

THIS WEEK:

- **Police Officer Testimony; Expert Witnesses**
- **Failure to Register as a Sex Offender; Sufficiency of the Evidence**
- **Discovery Violations; Evidence of Gang Affiliation**
- **Sentencing; Merger**
- **Child Hearsay; Unavailability**
- **Aggravated Stalking; Bad Character Evidence**

Police Officer Testimony; Expert Witnesses

Best v. State, A20A0418 (6/26/20)

Appellant was convicted on one count each of criminal attempt to commit a felony (murder), aggravated assault on a peace officer, and fleeing or attempting to elude a police officer. The evidence, very briefly stated, showed that appellant was the front seat passenger of a Chevrolet Avalanche driven by Lowery. An attempted stop for a broken taillight turned into a multi-county high speed chase involving sheriffs' deputies and GSP troopers. At various times, Lowery was able to lean out of the vehicle to shoot at the chasing police vehicles using a rifle and a shotgun. After the pursuit concluded, officers discovered the wreckage of the Montgomery County Sheriff's truck and the sheriff's body pinned underneath. The sheriff died as a result of multiple severe injuries he sustained in the crash.

Appellant argued that the trial court erred in admitting opinion testimony by a Montgomery County deputy. In particular, she presupposed that the deputy was presented as an expert witness and argued that the opinion testimony (1) was not based on the deputy's experience or training; (2) was not beyond the common understanding of any juror; and (3) invaded the province of the jury to decide the ultimate issue of the case. The Court disagreed.

First, the Court stated, nothing in Georgia's Rule 701 (a) prevents a law enforcement officer from being qualified to provide both lay opinion and expert testimony. And lay witnesses may draw on their professional experiences to guide their opinions without necessarily being treated as expert witnesses.

Here, the Court found, in response to appellant's counsel's questions during her cross-examination of the Montgomery County deputy, the deputy testified that he had advanced training in DUI field sobriety testing, accident reconstruction, motorcycle crash investigations, traffic issues, and Intox 9000 certification, and basic training in defensive driving. During the State's re-direct examination, the deputy testified that, at the moment Lowery positioned his upper torso outside the driver's side window and fired at him, the Avalanche was entering a turn and both of Lowery's hands appeared to be on his weapon. The State asked the deputy, "With your training in law enforcement, particularly your ... specialized training in traffic, do you see any way how that Avalanche could have maintained the roadway without someone's hand on the steering wheel?" Appellant objected, arguing that the question called for speculation. The trial court overruled appellant's

objection, and the deputy “agree[d] that someone else probably would have to steer the steering wheel in that situation, otherwise they would have wrecked.”

The Court stated that just because the officer's position and experience could have qualified him for expert witness status does not mean that any testimony he gives at trial is considered expert testimony. And here, the Court found, despite the deputy's testimony concerning his general training, the deputy simply made layperson observations concerning Lowery's inability to maneuver the vehicle while protruding from the driver's window and shooting at the deputy. Furthermore, this testimony was based upon his personal observations during the pursuit, helpful to determine whether appellant participated in Lowery's crimes, and was not necessarily based on any particular specialized knowledge. Therefore, contrary to appellant's characterization, the deputy did not provide expert testimony. Accordingly, appellant failed to show that the trial court abused its discretion in admitting the deputy's testimony.

Failure to Register as a Sex Offender; Sufficiency of the Evidence

Smart v. State, A20A0682 (6/29/20)

Appellant was convicted of failure to register as a sex offender based on a Michigan offense. The State presented the testimony of a police corporal who stated that appellant “was charged out of Detroit, Michigan, with assault with intent to commit CSC — I'm not sure what that means on their end — but in the second degree, which is a sexual offense.” Through the corporal, the State introduced “court records” from Michigan. The “court records” was a two page document. The first page was a warrant from 1988 indicating that appellant was charged with violating a Michigan code section for “engag[ing] in sexual penetration, to wit: cunnilingus, with the complainant, a person under 13 years of age[.]” The second page was a sentence sheet indicating that appellant pled guilty on February 6, 1991 to “assault with intent to commit CSC 2[.]” Neither the code section nor the case number on each page matched. The State also presented the testimony of a retired Detroit police lieutenant. She testified that “CSC” means “criminal sexual conduct” and explained that in 1988 she investigated a case involving appellant. The lieutenant testified that she prepared the warrant for appellant's arrest and she identified the “court records” previously admitted as the “court official document of charges.”

Appellant contended that the evidence was insufficient to support his conviction. The Court agreed, finding that the evidence was lacking in several respects. First, it was impossible to connect the two pages of the “court records” document with each other. The two pages did not contain the same case number or code section. The warrant mentioned the facts underlying the charge, but did not name the charge. The sentence sheet named the crime as “assault with intent to commit csc 2” but included no other facts or information about the charge. Second, to confuse matters further, the case number listed in the failure to register indictment was similar to the case number listed on the sentence sheet, but the indictment alleged that appellant was sentenced on December 8, 1988 and the sentence sheet reflected that he was sentenced on February 6, 1991. The actual sentence was redacted from the document upon request from the State and over objection by appellant. Also, the Court noted, it was not clear from the sentence sheet whether appellant pled to a felony or misdemeanor.

The Michigan lieutenant testified that she took a warrant out for appellant's arrest, but she was never asked and did not testify that appellant was convicted of the charge. The lieutenant also did not testify that appellant was required to register as a sex offender in Michigan. The corporal who maintained the registry testified that appellant was “charged” with a sexual

offense in Michigan and when asked if that “charge” would cause appellant to have to register as a sex offender, she replied “[t]hat’s what they have on records as for what they were registering him under.”

But, the Court stated, whether appellant was “charged” with a sexual offense involving a minor is not the pertinent question. The issue was whether appellant was *convicted* of a sexual offense involving a minor and whether that conviction required appellant to register as a sex offender in Michigan. Thus, the Court found, the State’s evidence on this crucial issue was insufficient. There was no definitive connection between appellant’s warrant and sentence sheet, no affirmative testimony that appellant was convicted of the charge listed in the warrant, and no affirmative testimony that appellant’s conviction required sex offender registration in Michigan. Therefore, the Court concluded, based on the evidence presented, a rational trier of fact could not have found beyond a reasonable doubt that appellant was guilty of the offense charged in his indictment. Accordingly, his conviction was reversed.

Discovery Violations; Evidence of Gang Affiliation

Williams v. State, A20A0397 (6/29/20)

Appellant was convicted of aggravated assault and aggravated battery. The evidence, very briefly stated, showed that the victim was shot as he left a neighbor’s apartment following a Christmas gathering. After appellant was arrested, he was incarcerated with Miller. According to Miller, appellant told him that appellant was charged with shooting a man who was “false claiming” membership in the Gangster Disciples. Miller further explained that false claiming referred to claiming membership in a gang to which you did not belong. After appellant confided in him, Miller had his attorney provide that information to the State in an effort to get out of jail.

Appellant’s trial was set for November 17. Ten days before trial, the State served supplemental discovery responses in which it identified for the first time Miller and Investigator Lyda as potential witnesses. The State also provided the defense with a copy of a search warrant allowing them to photograph Williams’s tattoos, photos taken pursuant to the warrant, a disc containing a police interview of Miller, and a photocopy of a threatening note allegedly received by Miller on November 7. The same day it served the supplemental discovery, the State also filed a motion to admit evidence of appellant’s status as a member of a street gang known as the Gangster Disciples. In support of this motion, the State claimed that the indicted crimes constituted unindicted criminal gang activity, committed for the purpose of furthering “the reach of the gang.” The State further contended that the evidence was admissible under OCGA § 24-4-404 (b) to show appellant’s motive in committing the crimes at issue.

Just before trial, the court held a hearing on the State’s motion to introduce evidence of appellant’s gang affiliation. During that hearing, the State revealed for the first time that the prosecution would be calling Investigator Lyda as an expert in criminal gangs. Defense counsel then requested a continuance to obtain an expert witness to refute the State’s gang-related evidence, including Lyda’s expert testimony. The court denied the motion.

Appellant contended that the trial court erred in denying his motion for a continuance based on the State’s failure to comply with the requirements of the Criminal Discovery Act. The Court agreed. The Court stated that that statute requires the State to provide the defendant, no less than ten days before trial, a copy of any expert report based on a physical examination. OCGA § 17-16-4 (a) (4). Furthermore, where such report “is oral or partially oral, the prosecuting attorney

shall reduce all relevant and material oral portions of such report to writing and shall serve opposing counsel with such portions no later than 10 days prior to trial.” *Id.* Here, the record showed that Lyda conducted a physical exam of appellant — i.e., he examined appellant's physical person for the purpose of photographing appellant's tattoos. And the expert opinions Lyda offered at trial were based, in part, on the results of his examination of appellant. Accordingly, the State was required to provide appellant, no later than ten days prior to trial, a written summary of any oral report Lyda provided to the prosecution. Its failure to do so violated OCGA § 17-16-4 (a) (4). Given this fact, and given defense counsel's accurate description of the testimony she contemplated a gang expert would provide on behalf of her client, the Court found that the trial court abused its discretion in denying appellant's motion for a continuance

Nevertheless, the Court stated, to be entitled to a new trial based upon the denial of his motion for continuance, appellant bore the burden of showing that he suffered harm as a result of that denial. To make this showing, appellant had to identify specifically the witness or witnesses and evidence he would have put forth in his defense if the trial court had granted his motion for a continuance. And here, the Court found, appellant met this burden. Specifically, appellant identified Dr. Hagedorn as the expert witness he would have called had he been afforded a continuance. And at the hearing on the motion for a new trial, Hagedorn offered testimony that rebutted Lyda's assertions that the Gangster Disciples were uniformly violent; that the Gangster Disciples had any kind of initiation process, violent or otherwise; and that the Gangster Disciples would always react violently towards any person falsely claiming membership in the gang. Additionally, Hagedorn refuted Lyda's testimony that the threatening note Miller allegedly found on his bunk was written by member of the Gangster Disciples. In doing so, Hagedorn called into question the credibility of Miller — the witness around whom the State built its theory of the case. Thus, the Court concluded, the trial court abused its discretion in denying appellant's motion for a new trial.

Appellant also contended that the trial court violated his constitutional right to confront the witnesses against him by erroneously limiting his cross examinations of the victim. The trial court found that appellant was not entitled to cross-examine the victim with respect to his gang membership (or lack thereof) or whether his facial tattoo reflected such membership. Specifically, the court ruled that this line of questioning would impermissibly place the victim's character in issue.

The Court found that at trial, the State contended that appellant assaulted the victim because the victim was falsely claiming membership in the Gangster Disciples. Thus, to the extent gang affiliation placed the victim's character in issue, it was a result of the State's theory of the case. Accordingly, given the State's theory, and in light of Miller's testimony supporting that theory, appellant was entitled to question the victim as to whether he had, in fact, falsely claimed membership in the Gangster Disciples or whether he actually was a member of the Gangster Disciples. By cutting off this line of inquiry, the trial court prevented appellant from exposing to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of Miller. Therefore, the Court held, the trial court abused its discretion in limiting appellant's cross-examination of the victim in this fashion.

Sentencing; Merger

Hogg v. State, A20A0394 (6/29/20)

Appellant was convicted of aggravated sexual battery, stalking, and three counts of child molestation. He contended that Counts 3 and 4 should have merged for sentencing purposes. The Court disagreed.

The Court noted that Count 3 alleged that appellant committed child molestation by inserting his finger into the victim's vagina, and Count 4 alleged that he committed aggravated sexual battery by penetrating the victim's vagina with a foreign object. Under *Drinkard v. Walker*, 281 Ga. 211 (2006), where the same act or transaction constitutes a violation of two distinct statutory provisions, the required evidence test considers whether each provision requires proof of a fact which the other does not. If so, then there are two offenses, and neither is "included in" the other. And here, the Court found, the offense of aggravated sexual battery required proof of a fact that offense of child molestation did not: lack of consent. Also, the offense of child molestation required proof of a fact that the offense of aggravated sexual battery did not: "the intent to arouse or satisfy the sexual desires of either the child or the person." Accordingly, the Court concluded, Counts 3 and 4 did not merge for purposes of sentencing.

However, the Court stated, even though appellant did not raise any argument regarding the merger of Counts 1 and 3, it has the discretion to correct merger errors sua sponte. Thus, the Court noted, Count 1 of the indictment charged appellant with child molestation by touching the "primary genital area" of the victim with his hand. Count 3 charged him with child molestation by inserting his finger into the victim's vagina.

The Court stated that its analysis turns on the interpretation of OCGA § 16-6-4 (a), which pertinently provides that "[a] person commits the offense of child molestation when such person ... [d]oes any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person[.]" OCGA § 16-6-4 (a) (1). Based on the plain language of the statute, the gravamen of the offense is the immoral and indecent act done to the child. Thus, each immoral or indecent act done to the victim in this case forms a "unit of prosecution."

And here, both Count 1 and Count 3 charged appellant with touching, in some way, the victim's genitals, and the record showed that this occurred in a single incident. Clearly, the Court stated, appellant could not insert his finger into the victim's vagina without first touching her primary genital area. Therefore, the Court concluded, the conduct charged in Counts 1 and 3 of the indictment was a single unit of prosecution, and those counts should have merged for sentencing.

Child Hearsay; Unavailability

Allison v. State, A20A0552 (6/29/20)

Appellant was convicted of one count each of child molestation, enticing a child for indecent purposes, and false imprisonment. Appellant contended that the trial court erred in allowing evidence of the child's forensic interview at Harmony House. Specifically, he argued that the video should have been excluded as child hearsay evidence because (1) the victim did not testify as required by OCGA § 24-8-820 (a) in that she merely acknowledged general identity information and then answered that she did not remember anything else, and (2) the victim should have been deemed

“unavailable” under OCGA § 24-8-804, even though she took the witness stand at trial, due to her inability or unwillingness to recall the events at issue. The Court disagreed.

Although OCGA § 24-8-804 (a) (3) defines an “unavailable” witness for purposes of hearsay as one who “[t]estifies to a lack of memory of the subject matter of the declarant's statement[.]” the Code section clearly limits that definition of unavailability to the exceptions included in the Code section. And here, the Court found, appellant's argument conflates constitutional unavailability for confrontation clause purposes with the statutory definition of unavailability for purposes of the admissibility of hearsay. The record showed that the victim, who was six-years-old at the time of the trial, took the stand and answered a number of questions posed by the trial judge, indicating that she knew why she was in the courtroom and that she understood she needed to tell the truth. In addition, she answered questions posed by defense counsel, demonstrating she knew the difference between the truth and a lie. The victim answered some general questions, but did not offer any testimony about the incident. During her testimony, she stated that she did not remember going to Harmony House or speaking with the forensic interviewer two years before the trial. At this point, the prosecutor stated that he did not have any further questions. Defense counsel was invited to cross-examine the victim, but indicated she did not have any questions, and the victim was excused.

The Court noted that while there is a dearth of case law regarding what constitutes availability to testify under OCGA § 24-8-820, there are a number of cases decided under the former Code section that are instructive. Furthermore, the Federal Rules of Evidence do not contain a specific equivalent to OCGA 24-8-820, so Georgia precedent should be principally referenced to interpret this code section. And, under our precedent, the fact that a child witness is unresponsive or evasive in response to certain questions on the witness stand does not render the child's out-of-court statements inadmissible under the former Child Hearsay Statute or violate the Sixth Amendment confrontation rights of the defendant. Instead, a witness' responsiveness or unresponsiveness, evasiveness or directness, verbal skills, intelligence, memory, perception, and apparent understanding are all factors which can be assessed by the jury and may raise a reasonable doubt.

Here, it was undisputed that the victim appeared at trial, took the witness stand, and was available for cross-examination regarding any lack of memory. Thus, contrary to appellant's assertion, there was no requirement that the child victim testify as to appellant's specific actions or the specific contents of her interview video, let alone that the State successfully elicit such testimony on direct examination. The victim's prior statements and her unresponsive testimony at trial simply presented a question of credibility to the jury; it did not render the prior statements inadmissible under either the Child Hearsay Statute or the Sixth Amendment's Confrontation Clause. Consequently, the Court concluded, the video of the victim's out-of-court statement given to the forensic psychologist at Harmony House comported with the Confrontation Clause and was admissible, and the trial court did not abuse its discretion in admitting the video.

Aggravated Stalking; Bad Character Evidence

Carlton v. State, A20A0327 (6/29/20)

Appellant was convicted of six counts of criminal attempt to commit the felony of aggravated stalking (three counts for sending a postcard (one for each of his three children, and three more counts for sending each of them a letter). The evidence, briefly stated, showed that when he was approximately 44 years old, appellant met N. S., who was age 15 or 16 at the time. The couple lived together for the ensuing four or five years and had three children who were the subject of a

deprivation proceeding that began in 2008, and a proceeding for the termination of his parental rights that began in 2012. In November 2008, during the deprivation proceeding, the juvenile court entered an order in which it found the two older children deprived and further ruled that appellant have “no visitation nor contact with the children unless he petitions this court in the future for such visitation and contact[,] and this court grants such relief” (the “Deprivation Order”). In March 2011, the children were placed with foster parents who eventually adopted the children. Later, the juvenile court denied various requests by appellant to modify any pending orders prohibiting his visitation with the children.

In 2012, appellant pled guilty pursuant to a negotiated plea agreement to three counts of impersonation of a public employee, a DFACS worker. The conviction stemmed from appellant having called the foster family's neighbor posing as a DFACS employee in an attempt to glean information about his children during their placement with the foster family; in the call, he suggested that the children had been abused in the foster home (the Criminal Sentence”). On the separate sentencing forms, the court set forth general and special conditions of probation, including, as shown on “Addendum A,” that appellant “shall have no contact with his children unless an order from ... [the] Juvenile Court allows it.”

Thereafter, appellant sent two items of correspondence to his children that led to the current charges. In early 2014, appellant sent a postcard from prison addressed to all three children at the address of their foster parents. Two months later, appellant sent a letter addressed in the same manner. When the foster mother received the postcard and the letter, she called the police; the children never saw the two items. Then, later in 2014, the deprivation and termination proceeding came to a conclusion with appellant's parental right terminated (the Termination Order).

Appellant contended the trial court erred by allowing the State to introduce the Termination Order and by failing to redact references in that order stating that he had a history of sexual deviancy and domestic abuse. At trial, he objected to references to prejudicial information in the Termination Order and the trial court agreed to redact such information with the exception of references to his past “sexual deviancy.” Appellant objected on grounds that the information was not relevant; that the Termination Order was issued months after he sent the postcard and letter; that the statements about sexual deviancy were prejudicial, inflammatory, and would bias the jury against him; and that much of that behavior took place many years before his children were born. The State argued that the evidence was relevant to show that the juvenile court terminated appellant's parental rights, not because he failed to maintain a relationship with the children, but because he had, among other things, a history of sexually deviant behavior. The trial court refused to redact the references to this conduct. Accordingly, the redacted Termination Order was admitted into evidence; it contains numerous statements about appellant's history of sexually deviant behavior.

The State argued that appellant opened the door to this evidence during his opening statement and during the cross examination of the foster mother. The Court disagreed. First, even if it is possible to open the door to introduction of bad character evidence during opening statement, there was virtually no connection between what appellant stated during his opening or during cross-examination of the foster parents, and his past history of “sexual deviancy.”

Second, the evidence itself was at best marginally relevant to the State's case and any probative value was substantially outweighed by its prejudicial effect. The only two possible justifications for admitting this information were (1) that the State had to prove that sending the postcard and letter were part of a pattern of activity for the purpose of harassing and intimidating the children, and (2) that the State was authorized to introduce evidence of the prior history/relationship between appellant and the victims. The State did not show that either concerned appellant's past sexual practices, with the

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possible exception of a reference to one child's knowledge of his "nudity and sexual activity," which, as shown in the unredacted Termination Order, occurred "either unintentionally or intentionally." In other words, the Court stated, this was not a case where appellant's history of sexual behavior appeared to involve intentional acts against his children who were the subject of the no-contact order. Thus, the relevance of this evidence to the State's case is very thin.

Furthermore, this thin, marginal evidence was so strongly prejudicial that the prejudicial effect greatly outweighed any possible probative value; accordingly, it should not have been admitted. Simply put, the fact that appellant had a previous history of sexual deviancy was barely relevant to the issue of whether he attempted to violate a no contact order. Therefore, the Court concluded, the trial court abused its discretion by allowing introduction of the numerous references to appellant's sexual deviancy.

Finally, the Court found, given the highly disputed evidence about whether, by sending the postcard and the letter (containing only innocuous language), appellant was attempting to harass or intimidate the children, the error was not harmless. Accordingly, the Court reversed the denial of appellant's motion for new trial and remanded for a new trial.