

## THIS WEEK:

- Merger; Units of Prosecution
- Judicial Misconduct; Coaching the Prosecutor
- Weapons; Relevance
- DUI; Refusal to Submit to Chemical Testing

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### Merger; Units of Prosecution

*Johnson v. State*, A20A0996 (6/15/22)

In 2013, Johnson was convicted of one count of burglary (Count 1), three counts of theft by taking based on the theft of three different Ford trucks (Counts 2, 3, and 4), and one count of theft by taking based on the taking of multiple pieces of property, including, among other things, a riding lawnmower, a plasma cutter, and a welder (Count 5). The evidence showed that the crimes occurred in a large building containing a shop and office space on the property of a contracting company (the “company”). The company had five surveillance cameras recording activity in its building. A video from one of those cameras, which recorded activity in the southwest corner of the shop, was introduced into evidence at trial. That video first showed Johnson in the shop area at 10:54 p.m. on October 31, 2007. It also showed that Johnson appeared to leave the shop and the property after completing the crimes at about 4:30 a.m.

The Court of Appeals rejected Johnson's contention that two of his three theft-by-taking convictions for the theft of the trucks should have merged, such that he could be convicted of only one count of theft by taking for the theft of the trucks. See *Johnson v. State*, 357 Ga. App. XXV (Case No. A20A0996) (Nov. 2, 2020) (unpublished) (“*Johnson I*”). In reaching that conclusion, the Court evaluated Johnson's merger claim using the “actual evidence” test enunciated in *Braswell v. State*, 245 Ga. App. 602, 604 (4) (2000), overruled in part as recognized in *Johnson v. State*, 313 Ga. 155, 160-161 (4) (2022) (“*Johnson II*”). See *Johnson I*, Case No. A20A0996, slip op. at 15 (8) (b). Under that test, the key question in determining whether a merger has occurred was whether the different offenses are proven with the same facts.

The Supreme Court granted certiorari and held that the Court of Appeals erred by relying on *Braswell's* “actual evidence” test, which governed merger for multiple counts of different crimes instead of multiple counts of the same crime — the latter being the type of merger claim Johnson presented with respect to his convictions for theft by taking. *Johnson II*, 313 Ga. at 158 (3). The Supreme Court further explained that, to address a merger claim premised on multiple convictions for the same crime, a court must ask whether those crimes arose from a single course of conduct and, if so, whether the defendant

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can face multiple convictions and sentences under a unit-of-prosecution analysis. The *Johnson II* Court observed that the course-of-conduct evaluation involves examining the defendant's intent and the time and location of the crimes at issue. And the *Johnson II* Court emphasized that the proper unit-of-prosecution test entails evaluating the statutory text to determine whether a particular course of conduct involves one or more distinct “offenses” under the statute. The case was then remanded back to the Court of Appeals to reconsider Johnson’s merger claims under the proper standard of review.

On remand, the Court found that Johnson acted with the same intent — to steal the company's property — from the moment he first entered the company's building shortly before 11:00 p.m. on the night in question until he left the property at approximately 4:30 a.m. the following morning. Moreover, the crimes all occurred in the same targeted area: the building containing the company's shop and office space, a garage in front of the building, and a parking area outside of the building. Finally, while several minutes passed between the times Johnson could be seen exiting the building with equipment and returning to retrieve more items, those brief passages of time — on the facts of this case — are more appropriately viewed as resulting from limits on how much property Johnson could move in each trip (and therefore ancillary to a single plan to steal multiple items), and not as breaks during which Johnson ceased all criminal activity and then formed a new intent to steal other items. Consequently, the Court determined, all the thefts arose from a single course of conduct.

Next, the Court turned to whether Johnson could face multiple convictions and sentences under a unit-of-prosecution analysis. The Court noted that with respect to whether his motor-vehicle-theft convictions merge with each other, the parties did not cite, and research did not reveal, any Georgia appellate decisions explicitly applying the unit-of-prosecution analysis to the statutes at issue here. But, the Court found, based on its plain language, the act or conduct prohibited by OCGA § 16-8-2 is the unlawful taking or appropriation of “any property of another with the intention of depriving him of the property.” Thus, the Court found, it is the taking or appropriation of “any property of another” with the requisite intent that forms the default unit of prosecution under OCGA § 16-8-2.

The Court then discussed the interplay of sentencing language of OCGA § 16-8-12 (a) (5) (A), the relevant sentencing provisions for theft of a motor vehicle with the default unit of prosecution under OCGA § 16-8-2. And here, the Court found, reasonable minds could disagree as to whether OCGA § 16-8-12 (a) (5) (A), when read in conjunction with OCGA § 16-8-2, unambiguously defines the unit of prosecution as a single motor vehicle. Interpreting these statutes in favor of Johnson, as the Court stated it must, the Court held that Johnson may not be convicted or sentenced for multiple counts of motor-vehicle theft where, as here, the offenses were committed during a single course of conduct.

Finally, the Court addressed whether Johnson's motor-vehicle-theft convictions merge with his non-motor-vehicle-theft conviction. The Court found that the statutory language does not unequivocally reflect a legislative choice to punish motor-vehicle theft separately from non-motor-vehicle theft

committed during the same course of conduct. Thus, because reasonable minds also could disagree as to whether OCGA § 16-8-12 (a) (5) (A) unambiguously defines a unit of prosecution distinct from that defined in OCGA § 16-8-12 (a) (1), the Court found that the rule of lenity required it to hold that Johnson may not be convicted of or sentenced for multiple counts of theft by taking where, as here, the motor-vehicle and non-motor-vehicle theft offenses were committed during a single course of conduct. The Court therefore vacated his convictions and sentences under Counts 3, 4, and 5 and remanded the case for the trial court to merge those convictions into Johnson's conviction for Count 2 and resentence him accordingly.

### **Judicial Misconduct; Coaching the Prosecutor**

*Dukes v. State, A22A0258 (6/22/22)*

Appellant was convicted of one count of aggravated battery. The evidence showed that appellant, Blackwell, and Edwards beat the victim for several minutes, even after he lost consciousness. At trial, appellant raised self-defense, and called Blackwell and Edwards as witnesses.

Appellant argued that the trial court “exit[ed] its role as a neutral arbiter or referee in the case and coach[ed] the prosecutor on how to try his case[.]” rendering the trial unfair. The Court noted that appellant neither objected to the trial judge's comments nor moved to recuse the judge and thus, failed to properly preserve the claim of error for appellate review. Nevertheless, appellant argued, these instances rose to the level of a due process violation. But the Court stated, even assuming that bias on the part of a trial judge so profound and pervasive as to implicate the constitutional guarantee of due process need not be raised in the trial court by way of a timely motion to recuse, this case presented no such bias.

Appellant first contended that the trial court improperly coached the prosecutor following Edwards's testimony. During a bench conference, the trial court stated that it was “confounded” by the State's failure to “tell the jury that [Edwards] pled guilty yesterday to the charges[ ]” after Edwards testified that “she [was] just sitting [t]here watching these things go on[.]” and suggested that doing so would have been “the most powerful part of any cross-examination[.]” The State responded that it had intended to introduce Edwards's conviction, but “failed to do that.” The trial court stated that it was “very, very, very, very, very frustrated up here about all of this[.]” and asked the State whether it intended to recall Edwards, to which the prosecutor answered yes. A few minutes later, the trial court stated that based on Edwards's trial testimony, it thought the prosecutor could ask her “if she pled guilty yesterday and admitted to making an admission[.]” and then asked the prosecutor, “you got a first offender, don't we, with [Edwards]?” When the State responded affirmatively, the trial judge informed the State that in that case, the impeachment was “not about her having a conviction,” but “what [Edwards] did out here in open court yesterday in relationship to this case[.]”

Appellant argued that there were “multiple issues with this conversation[ ]” because the trial judge denoted a “team effort” by referring to himself and the prosecutor as “we,” and inappropriately instructed the prosecutor on how to impeach Edwards when she was recalled, including instructions on what questions to ask. However, the Court found, in context, the trial judge's use of “we” was a reference to both the judge and the prosecutor being present when Edwards entered her guilty plea, and therefore was not indicative of actual bias. Moreover, the judge's instructions on how to impeach Edwards addressed the trial court's apparent concern that the State limit its use of the first-offender plea to a permissible purpose. The trial judge is charged with ensuring that the rules of evidence and procedure are followed, and that the proceedings are both orderly and fair. Thus, the trial court's decision to make the prosecutor “clear about what [he could] and [could not] do[ ]” with the evidence was proper, and did not support a finding of actual bias. Accordingly, the Court concluded, this claim was without merit.

As to the second area of alleged coaching, the record showed that the prosecutor asked Blackwell several questions about pleading guilty to his involvement in the incident. At a bench conference, the trial court asked the prosecutor why he did not impeach Blackwell with his certified conviction, to which the prosecutor answered that “[i]t was [his] failure to do that[,]” and that he “felt like [he] could just cross-examine [Blackwell]” on the subject. The trial court then asked the prosecutor whether he thought that obtaining a certified conviction of a co-defendant was “needed in preparation of the case[,]” to which the prosecutor responded, “I do think it's the best policy to do that.” The prosecutor then requested to recall Blackwell and Edwards, but the trial court responded that the State “can't do that during the defendant's case[,]” and explained that the State would have to make such a motion “at the conclusion when [the defense] rest[s].” Later, when the trial court allowed the State to reopen the evidence, the prosecutor attempted to tender Blackwell's certified conviction without first introducing it. The trial court corrected the prosecutor by telling him, “You have to have the witness identify State's [exhibit] 6 [i]f he knows what it is.”

Appellant argued that by “aid[ing]” and “assist[ing]” the prosecutor, the trial court “stepped out of its role as a neutral arbiter[.]” The Court again disagreed. While “coaching” by the trial judge “might be indicative of an actual bias in favor of the State,” here, it appeared to be indicative of “judicial frustration” with the prosecuting attorney for neither being prepared nor properly introducing evidence. Indeed, from the beginning of trial, the judge expressed concern that the lawyers did not “act like [they] underst[oo]d the fundamentals.” Under these circumstances, this sort of alleged “coaching” failed to rise to the level of actual bias.

The third instance occurred during the State's cross-examination of appellant, when the prosecutor attempted to impeach appellant's trial testimony with prior testimony. After the prosecutor questioned appellant about appellant's “earlier” testimony from a prior proceeding that appellant “didn't even receive any injuries from this fight,” appellant seemed to be confused, asking, “When was earlier?” and

"I said I didn't receive no injury?" At that point, the trial court interjected and told the prosecutor to show appellant "exactly" what appellant said in the transcript "and let's quit going back and around."

The Court stated that when a judge sees a lawyer presenting his case in a way that seems to be wasting the time of the jury or confusing the jurors, there is no absolute rule against the judge saying something to the lawyer, although the judge must take care not to do so by way of an impermissible ex parte conversation. Here, the alleged coaching occurred in open court and in an effort to move along the testimony. Thus, this exchange disclosed no actual bias, and appellant's claim of an unfair trial in violation of the constitutional guarantee of due process failed.

Finally, appellant contended that the trial court erred by interposing objections on the State's behalf and that by disallowing the leading questions, the trial court "assumed the role of advocate" in front of the jury, which "was harmful." Specifically, he identified two instances when the trial court admonished defense counsel for asking leading questions absent an objection by the State. The first time, the trial court told defense counsel: "Now, listen to me for a second. You got real upset when you claim[ed] the State was leading [its] witness and doing everything. So you can't do the exact same thing you were complaining the State [was] doing. You may ask [the witness] questions but not lead her into the answer which is contained in your question." The second time, the trial court stated: "Counselor, you know, I have had the statement with you before. The witnesses have to testify. You can only ask an open-ended question, not a question that the answer is actually in the question just as you just asked. So please adhere to that."

The Court stated that to the extent appellant argued that the trial court was biased against the defense, he did not move to recuse the trial court and thus failed to properly preserve this issue for review. Moreover, the record disclosed no actual bias. Instead, the trial court properly exercised its discretion to control the conduct of counsel by preventing defense counsel from asking leading questions on direct examination. Therefore, appellant failed to show that the trial court's remarks were "harmful," considering that on both occasions, defense counsel was still permitted to ask the questions after rewording them. Thus, the Court concluded, there was no error.

### **Weapons; Relevancy**

*Jones v. State, A22A0473 (6/24/22)*

Appellant was convicted of aggravated battery and cruelty to children in the first degree. The victim was the 21-month-old son of appellant's girlfriend. The girlfriend, appellant, their newborn daughter, the victim and appellant's four-year-old son all lived together. The evidence showed that the victim was severely injured by blows to the head.

Appellant contended that the trial court erred by admitting pictures of firearms found during the search of the home he shared with his girlfriend. The record showed that the police obtained a search warrant for the home, and, at trial, the State introduced over 100 photographs of the home and items found during the search, including pictures of two handguns and the ammunition that was removed from the guns. Appellant objected on the basis that the photographs placed his character in evidence, and the State countered that its intent was to present the full evidence of what was recovered from the home, that there was nothing illegal about owning handguns, that there was no evidence that appellant had used the handguns in an improper or violent manner, and that the State did not plan to make any specific mention of the handguns other than when the pictures were introduced and identified.

The trial court initially overruled appellant's objection to the photos. However, after the jury viewed the photographs, the trial court reconsidered its ruling on the admissibility of the pictures of the handguns. The trial court then gave the following instruction: "I'm going to direct that you're not to consider the fact that there are weapons in the house as to this issue for which [appellant] is charged. It is — those two weapons ... - that were in the house are not material to the charges for which [appellant] is standing trial for. So you are not to consider that in your deliberation." During its final charge, the trial court gave a similar instruction.

The Court agreed with appellant, and the State conceded that the photographs of the handguns were irrelevant and, accordingly, should not have been admitted. But, the Court stated, that did not mean that reversal is required; Appellant could not show harm here.

First, the Court noted, the trial court twice plainly instructed the jury that the photographs were not relevant and that the jury was not to consider them in deciding appellant's guilt. The jury is presumed to follow the trial court's instructions, and a new trial will not be granted unless it is clear that the trial court's curative instruction was inadequate. And, although appellant argued that the trial court's instructions were insufficient to cure the "highly prejudicial effect" this evidence had on the jury because the court did not explain why the guns had been moved, in doing so, the Court noted, he omitted or misstated key testimony, namely the testimony of the detective who detailed standard procedure when photographing weapons. Additionally, the State did not reference the guns at any time other than when they were introduced, and the State never intimated or sought to elicit testimony that appellant illegally owned the guns or that any crimes were associated with the guns. Considering all these circumstances, and based on the record, the Court concluded that it was highly unlikely that the erroneously admitted evidence contributed to the jury's verdict, and a new trial is not warranted.

#### **DUI; Refusal to Submit to Chemical Testing**

*Porter v. State*, A22A0134 (6/24/22)

Appellant was convicted for DUI (less safe) in 2016. The evidence at trial showed that appellant refused to provide a chemical breath test sample.

Appellant argued that the trial court erred in admitting evidence of his prior 2015 arrest for DUI because he refused to submit to a chemical breath test in 2015 and evidence of a defendant's refusal to submit to a breath test is excluded under the Georgia Supreme Court's rulings in *Olevik v. State*, 302 Ga. 228 (2017) and *Elliott v. State*, 305 Ga. 179 (2019). Although the Court agreed that the Georgia Supreme Court has held that the Georgia Constitution precludes admission of evidence that a suspect refused to consent to a breath test, appellant in 2015 did not refuse to submit to a breath test. Trial testimony showed that appellant submitted to a chemical breath test following his arrest for DUI in 2015. Thus, as evidence of appellant's prior DUI arrest did not involve a refusal to test, the Court concluded that appellant's argument the trial court erred on these grounds was without merit.

Next, appellant contended that the trial court erred in admitting evidence that he refused to submit to a breath following his arrest in the instant case. The Court agreed and the State conceded that the trial court erred.

However, the Court noted, a conviction will be affirmed despite a constitutional error if the error was harmless beyond a reasonable doubt. A constitutional error is harmless if there is no reasonable possibility that the evidence complained of might have contributed to the conviction. And here, the State conceded that testimony of appellant's refusal was not harmless error, it did not carry its burden of showing that the testimony did not contribute to the verdict. Thus, based on the presentation of testimony regarding appellant's refusal to test, in addition to the State's concession that the error was not harmless, the Court concluded that the error was not harmless beyond a reasonable doubt. Consequently, the Court vacated appellant's conviction for DUI (less safe), and remanded the matter to the trial court for a new trial.

The Court stated that to the extent appellant argued that the trial court was biased against the defense, he did not move to recuse the trial court and thus failed to properly preserve this issue for review. Moreover, the record disclosed no actual bias. Instead, the trial court properly exercised its discretion to control the conduct of counsel by preventing defense counsel from asking leading questions on direct examination. Therefore, appellant failed to show that the trial court's remarks were "harmful," considering that on both occasions, defense counsel was still permitted to ask the questions after rewording them. Thus, the Court concluded, there was no error in this regard.