from other crimes, given the State's compelling governmental interest in the welfare of children. Moreover, the Court recognized that the conduct underlying appellant's three child molestation convictions, which included his touching the victim's breasts and inserting his finger into her vagina and buttocks, involved trauma to, and violated three distinct parts of the victim's body. This scenario contrasts with assault cases, where courts have found that a series of shots fired or blows administered in quick succession, often in the heat of the moment, do not constitute a renewed assault and thus are subject to merger. But, here, based on the text of OCGA § 16-6-4 (a) (1), the General Assembly has not, by clear and unambiguous language, provided that multiple touches to a victim, during a single uninterrupted course of conduct, authorize multiple prosecutions and convictions for separate acts of child molestation. And, if reasonable minds disagreed as to whether the statute is, in fact, ambiguous, the rule of lenity requires the Court to interpret it in favor of the defendant.

Thus, the Court concluded, applying the rule of lenity here, as required absent a clear mandate, it was compelled to hold that appellant's conduct, as outlined in Counts 2, 3, and 4 of the indictment, in violation of OCGA § 16-6-4 (a) (1), constituted a single unit of prosecution for which he was subject to only one conviction and sentence. Therefore, the Court stated, it was "constrained" to vacate appellant's child molestation convictions and sentences on Counts 2, 3, and 4 and remand to the trial court for resentencing on a single count. In so holding, the Court stated that if the General Assembly intends for OCGA § 16-6-4 (a) (1) to punish each separate invasion of a protected area of a victim's body in a single uninterrupted course of conduct, it is urged to employ such clear, unambiguous language to specify the unit of prosecution accordingly.

## **Motions for New Trial; General Grounds**

*State v. Rhodes, A20A0246 (7/1/20)*

Rhodes, who was 16 years old at the time of the offenses, was convicted of two counts of aggravated child molestation, and the trial court sentenced him to concurrent 25-year terms of imprisonment, followed by life on probation. Rhodes timely filed a motion for a new trial, and argued among other things that "the jury reached a verdict against the weight of the evidence." After holding a hearing and considering the parties' legal briefs, the trial court granted the motion for new trial under the standards set forth in OCGA §§ 5-5-20 and 5-5-21. The State appealed.

The State contended that the trial court granted Rhodes a new trial because the court was distressed at the mandatory sentence Rhodes had to receive upon conviction. The Court agreed that dissatisfaction with the mandatory sentence is not a proper basis for granting a new trial. However, while the record reflected the trial court's concern with the length of the

sentence, it did not establish that the length of the sentence was the trial court's only concern, or that this concern factored into the court's award of a new trial. In fact, in its order granting the new trial, the court did not discuss the length of the sentence, or mention any concern about Rhodes's relatively young age at the time the offenses were alleged to have occurred. Nothing in the order indicated that the trial court failed to perform its duty to exercise its discretion and weigh the evidence in its consideration of the general grounds. The court did not state the incorrect standard in its order, and the record did not support the conclusion that the court was unaware of its responsibility. The court clearly recognized that, in its discretion, it could grant a new trial under the authority of OCGA §§ 5-5-20 and 5-5-21, and chose to do so. Importantly, the law does not require a trial court to provide findings regarding the factors it considered in exercising its discretion as the thirteenth juror, so long as it is clear that the trial court applied the correct standard and exercised its discretion under OCGA §§ 5-5-20 and 5-5-21.

Thus, the Court concluded, having reviewed the entire record, and considering that the trial court was authorized, as the thirteenth juror, to credit Rhodes's version of events as recounted in his police interview, and to discount versions offered by other witnesses, and bearing in mind the deferential standard of review set forth in OCGA § 5-5-50, it could not say that the trial court abused its substantial discretion in granting Rhodes a new trial on the general grounds.

## **Cultural Norms; Opinion Testimony**

*Martinez-Arias v. State, A20A1080 (7/14/20)*

Appellant was convicted of child molestation, aggravated child molestation, and aggravated sexual battery. The transcript showed that a school counselor was allowed, over appellant's objection, to offer testimony about Latino culture. Specifically, the evidence showed that the victim lived with her aunt and appellant, the aunt's boyfriend. The victim's family is originally from Mexico, and the victim's father lived there. Noting her own Latino heritage and professional experience working with at-risk Latino youth and Latino children who had been exposed to sexual abuse, the counselor began describing what she termed the "machismo" and "collectivistic family" nature of the Latino culture. The prosecutor asked the witness to describe attitudes she had noticed "with the Latino culture and sexual abuse." In response, the school counselor testified about the "machismo culture," in which females "are supposed to be submissive to" the male head-of-household. The counselor testified further about Latino cultural norms she had observed in cases of child sexual abuse, specifically, that Latino girls reporting such abuse experience guilt, shame, a lack of family support, and difficulty making disclosures. According to the counselor, these victims feel that "it's the girl's fault for opening her legs and the boys are just supposed to be that way, they just have urges." She further stated: "[T]he Mexican culture, in particular, it's taboo – sexual education is a taboo topic among Latinos and a lot more in the Mexican structure, because it's based on religious foundations[.]"

Appellant argued that "cultural norms around gender and sexuality [was] not relevant to whether a crime occurred because the testimony proved nothing with respect to whether he molested the victim. The Court disagreed. Instead, the Court found, the testimony provided context for the several-year delay in the victim's outcry, a relevant issue given the defense's theory that the allegations of abuse were fabricated. And, although appellant contended that the evidence encouraged "a verdict that took [his] ethnicity into account," the trial court was authorized to conclude that the testimony related to the victim's fear and failure to immediately disclose the abuse, rather than appellant's ethnicity. Thus, the Court concluded, under these circumstances, the trial court acted within its discretion in deeming the counselor's testimony relevant.

Moreover, the Court found, the trial court did not err in finding that the counselor's testimony was admissible as lay opinion evidence, rather than expert testimony. Pursuant to OCGA § 24-7-701 (a), a witness's lay opinion testimony is admissible if the opinions are: (1) rationally based on the witness's perception; (2) helpful to clearly understanding the witness's testimony or determining a fact in issue; and (3) not based on scientific, technical, or other specialized knowledge. To be rationally based on the witness's perception and thus qualify as lay opinion, testimony must be based on first-hand knowledge or observation.

Here, the school counselor offered opinions based on her first-hand knowledge and observations as a member of the Latino community and a counselor for at-risk Latino youths. Although she also described her training and the scholarly research she had conducted, lay witnesses may draw on their professional experiences to guide their opinions without necessarily being treated as expert witnesses. Thus, the Court determined, the evidence supported the conclusion that the counselor's testimony was rationally based on her perceptions, would be helpful to the jury in judging the victim's credibility, and were not based on scientific, technical, or specialized knowledge. Accordingly, the trial court properly exercised its discretion in admitting the evidence as lay opinion evidence.

## **Search & Seizure; Motions to Suppress**

*Riley v. State, A20A1376 (7/21/20)*

Appellant was convicted of possession of tools for the commission of a crime, failure to maintain lane, and two counts of forgery of a financial transaction card. The evidence was found during a traffic stop of the vehicle appellant was driving. Appellant contended that the trial court erred in denying his pre-trial motion in limine regarding the items found in the car. The Court disagreed.

The record showed that six days before his trial began - and more than nine months after he waived arraignment - appellant filed a motion in limine, seeking to bar the State from referring to or attempting to introduce at trial "[a]ny reference to" the items found in his car and his statements to officers, on the ground that the search that produced the evidence was unconstitutional.

First, the Court noted, appellant mischaracterized his motion in limine by asserting that it sought to bar the introduction of the physical items found in his car. But, the motion did not seek to suppress those items; it rather sought to bar any *argument or testimony* regarding those items (and his ensuing statements to officers). And, the Court found, appellant did not file a timely motion to suppress any physical evidence in this case. As a result, the Court held, he waived any right to claim that the underlying search which produced the physical evidence was unconstitutional, and he therefore was not entitled to exclusion of testimony describing the physical evidence on the basis that the testimony was the fruit of an unconstitutional search.

Moreover, the Court noted, in his motion in limine, appellant's sole challenge to the admissibility of his statements to officers was that those statements resulted from the allegedly unconstitutional search of his car. Thus, by waiving any claim that the search of his car was illegal, he necessarily waived any claim that his statements to officers should be suppressed

due to the alleged illegality of the search. Consequently, the Court concluded, the trial court did not err when it denied appellant's motion in limine.

## **Ineffective Assistance of Counsel; Plea Deals**

*McNeely v. State, A20A1496 (8/3/20)*

Appellant was convicted of aggravated assault and possession of a firearm during the commission of a crime. The evidence showed that appellant went to a hotel to buy an ounce of methamphetamine. After the victim weighed the drugs, appellant pulled a gun and attempted to rob him. The victim refused and appellant fired his gun twice before running out of the room. The victim then left and got into his truck in the parking lot. As he was driving off, an SUV then pulled up beside the victim's truck and someone got out, unsuccessfully tried to open the truck's doors, and fired two shots into the truck before jumping back into the SUV. One of the bullets struck the victim in the leg. The victim rammed the SUV with his truck, and then both vehicles drove away.

At trial, the prosecutor showed a videotape of the incident in the parking lot. Appellant's counsel told appellant at the time that he neglected to view this evidence. Thereafter, appellant filed a motion for new trial, contending that if his trial counsel had reviewed the video file before trial and discussed it with him, he would have accepted the plea deal offered by the State. The trial court disagreed and denied the motion.

Premitting whether trial counsel was deficient in failing to review the video file before trial and discuss it with him, the Court concluded that the trial court was authorized to determine that appellant failed to establish that he was prejudiced by counsel's alleged deficiency. Appellant did not argue that there was a reasonable probability that the result of his trial would have been different, but for his counsel's alleged deficiency in failing to review the video file. Rather, he contended that but for his counsel's deficiency in failing to review the video and advise him about it in their discussions about the State's plea offer, he would have accepted the plea offer instead of proceeding with trial.

A defendant claiming ineffective assistance based on rejecting a plea offer because of counsel's deficient advice must establish prejudice by showing: (1) that but for the ineffective advice of counsel, there is a reasonable probability that the plea offer would have been presented to the court, meaning that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances; (2) that the trial court would have accepted the terms of the negotiated plea; and (3) that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Here, the Court noted, appellant did not testify or offer any other direct evidence at the motion for new trial hearing that he would have ever accepted the State's offer of five years in confinement followed by five years on probation, had he been advised by counsel about the video file. And, there was testimony from appellant's trial counsel at the new trial hearing reflecting that appellant was pleased that the case had been assigned to the same trial judge who had previously acquitted him in a different case, that he strongly wanted to proceed to trial, and that there were no signs that appellant ultimately would be willing to plead guilty. Furthermore, in appellant's letters to the prosecutor admitted into evidence at the new trial hearing, appellant criticized the State's plea offer, proclaimed his belief in his innocence, indicated that he was only

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# CaseLaw UPDATE

WEEK ENDING SEPTEMBER 11, 2020

Issue 37-20

amenable to a plea deal involving much more probation time and less prison time, and made clear that he believed there were good reasons to proceed with a trial.

Consequently, the Court held, given this record, the trial court was entitled to find that appellant failed to show that a reasonable likelihood existed that he would have accepted the State's plea offer, but for his trial counsel's failure to review the second video file and discuss it with him. Accordingly, the trial court committed no error in rejecting appellant's ineffective assistance claim and denying his motion for new trial.

**Page 7**

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