

## THIS WEEK:

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## Voir Dire; Batson

*Thomas v. State, S20A0721 (8/10/20)*

Appellant was convicted of murder and related offenses. Appellant contended that his convictions should be reversed because the trial court failed to sufficiently evaluate the prosecution's reasons for its peremptory strikes to determine if those strikes were not pretexts for racial discrimination. Essentially, he argued that the trial court did not conduct a full *Batson* analysis and that, if it had, it would have seen the State's discriminatory intent in striking African-American potential jurors.

The Court stated that a *Batson* challenge involves three steps: (1) the opponent of a peremptory challenge must make a prima facie showing of racial discrimination; (2) the proponent of the strike must then provide a race-neutral explanation for the strike; and (3) the court must decide whether the opponent of the strike has proven the proponent's discriminatory intent.

The record showed that the prosecutor used seven of nine peremptory strikes to remove African-American jurors from the venire, one of whom (Juror 42) would have been an alternate. Ultimately, two African-American jurors were seated on the jury panel, one of whom was an alternate. After appellant made his *Batson* challenge, the State conceded and the trial court agreed that appellant had made out a prima facie showing of racial discrimination in the use of the State's peremptory strikes. Thereafter, the trial court asked the prosecutor to state the reasons for its peremptory strikes. When the prosecutor finished, appellant then broadly asserted that the State's race-neutral reasons given with respect to Jurors 18, 31, and 42 were implausible. He complained that the prosecutor's explanation as to Jurors 18 and 42 were difficult to believe and that her explanation with respect to Juror 31 was "clearly speculation." When asked for specific responses to the State's explanations in support of its strikes, defense counsel argued that Juror 42 was a good juror for the State because her grandson had been the victim of a crime. He also said, however, that he had "no response" to the State's rationales for

striking Jurors 31 and 42 and would "rest on his motion." With respect to Juror 18, he asserted that the record did not support the prosecution's belief that the juror's demeanor indicated sympathy for the defendant.

After hearing from defense counsel, the trial court ruled that because appellant had not articulated responses that adequately rebutted the State's race-neutral rationales for striking Jurors 18, 31, and 42, his *Batson* challenge was denied. Moreover, the record showed that appellant made no argument that the State had seated similarly situated white jurors or pointed to any other circumstances from which the trial court could reasonably infer that the prosecutor had a discriminatory intent in striking these jurors.

The Court held that based on this record, there was no clear error in the trial court's ruling denying appellant's *Batson* challenge. After hearing argument from both appellant and the State and after explaining its reasoning, the trial court denied the *Batson* challenge as to Jurors 18, 31, and 42. The record indicated that the court assessed all of the circumstances before it and found no discriminatory intent in the State's use of its peremptory strikes, thereby fully engaging in the *Batson* inquiry. Further, although appellant expressed doubt about the prosecutor's rationales for using peremptory strikes against the three jurors, he failed to make any factual argument in support of those doubts or in support of his claim that the prosecutor acted with discriminatory intent. The burden of persuasion is on the opponent of a strike to prove discriminatory intent, and appellant failed to do that.

## Residual Hearsay; Rule 807

*Reyes v. State, S20A0780 (8/10/20)*

Appellant was convicted of malice murder and other offenses in connection with the stabbing death of his girlfriend. The evidence showed that appellant and the victim lived in a two-bedroom apartment with many others, included Nelson, the victim's nephew, his wife, and children. Appellant contended that the trial court erred by admitting statements made to Nelson by the victim regarding her relationship with appellant. The Court disagreed.

The record showed that the State offered the statements to show the history of abuse and difficulties between appellant and the victim and to show that appellant was aware that the victim had a knife and that she kept it in the bedroom they shared. The Court noted that appellant did not argue that the statements were not offered as evidence of a material fact or that the State, through reasonable efforts, could have procured more probative evidence on these points. Moreover, appellant did not argue that another exception to the hearsay rule applied to the statements at issue. Instead, appellant argued that the trial court's ruling to admit the evidence constituted an abuse of discretion because, even though appellant's trial took place after January 1, 2013, the court applied case law interpreting the "necessity" exception to the hearsay rule in Georgia's former Evidence Code.

The Court found that in ruling upon appellant's claim in his motion for new trial that the statements at issue should not have been admitted pursuant to OCGA § 24-8-807, the trial court referred to *Williams v. State*, 299 Ga. 209, 212 n.2 (2) (2016), which applied the "necessity" exception to the hearsay rule set forth in former OCGA § 24-3-1 (b) and that exception was not carried over into the current Evidence Code. However, despite its citation to *Williams*, the trial court's order denying appellant's motion for new trial on this ground relied primarily on *Jacobs v. State*, 303 Ga. 245, 249 (2) (2018), a decision setting forth the appropriate factors for the trial court to consider in determining whether to admit

evidence under OCGA § 24-8-807. Thus, because the trial court ultimately applied the appropriate evidentiary standard despite its citation to a case construing the former Evidence Code, the Court found it unnecessary to vacate the trial court's denial of appellant's motion for new trial on this ground.

Appellant also contended that the trial court abused its discretion by admitting the statements at issue pursuant to the residual exception. The Court noted that the trial court determined that there were a number of factors that weighed in favor of finding that the statements made by the victim to Nelson were trustworthy. It noted that the statements concerned violence and abuse, that the victim had no motive to fabricate any of the statements, and that she had made them to Nelson shortly before her death. The trial court also took particular note of the fact that Nelson and the victim were close relatives and that they had been residing in the same apartment for several months when the statements were made. The trial court based this determination on Nelson's proffered testimony, in which he indicated that he and the victim had a close relationship in which they regularly shared with each other what was happening in their lives. Additionally, Nelson had actually witnessed fights and arguments between the victim and appellant (including the argument between them the night the victim was killed) and had heard appellant threaten the victim on one occasion. Because each of these factors supported a determination that there were exceptional guaranties of trustworthiness regarding the making of these statements, the Court found no abuse of the trial court's discretion in permitting Nelson to testify to the victim's statements to him.

## Statements; *Miranda*

*Young v. State, S20A0859 (8/10/20)*

Appellant was convicted of malice murder. He contended that the trial court erred in denying his motion to suppress his statements made during police interviews. Specifically, he argued that his statements should have been excluded because (a) he never knowingly waived his rights under *Miranda* because he was misinformed about his "immediate right to a free lawyer" and e (b) the detectives continued his interrogation after he invoked his right to silence. The Court disagreed.

The record showed that after appellant was read his *Miranda* rights, and indicated that he understood them, he inquired as to whether if he asked for a lawyer, the police would get him one. The detective stated "I mean, we, you know—you're not being charged with anything, so there—we don't—you get appointed with a lawyer when you're charged with something, so if you said you wanted a lawyer, and you wanted to go get one and come back and talk to us, that's—up to you." Appellant contended that the detective's statement that "you get appointed with a lawyer when you're charged with something" contradicted *Miranda's* warning about the right to counsel such that his waiver of his rights under *Miranda* was not knowingly and intelligently made. But, the Court found, the detective's statement was accurate insofar as an accused may be appointed a lawyer once he is charged with a crime under case law interpreting the Sixth Amendment.

Additionally, because the record showed that the detective properly advised appellant of his *Miranda* rights and later told appellant that "if [he] wanted a lawyer, and ... wanted to go get one and come back and talk to us, that's—that's up to you," the Court could not say that the detective misled appellant about his Fifth Amendment right to an attorney under *Miranda* such that appellant's waiver of his rights under *Miranda* was not knowing and intelligent. Moreover, the Court found, appellant did not unambiguously invoke his right to counsel, and after the detective asked if appellant wanted to talk without a lawyer present, appellant replied, "Just talk, let's see what you got to say." Thus, the Court concluded, because the detective advised appellant of his rights under *Miranda*; because the detective's statements did not contradict

*Miranda*; and given that the record supported the trial court's conclusion that under the totality of the circumstances, appellant made his interview statements knowingly and intelligently, the trial court's decision was not erroneous, let alone clearly erroneous.

Appellant also argued that later in the interview, his statement "I'm done talking to you. If y'all find this s\*\*\* so funny, I'm done talking" was an unequivocal invocation of his Fifth Amendment right to remain silent, and that the interrogation should have ceased after his purported invocation. However, the Court found, viewed in context, the record supported the trial court's finding that appellant's statement was not an "unequivocal and unambiguous" invocation of his right to remain silent. Although the first half of the statement—"I'm done talking to you"—might appear unequivocal in isolation, it was immediately followed by the conditional statement—"[i]f y'all find this s\*\*\* so funny, I'm done talking"—rendering the whole statement equivocal. Moreover, video of the interview revealed that, rather than manifesting a desire to end questioning, appellant continued talking as soon as the detectives assured him that they would listen to his account of events. Therefore, the Court concluded, because appellant's statement was not so clear as to lead a reasonable police officer to understand that he was unequivocally and unambiguously invoking his right to remain silent, it was insufficient to trigger the detective's duty to cease questioning.

### **Other Acts Evidence; Rule 404 (b)**

*Hood v. State, S20A0725 (8/10/20)*

Appellant was convicted of the felony murder of Carden, the aggravated assault of Smith, and other offenses. The evidence, very briefly stated, showed that appellant met Carden early one evening at a club, sold him some cocaine, and then offered to meet him later for "services." Carden was travelling with Smith, but Smith did not go into the club or meet appellant. Appellant and Carden were in continuous contact through texting. Unbeknownst to Carden, appellant was also setting him up through texts with Estrada and Lanus. Eventually, Estrada and Lanus found Carden and Smith. Carden was killed and Smith was wounded.

At trial, the State was permitted to show that three months after this incident, appellant was involved in another armed robbery. The evidence showed that a landlord went to an apartment complex to meet with a tenant who was in arrears on her rent. After the tenant paid the landlord, appellant and Estrada appeared, armed robbed the landlord and drove off in a BMW, which was later identified as the tenant's vehicle.

Appellant contended that the trial court abused its discretion in admitting the other acts evidence. The Court disagreed.

Appellant argued that the other acts evidence was not admissible to prove intent because she admitted in her custodial interview that she intended to rob Carden and Smith of their wallets if the opportunity arose. But, the Court found, appellant was charged as a party to the crimes, and the State conceded that she was not the shooter. As such, the State was required to prove that appellant shared a common criminal intent with the direct perpetrators. And at trial, appellant testified to a different story, one where she did not share a common intent with Lanus and Estrada. Thus, the State still very much needed to prove appellant's intent to commit armed robbery.

Furthermore, armed robbery was not the only crime for which appellant was prosecuted and for which the State was required to prove intent. Appellant was charged with other crimes, including malice murder, aggravated assault, and aggravated battery, and a court may consider whether the other act was relevant to the issue of intent on any of these offenses. The relevance of other acts evidence offered to show intent is established when the prior act was committed with the same state of mind as the charged crime. Here, the states of mind required for the charged offenses of aggravated assault, aggravated battery, and armed robbery were the same as the states of mind required for the other acts incident, which could constitute robbery, aggravated assault, and aggravated battery. Therefore, the trial court did not err by ruling that the other-acts evidence was relevant to a matter other than appellant's character — her intent.

Next, the Court addressed whether the other acts evidence was admissible under Rule 403. The Court found that the prosecutorial need for the other-acts evidence was significant. Appellant's chief defense at trial was that Lanus and Estrada acted on their own in carrying out the crimes and that she was not aware that they were going to rob the victims and had no intent to participate in the crimes with them. But, the Court stated, if the principal in the killing was not the defendant, as was the case here, a question then would have arisen about whether the defendant was a party to the crime as an accomplice, which would have depended substantially upon her intent. Moreover, the charged crimes and the other acts incident bore striking similarities: both incidents involved victims in possession of cash who were lured to a specific location for an agreed-upon transaction with appellant or her associate, at which point they were ambushed by two individuals, beaten, and robbed by force. Estrada was also involved in both incidents. As for temporal proximity, the other acts incident occurred less than four months after the charged crimes in a neighboring county. The other acts incident thus had high probative value. And finally, the Court found, even if the evidence was prejudicial, the Court could not say that the high probative value of this evidence was so outweighed by the danger of unfair prejudice that the trial court abused its discretion when it admitted it. Accordingly, the Court concluded that this claim was without merit.

## **Statements; *Miranda***

*State v. Hinton, S20A0648 (8/10/20)*

Hinton was charged with murder and other offenses. He moved to suppress his statements. The court granted the motion and the State appealed.

The Court noted that Hinton told the detective that he did not want to talk after being informed of his *Miranda* rights. The State did not dispute this material fact, but argued that the trial court made an erroneous factual finding regarding whether the *Miranda* warnings were adequate or understood. However, the Court stated, these arguments were irrelevant to whether Hinton invoked his right, because a person in the custody of law enforcement officers has a constitutional right to remain silent in response to their questions, regardless of whether he or she fully understands that right or has been advised of it under *Miranda*. Accordingly, the Court concluded, the trial court did not err in suppressing Hinton's statements.

Nevertheless, the State argued, Hinton reinitiated communications with the detective, who honored Hinton's right to remain silent by responding to Hinton's questions by saying he could not talk to Hinton without his attorney being present. But, the Court stated, the State's position would require crediting the detective's testimony on those points and the trial court's order indicated that the trial court questioned the detective's credibility, specifically citing the vague nature

of his testimony and the detective's professed lack of memory on key points. And it was for the trial court — not it — to determine whether the detective was credible. Consequently, having reviewed the trial court's order and the detective's testimony, the Court held that the State failed to show that the trial court's credibility findings were clearly erroneous and therefore, failed to show that the trial court erred in concluding that the State did not carry its burden of establishing that Hinton's statements were admissible.

### **Sentencing; Merger**

*Kim v. State, S20A0865 (8/24/20)*

Appellant was convicted of murder and other offenses related to the stabbing deaths of Mr. and Mrs. Choi. Although appellant did not raise the issue, the Court found that the trial court erred by failing to merge the sentences on his aggravated battery charges into his malice murder convictions and the error was harmful.

The Court found that Count 1 of appellant's indictment charged him with the murder of Mr. Choi by stabbing him in the heart, and Count 9 of the indictment charged appellant with aggravated battery for rendering Mr. Choi's lungs useless by stabbing him. Count 2 charged appellant with the murder of Mrs. Choi by cutting her across the neck, and Count 10 charged him with aggravated battery for rendering Mrs. Choi's lungs useless by stabbing her. The Court stated that even when an aggravated battery charge requires proof of an injury which the malice murder charge does not (which, in this case, was injuries to the victims' lungs), merger of the two crimes is still required if the only difference is that the aggravated battery involved a less serious injury.

Here, the Court found, appellant's convictions for aggravated battery and malice murder were based on the same act of attacking the Chois with an edged weapon. No evidence presented at trial established a deliberate interval between the Chois' fatal wounds and the wounds that damaged their lungs. Therefore, appellant's sentences for aggravated battery on Counts 9 and 10 should have merged with the malice murder convictions in Counts 1 and 2. Accordingly, the Court vacated the sentences imposed for Counts 9 and 10.

### **Ineffective Assistance of Motion-for-New-Trial Counsel; *Brady***

*Harris v. State, S20A0855 (8/24/20)*

Appellant was convicted of malice murder and other offenses. He contended that his motion-for-new-trial counsel was constitutionally ineffective in failing to assert a *Brady* claim on the ground that the prosecution failed to inform the defense that one of the State's witnesses had made a deal to testify at his trial in exchange for a reduced sentence on an unrelated federal charge. Appellant also moved for a remand of the case to allow him to put testimony and evidence in the record to support this claim.

The Court noted that generally, when a preserved ineffective assistance of counsel claim is raised for the first time on appeal, it must remand for an evidentiary hearing on the issue. But remand is not mandated if the Court can determine from the record that the defendant cannot establish ineffective assistance of counsel under the two-prong test set forth in *Strickland*.

# Prosecuting Attorneys' Council of Georgia **CaseLaw** UPDATE

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The record showed that Nathaniel Howard was the only witness at trial to supply robbery as the motive for appellant and his co-defendants. Howard appeared at trial in a jumpsuit and chains, and when the prosecutor asked for an explanation for this attire, Howard testified that he was in custody in Virginia after his conviction on a federal gun charge. The prosecutor then asked whether the State had a deal with Howard for his testimony, and Howard replied, "No, ain't no deal." Howard testified, however, that he was hoping to get a reduction in his federal sentence in exchange for his testimony, but as far as he knew, "there's nothing guaranteed." Later on in cross-examination, Howard said that any reduction in his sentence on the federal charge was up to the judge in that case, although he did not know how the federal judge would learn what had transpired at appellant's trial.

The Court stated that in order to establish a *Brady* violation as a basis for his ineffective assistance of motion counsel claim, appellant must show that (1) the State, including any part of the prosecution team, possessed evidence favorable to the defendant; (2) the defendant did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) a reasonable probability exists that the outcome of the trial would have been different had the evidence been disclosed to the defense.

Appellant argued that the State withheld evidence that at the time of trial, Howard had already received a 24-month sentence reduction in his federal criminal case in exchange for his cooperation in the prosecution of appellant and his co-defendants. He contended that evidence of this completed deal would have been an important factor in the jury's evaluation of Howard's credibility, particularly his testimony that appellant and the co-defendants intentionally went to the scene to commit a robbery.

But, the Court found, even if appellant could establish the first three elements of his *Brady* claim on remand, he would not be able to establish a reasonable probability that the outcome of his trial would have been different if the State had disclosed information about Howard's alleged deal with the federal prosecutors. Appellant's defense was that he was in the area to purchase marijuana, so the jury had an alternative basis for placing appellant at the scene. Additionally, the evidence at trial showed that Howard began speaking with law enforcement about the crimes in this case approximately one year before appellant's trial, and thus, months before the date appellant contended Howard was sentenced in federal court. His testimony at trial was consistent with his pretrial statements to police. Also, Howard admitted at trial that he was testifying with the hope of receiving a reduced sentence on his federal charge and that it was up to the federal judge to determine if that happened. Under these circumstances, the Court concluded that a reasonable probability did not exist that the outcome of the trial would have been different if the jury had known that Howard's deal was completed rather than merely pending when he testified. Therefore, premitting whether a remand of the case would allow appellant to prove the other elements of a *Brady* claim, his claim failed because he could not successfully establish the prejudice element of the claim. And because appellant could not establish the prejudice element of his *Brady* claim, he also could not prove prejudice for his ineffective assistance of motion counsel claim.

Nevertheless, appellant argued, his motion-for-new-trial counsel performed deficiently in failing to assert a due process claim because his conviction rested, in part, on Howard's false testimony that he had no deal and in failing to present evidence in support of that claim. But, the Court found, Howard never expressly denied that he had a deal with federal prosecutors, only that he had a deal with the State. He also testified that the reduction in his federal sentence was not guaranteed but was up to the federal judge. Thus, the Court concluded, even if appellant could establish on remand that

this testimony was false and that the prosecutors for the State knew it to be false at the time of trial, appellant could not establish a reasonable likelihood that the testimony affected the jury's verdict because the jury knew Howard's motivation for testifying. Likewise, appellant could not establish a reasonable probability that the trial court would have granted the motion for new trial had motion counsel raised a due process claim below, and thus he cannot prevail on his claim of ineffective assistance of counsel on this ground.

## **Appellate Jurisdiction; Statutory Double Jeopardy**

*Roberts v. State, S20A0988 (8/24/20)*

Appellant pled guilty in federal court to a crime relating to the theft of a medical product, liquid silicone, which she injected into the buttocks of the victim, resulting in the victim's death. When she was later indicted in superior court for state crimes arising from the victim's death, including malice murder, appellant filed a plea of statutory double jeopardy in superior court, contending that under OCGA § 16-1-8 (c), her conviction in federal court barred the state prosecution for all crimes except malice murder. The trial court rejected that claim, and appellant appealed.

The Court first addressed whether it had jurisdiction to hear the appeal because the indictment was still pending in superior court. The Court, citing *Patterson v. State*, 248 Ga. 875 (1982), noted that it is well established that the denial of a constitutional double jeopardy claim is appealable under the collateral order doctrine. The Court concluded that the same considerations that led the *Patterson* Court to conclude that the denial of a constitutional double jeopardy claim is directly appealable under the collateral order doctrine also apply here. Accordingly, the Court concluded that the denial of appellant's statutory double jeopardy claim against successive prosecution under OCGA § 16-1-8 (c) was directly appealable under the collateral order doctrine.

Appellant contended that OCGA § 16-1-8 (c) barred her prosecution for state crimes arising from the victim's death because she has already been convicted of a federal offense in federal court for a crime arising from the same conduct. Specifically, she was convicted of violating 18 USC § 670 ("Theft of medical products"). The Court noted that three factors must be satisfied for OCGA § 16-1-8 (c) to bar a state prosecution. First, there is a "threshold" requirement that the federal crime must be within the State's concurrent jurisdiction. Second, the federal prosecution must have resulted in a conviction or acquittal. Third, the state and federal prosecutions must be for the same conduct and must not require proof of a fact not required by the other, or the state crime was not complete at the time of the federal trial.

The Court found that appellant's prosecution is not barred by OCGA § 16-1-8 (c) because the third element of its test was not satisfied insofar as the federal and state prosecutions each require proof of a fact not required by the other. Specifically, the federal crime of theft of medical products, requires proof of the element of interstate commerce—a fact not required to be proved by any of the four state offenses at issue, i.e., the two counts of felony murder and their predicate felonies. See OCGA § 16-5-1 (c) (felony murder); OCGA § 16-5-24 (a) (aggravated battery); OCGA § 43-34-42 (practicing medicine without a license).

Moreover, the state offenses of aggravated battery and felony murder predicated on aggravated battery require proof that appellant "maliciously cause[d] bodily harm" to the victim. OCGA § 16-5-24 (a). Appellant argued that the federal crime of theft of medical services contains an element of malicious intent because it is the type of intent that one could infer from

injecting a person with a substance like liquid silicone. But, the Court stated, even if that is so, it is required to compare the elements of the federal and state crimes, and 18 USC § 670 contains no element that appellant had to maliciously cause the victim bodily harm.

As to practicing medicine without a license and felony murder predicated on that offense, they require proof that appellant "suggest[ed], recommend[ed], or prescribe[d] a [ ] form of treatment for the palliation, relief, or cure of a [ ] physical or mental ailment of any person" without having a "valid license to practice medicine." OCGA § 43-34-22 (a) (specifying when a person "shall be deemed to be practicing medicine without complying with this article and shall be deemed in violation of this article"). No proof of such facts is required to convict someone of violating 18 USC § 670.

Nevertheless, appellant argued, the introductory allegations of her federal indictment alleged that appellant "falsely and with intent to defraud claimed to the victims and others that she was a licensed medical practitioner, when in truth and in fact, she was not a licensed medical practitioner." But, the Court stated, even assuming that federal prosecutors were required to prove the introductory allegations of the indictment, it is required to compare the *elements* of the federal and state crimes, and 18 USC § 670 does not require proof that appellant practiced medicine without a license. Accordingly, the Court concluded, the federal offense of theft of medical services required proof of a fact not required by the four state offenses, and the four state offenses each require proof of a fact that the federal offense does not. Consequently, OCGA § 16-1-8 (c) does not bar the State's prosecution of appellant for the state offenses for which she was indicted.

## **Ineffective Assistance of Counsel; Defense of Habitation**

*Brooks v. State, S20A0895 (8/24/20)*

Appellant was convicted of malice murder and aggravated assault in connection with the shooting death of Tinch and the aggravated assault of Gay. The evidence, very briefly stated, showed that Tinch and his friend Gay were riding around the area in Tinch's car, with Gay driving. They got a call from appellant, who said he was looking for a ride to cash a check and gave Tinch the address of a nearby house. Gay did not really know appellant, but recalled seeing him around the neighborhood. Tinch and Gay drove to the address, and appellant walked out of the house, got into the rear passenger seat, and, without saying anything, pulled out a revolver. As Gay grabbed a gun from under the dashboard and rolled out of the car, he heard a gunshot and saw Tinch trying to crawl over towards the driver's door, so he fired a shot at appellant. Tinch, wounded and bleeding, managed to crawl out of the car with Gay's help, and several witnesses in the neighborhood saw appellant shooting at Tinch and Gay as they fled. Appellant then ran from the scene.

Appellant contended that his trial counsel was constitutionally ineffective in his choice of a theory of defense. Specifically, he argued that his trial counsel was ineffective in pursuing a defense of justification by self-defense, contending it was a legally unsupportable theory, and that trial counsel instead should have asserted the "viable" defense of justification by defense of habitation. The Court disagreed.

Here, appellant specifically argued that his trial counsel was deficient in failing to assert this defense because slight evidence supported the theory that Tinch and Gay committed an "unlawful . . . attack upon a habitation," i.e., their own vehicle, to commit two felonies: an armed robbery and aggravated assault upon appellant. But, the Court found, this interpretation is belied by the language of OCGA § 16-3-23, which provides that deadly force may be used only when an "*entry is made*

or attempted in a violent and tumultuous manner" or "for the purpose of committing a felony." OCGA § 16-3-23 (1), (3). It does not contemplate the use of deadly force when no entry is made or attempted.

And here, neither Tinch nor Gay "entered" the vehicle, as they were already inside at the time appellant entered it. Furthermore, it is doubtful in any event whether appellant could claim the victims' vehicle as his "habitation" as opposed to the "habitation" of the victims, the driver and owner. Moreover, the Court stated, its precedents do not clearly establish that a person can claim the defense of habitation to protect the habitation of another.

Nevertheless, appellant contended, "there is no Georgia precedent holding that the defense of habitation may only be claimed by the owner or possessor of the habitation." But, the Court stated, this is not the correct analysis for a claim of ineffective assistance of counsel. The standard for effectiveness of counsel does not require a lawyer to anticipate changes in the law or pursue novel theories of defense. The record showed that trial counsel's defense of justification by self-defense was based upon the evidence and an established legal theory and constituted a reasonable trial strategy. Failing to interpose a novel defense of doubtful application to these facts did not constitute deficiency. Accordingly, the Court concluded, appellant's trial lawyer did not perform deficiently when he failed to pursue a jury charge that would have required an extension of existing precedents and the adoption of an unproven theory of law.

## **Complete Transcripts; OCGA § 5-6-41 (f)**

*Anderson v. State, S20A0873 (8/24/20)*

Appellant was convicted of felony murder. He contended that the trial court should have granted him a new trial because the State failed to provide him with a complete transcript. The record showed that, due to the "corruption" of a recording, the trial testimony of two witnesses, Davis and Jordan, could not be transcribed. For this reason, the trial court held a reconstruction hearing pursuant to OCGA § 5-6-41.

The Court noted that in OCGA § 5-6-41 (g), the correctness of a re-created transcript, as determined by the trial court, is final and not subject to review. But whether the transcript is *complete* pursuant to OCGA § 5-6-41 (f) is reviewable on appeal. "Complete," however, is not synonymous with "verbatim." A narrative transcript, though, must be sufficiently detailed to allow the defendant to identify alleged errors and to allow meaningful appellate review.

Here, the Court found, appellant received a complete transcript after reconstruction, and the narrative parts which were re-created were sufficiently detailed for meaningful review. Both prosecutors who tried the case testified at the reconstruction hearing, and their versions of what transpired at trial, which included recollections both helpful and detrimental to the State's case, were largely identical. The trial court acknowledged the accuracy of the prosecutors' accounts of Davis's and Jordan's testimony, stating that "the Court remembers it exactly as the State stated it, except I disagree, I think, on one or two issues," explaining that, in the trial court's recollection, Jordan was "a nominal-type witness," who "didn't want to be here." Thus, the Court held, under these circumstances, appellant was not entitled to a new trial

Moreover, the Court noted, once the State provided testimony regarding what transpired at trial, appellant was required to provide evidence to support his argument that the record remained incomplete but failed to do so. Also, the Court

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stated, appellant's contention that the record could not possibly be re-created because trial counsel should not be expected to assist appellate counsel since "trial counsel cannot be made to assert his own ineffectiveness" was incorrect. Trial counsel would have been aiding in the reconstruction of the transcript, not using the transcript to demonstrate any ineffectiveness. And, in any event, trial counsel did testify at the reconstruction hearing, though he testified that he could not remember anything about the testimony at issue.