

THIS WEEK:

- Double Jeopardy; Plea Bargains
- Ultimate Issue Testimony; Banishment Sentencing
- Identification; Impermissible Suggestiveness
- Indictments; Jury Instructions
- Jury Deliberations; Jury Questions
- Probation Revocation; Banishment

Double Jeopardy; Plea Bargains

Appellant v. State, A21A0911 (8/2/21)

Appellant appealed from the denial of his plea in bar on double jeopardy grounds. The evidence, briefly stated, showed that On February 28, 2018, a Forsyth County detective arranged via text to purchase marijuana from appellant. Because the sale occurred at appellant's home in Fulton County, the Forsyth County detective notified the Johns Creek Police Department, and a joint investigation began. The joint investigation continued through April 4, 2018, involved "several phone calls" to appellant's home, "a lot of" which were placed from Forsyth County, and finally culminated in an agreement for a "transaction" on April 4, 2018, at a hotel parking lot in Forsyth County. On April 4, appellant was placed under constant surveillance at his home while Forsyth County officers continued to communicate with him about the transaction. Appellant was observed leaving his home with a large duffel bag and proceeding to the hotel parking lot, where he removed the same large duffel bag from his vehicle. Forsyth County officers arrested appellant as he exited his vehicle. The duffel bag contained 11 pounds of marijuana. Later that same day, Johns Creek officers executed a search warrant at appellant's home which led to the seizure of an additional 2.5 ounces of marijuana and a couple of long-bladed knives.

On July 9, 2018, appellant was indicted in Forsyth County for sale of marijuana (Count 1), trafficking in marijuana (Count 2), possession of a firearm during the commission of a felony (Count 3), and use of communication facility (Count 4). On October 30, 2018, appellant was indicted in Fulton County for sale of marijuana (Count 1), possession of marijuana with intent to distribute (Count 2), and use of communication facility in committing crime (Count 3). On December 11, 2018, appellant entered a negotiated guilty plea in Forsyth County to sale of marijuana, trafficking in marijuana (which was reduced to possession of marijuana with intent to distribute), and possession of a firearm during the commission of a felony. The State nolle prossed the remaining charge of illegal use of a communication facility. On December 18, 2018, appellant filed a plea in bar, seeking to dismiss the Fulton County charges on double jeopardy grounds, which the court denied.

The Court noted that because the Georgia Code expands the proscription of double jeopardy beyond that provided for in the United States and Georgia Constitutions, all questions of double jeopardy in Georgia must be determined under

OCGA §§ 16-1-6 through 16-1-8. Appellant contended that under our statutory scheme, his Fulton County charge for possession with intent to distribute was barred by substantive and procedural double jeopardy. The Court disagreed.

As to the procedural double jeopardy claim, the Court found that the reduced possession charge to which appellant pleaded guilty in Forsyth County arose from the seizure of 11 pounds of marijuana in the parking lot of a hotel in Forsyth County on the morning of April 4, 2018, while Count 2 of the Fulton County indictment arose from the discovery of additional marijuana at appellant's home pursuant to the execution of a search warrant later that same day. Accordingly, the Court concluded, it was proper to charge each offense separately.

Turning to appellant's procedural due process claim, the Court noted that under § 16-1-7 (b), if several crimes (1) arising from the same conduct are (2) known to the proper prosecuting officer at the time of commencing the prosecution and are (3) within the jurisdiction of a single court, they must be prosecuted in a single prosecution. A second prosecution is barred under OCGA § 16-1-8 (b) (1) if it is for crimes which should have been brought in the first prosecution under OCGA § 16-1-7 (b). In order for this procedural aspect of double jeopardy to prohibit a prosecution, all three prongs must be satisfied.

The Court found that appellant could not satisfy the first prong of the test because the term "same conduct" means "same transaction." And here, Count 2 of the Fulton County indictment (possession of marijuana with intent to distribute) did not arise from the "same conduct" as Count 2 of the Forsyth County indictment (trafficking in marijuana, reduced to possession of marijuana with intent to distribute), to which appellant pleaded guilty "in the sense of one specific transaction or unbroken sequence of events as contemplated by OCGA §§ 16-1-7 (b) and 16-1-8 (b)." Thus, the Court affirmed the denial of the plea in bar on Count 2 of the Fulton County indictment.

But, regarding Count 3 (Use of Communication Facility) in the Fulton County indictment, the Court found that the trial court erred in not granting the plea in bar. The Court noted that Forsyth County nolle prossed Count 4 (Use of Communication Facility) as part of a plea bargain with appellant. Citing *Arnold v. State*, 352 Ga. App. 777 (2019), the Court stated that it is well settled that a plea bargain agreement is a contract under Georgia law which binds both the State and defendant. This principle would be rendered meaningless if the State may circumvent any such prohibition by reindicting appellant for use of communication facility in Fulton County simply because, on the current factual posture of this case, that charge apparently could have been brought in either county. Thus, the Court reversed the trial court's denial of the plea in bar on Count 3 of the Fulton County indictment.

Ultimate Issue Testimony; Banishment Sentencing

Cantrell v. State, A21A0773 (8/12/21)

Appellant was convicted of three counts of child molestation and one count of sexual battery against a child under the age of sixteen. He contended that the trial court erred in restricting his cross-examination of the forensic interviewer. Appellant sought to ask the forensic interviewer a hypothetical question about whether the victim invented the allegations against him in order to avoid being returned to her mother's care. The trial court sustained the State's objection to this question, ruling that defense counsel was asking the witness to speculate and that he could argue his theory to the jury. The Court found no error, but for a reason different than that relied upon by the trial court.

The Court stated that Georgia law forbids expert opinion testimony that implicitly goes to the ultimate issue to be decided by the jury, when such issue is not beyond the ken of the average juror. In other words, an expert may not testify as to his opinion as to the existence or not of a fact unless the inference to be drawn from facts in evidence is beyond the ken of the jurors—that is, unless the jurors, for want of specialized knowledge, skill, or experience, are incapable of drawing—from facts in evidence—such an inference for themselves.

Here, the Court found, defense counsel began his cross-examination on this issue by asking the forensic interviewer to discuss "what is an alternative hypothesis." When counsel asked "[i]n this particular case, could a possible alternative explanation be that [the victim] would say this happened because she wants to make sure she doesn't go back home to mom or be around [appellant]," the State objected. Relying on *Harris v. State*, 283 Ga. App. 374, 379 (3) (2007) and *Duncan v. State*, 232 Ga. App. 157, 161 (3) (1998), the Court found that this question implicitly went to the ultimate issue to be decided by the jury, namely, whether the victim had fabricated the molestation allegations against appellant because she did not want to return to an unstable and volatile home life. Furthermore, the Court noted, the jury heard ample testimony from the victim and her aunt, as well as an investigator with the district attorney's office, about the victim's unstable and volatile home life, and could determine — without expert opinion — whether the victim had fabricated the events. Accordingly, the trial court did not abuse its discretion in limiting defense counsel's cross-examination of the forensic interviewer.

Appellant also contended that the trial court erred in including an "indeterminable banishment" as part of his sentence. As part of the special conditions of probation, the trial court banished him from Fannin County, where the victim resides, but also imposed the following special condition: "The Defendant may not be present in any County contiguous to where the victim currently resides." The banishment included any future residence of the victim so long as the victim provided the address to the Department of Community Supervision while appellant was on probation. Appellant argued that this condition was not "rationally related to the purpose of the sentencing objective" because it is a "moving target" susceptible to accidental violation. The Court disagreed.

A trial court has broad discretion in fashioning reasonable probation conditions, including banishment of a defendant from certain counties within the State. However, banishment conditions are not unlimited: such conditions must not be unreasonable or otherwise fail to bear a logical relationship to the rehabilitative scheme of the sentence pronounced. The defendant bears the burden of demonstrating that his banishment condition is unreasonable.

The Court stated that a condition of probation which precludes contact between the perpetrator of a sexual crime and his victim bears a reasonable relation to future criminality especially where a family relationship provided the opportunity for the past criminal conduct. Moreover, a rehabilitative scheme that is designed to promote the victim's protection is not unreasonable. Relying on *Terry v. Hamrick*, 284 Ga. 24, 27 (3) (2008), the Court found that the condition at issue here was fundamentally similar to and less restrictive than the one at issue in *Terry*, and not an unreasonable one under the circumstances. Accordingly, the trial court did not err in including the condition as part of appellant's sentence.

Identification; Impermissible Suggestiveness

Jefferson v. State, A20A0214 (8/13/21)

Appellant was convicted of two counts of armed robbery, kidnapping with bodily injury, two counts of aggravated assault, burglary, and possession of a firearm during a felony. At trial, the victim identified appellant as one of her attackers, testifying that she recognized his eyes and facial structure even though he wore a mask during the attack.

Appellant contended that the trial court erred in admitting this testimony because the identification procedure was impermissibly suggestive. Specifically, he contended, the following facts tainted the identification: the victim had never previously been asked to identify him, he was one of only three African-American men in the courtroom at the time of the victim's in-court identification, the trial occurred almost two years after the offense, and the victim's assailant wore a mask during the crime. The Court disagreed.

The Court stated that in-court identifications are subject to the same rules of evidence, witness credibility, and cross-examination as all testimony in a criminal trial. Also, a line-up identification, or identification from a group of photographs, is not a prerequisite to every in-court identification. In fact, the Court noted, it has held that an in-court identification is not rendered inadmissible simply because the victim did not participate in a pre-trial identification procedure before making the in-court identification. Consequently, the fact that the victim had not previously identified appellant did not render her in-court identification inadmissible.

Citing *Ralston v. State*, 251 Ga. 682, 683-684 (2) (1983) and *Pitts v. State*, 323 Ga. App. 770, 772 (1) (2013), the Court also rejected appellant's argument that the trial court should have prohibited the victim's in-court identification because he was one of only three African-American men in the courtroom when the identification was made. Instead, the Court stated, the problematic aspects of an in-court identification go to the identifying witness's credibility, which is solely a question for jury determination. In fact, all of appellant's challenges to the victim's in-court identification went to the weight and credibility of the victim's testimony, not to its admissibility.

And here, the Court found, defense counsel cross-examined the victim about her in-court identification of appellant, raising questions about the victim's ability to correctly identify her assailant given that he was wearing a mask. The victim admitted that her identification of appellant was based solely on the shape of his head and the visible portion of his face from the cheekbones to the forehead. Thus, given that appellant's counsel cross-examined the victim about her in-court identification of appellant, the admission of the in-court identification was not cause for reversal.

Indictments; Jury Instructions

Benton v. State, A21A1118 (8/17/21)

Appellant was convicted of two counts of aggravated assault. The evidence showed that the victim was working in a convenience store when appellant approached him and accused the victim of stealing appellant's weed-whacker. When the victim adamantly denied doing so, appellant attacked the victim and stabbed him with a knife.

Relying on *Talton v. State*, 254 Ga. App. 111, 112 (1) (2002), appellant contended that the trial court plainly erred by instructing the jury on aggravated assault as defined in OCGA § 16-5-21 (a) (2), rather than OCGA § 16-5-21 (a) (1), because the indictment alleged that he attempted to inflict a violent injury on the victim with a knife, not that he placed the victim in reasonable apprehension of immediately receiving a violent injury. The Court agreed that the instruction was a clear and obvious error because, while the indictment specifically alleged that appellant *stabbed* the victim with a knife, the court instructed that the State was not required to show that any injury occurred, and instead, it only needed to prove appellant's actions placed the victim "in reasonable fear of receiving a violent injury."

However, citing *Flournoy v. State*, 294 Ga. 741(2014), the Court found that the erroneous jury charge was cured when the trial court read the indictment to the jury, provided a copy of the indictment to the jury, and instructed the jury as to the reasonable-doubt standard. Thus, the jury, out of necessity, had to find that appellant stabbed the victim, and consequently, there was no concern that it was authorized to convict appellant of aggravated assault by merely pointing the knife at him and only placing him in reasonable apprehension of receiving a violent injury. Accordingly, the Court concluded that under these circumstances, the trial court did not err in finding that the erroneous jury instruction had been cured.

Jury Deliberations; Jury Questions

Turkia v. State, A21A1013 (8/18/21)

Appellant was convicted of aggravated battery, battery, and simple assault as a lesser-included offense of aggravated assault. During deliberations, the jury sent out two notes to the court. He contended that the trial court erred by failing to follow the procedure established by *Lowery v. State*, 282 Ga. 68, 72-76 (4) (b) (2007), for responding to a deliberating jury's questions.

The Court noted that the procedure for addressing a deliberating jury's question is well settled. A trial court is required to have jurors' communications submitted to the court in writing; to mark each written communication as a court exhibit in the presence of counsel; to afford counsel a full opportunity to suggest an appropriate response; and to make counsel aware of the substance of the trial court's intended response in order that counsel may seek whatever modifications counsel deems appropriate before the jury is exposed to the instruction. The State acknowledged that the trial court failed to follow the *Lowery* procedure after the first note, but followed it on the second note.

However, the Court found, appellant did not challenge the substance of the responses given to the two questions from the jury; he only challenged the failure to follow the *Lowery* procedure. But, the Court found, notwithstanding the trial court's failure to follow the proper procedure, appellant did not object at trial to the procedure that the court followed in handling the jury notes. Therefore, the Court concluded, appellant waived his claims and he was not entitled even to plain error review of these alleged errors.

Probation Revocation; Banishment

Jacobs v. State, A21A1179 (8/23/21)

Appellant was granted a discretionary appeal from an order revoking his probation. The record showed that after serving nearly fourteen years for child molestation, appellant was released to serve his remaining five years on probation, which included a condition of banishment from a section of the state that included Coffee County. When appellant met with his probation officer in Tift County, he was told to register as a sex offender with the Sheriff's Office. But when he went to do so, law enforcement officers, according to the prosecutor, "kidnapped" appellant and brought him to the Coffee County Jail. They held him for a couple of days and then dropped him off at his nephew's house in the county. Appellant's probation officer told him he had 48 hours to leave the probation area. However, appellant had no car, no one to drive him and he could not hitchhike or afford to hire someone to drive him out of the county. His only option was to walk, but it was "about a hundred degrees" and appellant is a diabetic. When appellant was located at his nephew's house after the time to leave expired, he was arrested and his probation revoked.

The Court stated that to establish a probation violation, the State generally must show some *voluntary* act on the part of the probationer. In other words, the prosecution must show that the probationer's own actions were the cause of the probation violation. And here, the Court noted, the State conceded that appellant did not enter the banishment area voluntarily and that it did not allege that he violated his probation for that reason. Instead, the State argued that the evidence showed that appellant voluntarily remained in the banishment area after the 48-hour time period expired.

Specifically, the State pointed to appellant's statement to the probation officer that he would be at his nephew's house at the end of 48 hours and argued that this should be construed as evidence of appellant's intent to remain in the banishment area. But, the Court stated, notwithstanding his intent, without evidence that appellant could have removed himself from the banishment area within the time frame imposed upon him, there was no evidence that his "own actions" caused the probation violation.

The State also argued that the trial court, as factfinder, was entitled to disbelieve appellant's testimony about his medical condition and lack of financial means. But, the Court stated, such disbelief alone will not supply a missing element so as to satisfy the State's evidentiary burden. Moreover, the probation officer also testified to some of these facts.

Finally, the State asserted at the probation revocation hearing that appellant's probation should be revoked because he could have walked out of the banishment area within 48 hours. However, the Court found, appellant's probation officer did not expect that of him, and there was simply no evidence showing that it would have been possible for appellant to do so. Consequently, the Court concluded, the State did not meet its burden of showing that appellant's continued presence in the banishment area was voluntary, and the trial court abused his discretion in revoking appellant's probation for that reason.