

## THIS WEEK:

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- **Jury Charges; Rape and Incest**

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### Ineffective Assistance of Counsel; School and Medical Records

*Harvard v. State, A22A1142 (8/30/22)*

After a bench trial, appellant was convicted of child molestation, rape, and incest. The victims were his stepdaughters, M. W. and J. W. Appellant argued that his counsel rendered ineffective assistance by not presenting an expert witness to testify about the victims' forensic interviews. Appellant called an expert in forensic interviews to testify at the motion for new trial hearing. She testified that the person who conducted the forensic interviews of the victims failed to explore whether third-party communications influenced the victims; failed to explore whether there was an alternative explanation for the conduct they described, such as family dysfunction or a history of physical violence; and failed to explore the victims' potential motivation for making the allegations. The expert also testified that the interviewer could have done a better job of asking follow-up questions and getting more detail. She testified that although she did not believe the interviewer led the victims to make their statements, the interviewer did ask two leading questions. According to the expert, the interviewer's errors, apart from two leading questions, were errors of omission, failures to pursue certain lines of inquiry.

The Court found that the expert's criticism of the interviewer's errors and omissions did not specifically demonstrate how counsel's failure would have affected the outcome of the case. Arguments founded on the expert's testimony amounted to no more than speculation about the evidence, which is not sufficient to show that there was a reasonable probability that the outcome of the trial would have been different. And the Court stated, this was particularly true here since the trial court judge — who sat as the fact finder — stated in his order denying the motion for new trial that he never watched the recordings of the forensic interviews because the "victims testified during the trial and were both subject to a thorough and sifting cross examination by trial counsel."

Consequently, the Court stated, although appellant proffered this expert testimony on interviewing techniques, he failed to demonstrate a reasonable possibility that this testimony would have resulted in a different outcome at his trial. To establish the prejudicial effect of trial counsel's failure to present certain evidence, an appellant is required to make an affirmative showing that specifically demonstrates how counsel's failure would have affected the outcome of the case.

Appellant also argued that the trial court erred in denying his post-trial motion to review the victims' school and medical records. He contended that counsel could have used those records at the motion for new trial hearing to show that the victims' behaviors were not consistent with the behavior of victims of abuse. The Court disagreed.

Here, the trial court entered an order regarding a post-conviction status conference, in which he noted that appellant's post-conviction counsel had requested the victims' medical records. The court stated that he had conducted an in-camera inspection of the records and "failed to find any pertinent information or evidence pertaining to [appellant's] case." The court ordered that the records be sealed and not released to either party. The court also entered an order denying appellant's request for post-conviction discovery of M. W.'s school records and J. W.'s medical records on the ground that he had examined the records in camera and the records did not contain material or relevant information.

The Court stated that if the trial court performs an in-camera inspection and denies the defendant access to certain information, on appeal the appellant has the burden of showing both the materiality and the favorable nature of the evidence sought. Mere speculation that the items the appellant wishes to review possibly contain exculpatory information does not satisfy this burden. And here, the Court found, appellant failed to meet his burden of showing that the records were relevant to his guilt, innocence, or the appropriate penalty. Therefore, the Court found no error in the trial court's denial of access to those files. In so holding, the Court noted that as the trial court held, trial counsel did present witnesses who testified that they did not witness any "abnormal" behavior from the victims, and the court as factfinder took that evidence into consideration. So, appellant also did not show that introducing any such records would have changed the outcome of the trial.

## Res Judicata; Void Sentencing

*Harris v. State, A22A0736 (8/31/22)*

In 2003, appellant pled guilty to one count of child molestation and was sentenced to twenty years, serving seven in incarceration consecutive to any sentence he was currently serving. At the sentencing hearing, the court explained that the maximum sentence for the offense was 20 years confinement. The State had filed a recidivist motion based on two prior felony convictions, which the State maintained required that the trial court sentence appellant to the maximum sentence with discretion to probate portions of the sentence. Thereafter, relying on the recidivist statute and the two felony convictions presented by the State, the court sentenced appellant to 20 years, to serve 7 in incarceration consecutive to any sentence he was currently serving.

Over the years, appellant filed numerous post-judgment motions, including an omnibus motion to, inter alia, correct a void sentence, which the trial court denied. He also filed a motion for out-of-time appeal in April 2020, raising numerous arguments, which motion was denied and affirmed on appeal. See *Harris v. State*, Case No. A20A2087 (decided Feb. 18, 2021). In 2021, appellant filed a motion to vacate or correct a void sentence, which the trial court denied, finding that he should have raised the issue previously.

The State contended that res judicata applied to appellant's arguments because he could have raised them in one of his prior appeals. The Court disagreed in part. The Court found that appellant did not raise the void sentence argument in his prior motions before the trial court. And while he may have been able to bring the claim at that time, the nature of a void sentence is that it is not authorized by the law. Therefore, the Court declined to apply the doctrine of res judicata to the portion of the appeal regarding that argument. To the extent that appellant raised any ineffective assistance of counsel claims, however, the Court affirmed the trial court's judgment as to those issues.

Appellant contended that two non-final convictions were improperly used to enhance his sentence under the recidivist statute. The convictions at issue were affirmed in *Harris v. State*, 269 Ga. App. XXVI (Case No. A04A1851, unreported) and *Harris v. State*, 273 Ga. App. 90 (2005). The State conceded that these convictions were not final at the time that appellant was sentenced and therefore, could not have been used to support a recidivist enhancement.

Nevertheless, the Court determined, the sentence imposed by the trial court was within the statutory range of punishment regardless of any improper recidivist enhancements, and the trial court had discretion to run the sentence consecutive to the other sentences appellant had been ordered to serve. Therefore, the Court concluded, appellant's sentence was not void, and the trial court did not err by denying the motion to vacate or correct his sentence as void.

## Jury Charges; Plain Error

*Grullon v. State*, A20A1051 (9/1/22)

In *Grullon v. State*, 357 Ga. App. 695 (2020) (*Grullon I*), the Court affirmed appellant's conviction for trafficking in 28 or more grams of a mixture containing heroin. In so holding, the Court concluded that appellant's claim that a jury charge was improper on deliberate ignorance was not a ground for reversal because he had not preserved that claim for ordinary appellate review and because he had affirmatively waived that claim, meaning that he could not show the first prong of plain error. The Supreme Court granted appellant's petition for certiorari and reversed, holding that appellant had not affirmatively waived his claim of error. *Grullon v. State*, 313 Ga. 40 (2021) (*Grullon II*). The Supreme Court remanded the case back to the Court to determine whether appellant met his burden of demonstrating the other three prongs of plain error review.

The Court noted that plain error requires the following analysis: First, there must be an error or defect — some sort of deviation from a legal rule — that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the trial court proceedings. Fourth and finally, if the above three prongs are satisfied, the appellate court has the discretion to remedy the error — discretion which ought to be exercised only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

The evidence, briefly stated, showed that law enforcement believed that Enciso-Rodriguez was acting as a middleman between a distributor in Mexico and buyers in New York and Philadelphia. The buyers would drive to the metro Atlanta area and meet Enciso-Rodriguez at a QuikTrip convenience store, where he would give them a car battery in which heroin was concealed. On February 6, 2016, Enciso-Rodriguez had a series of telephone conversations with a man, later identified as appellant, who asked for directions to the QuikTrip. Appellant and Hernandez, the buyer from a January transaction, arrived at the QuikTrip in a vehicle with New York plates registered to appellant. Enciso-Rodriguez gave Hernandez a car battery, which Hernandez placed in the vehicle, and Hernandez and appellant drove away. Officers followed the vehicle and stopped it shortly thereafter for a tag violation. When officers stopped the vehicle, Hernandez was driving, and appellant was seated in the front passenger seat. Hernandez consented to a search of the vehicle. He told the officers that he and appellant had been in Atlanta for two days visiting a friend and that the battery in the back of the vehicle belonged to him. When the officers began asking questions about the car battery, appellant appeared as though he might "pass out." The officers cut apart the battery and found six bricks of a substance inside, which were later tested and found to be a mixture containing heroin, weighing 465 grams.

Appellant argued that the trial court met the second prong because it was clear and obvious that the jury charge on deliberate ignorance was not supported by the evidence. But the Court found, contrary to appellant's argument, this was

not a case in which the evidence pointed only to his actual knowledge of the heroin or to no knowledge at all. In fact, appellant conceded in his appellate brief that a reasonable juror could conclude from the evidence that he "had strong suspicions that something illicit was inside the battery." Given the evidence, the Court stated it could discern no obvious error in the trial court's decision to give a charge on deliberate ignorance.

Nevertheless, appellant argued, there was obvious error because the trial court included the word "intent" in the charge on deliberate ignorance. The Court noted that the trial court's instruction began by stating that "[t]he element of knowledge, *intent*, may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him." (Emphasis supplied.) The Court agreed because a charge on deliberate ignorance that equates intent with knowledge, or which tends to confuse those concepts, is erroneous.

Nevertheless, the Court found that the error did not satisfy the third prong of the plain error test. The third prong of the plain error analysis imposed upon appellant the burden of making an affirmative showing that the error probably affected the outcome of his trial. Relying on *Matos-Bautista v. State*, 353 Ga. App. 773, 778 (1) (2020), the Court noted that it held in that case that a charge containing similar language and instruction was held to be harmless error when viewed in the context of the whole charge to the jury. The Court found its reasoning in *Matos-Bautista* persuasive here, even more because it was decided using a harmless error analysis rather than a plain error analysis. The principle that jury charges cannot be read in isolation but must be read and considered as a whole also applies to plain error review. And the plain error analysis is more stringent than the harmless error analysis. Thus, the Court concluded, given that both the specific deliberate ignorance instruction and the salient portions of the charge are nearly identical in this case to those in *Matos-Bautista*, the Court concluded that appellant did not meet his burden of showing that the error affected the outcome of the trial court proceedings. Consequently, he failed to show plain error.

## Chain of Custody; Fungible Evidence

*Manor v. State*, A22A1020 (9/2/22)

Appellant was convicted of possession of marijuana with intent to distribute, possession of oxycodone, fleeing or attempting to elude a police officer, and reckless driving. He contended that the trial court committed plain error in admitting test results of the alleged marijuana because the State failed to establish a chain of custody of the substance tested. The Court agreed and the State conceded the error.

The Court stated that to establish the chain of custody of a fungible substance like marijuana the State must establish the identity and integrity of the substance. The proponent must show that the substance tested at the crime lab, for example, is the same as that seized from the accused. The proponent also must show that the drugs were neither tampered with nor corrupted during their travels from crime scene to evidence room to laboratory to courtroom. Proving the chain of custody for fungible evidence means accounting for the safekeeping and transportation of the evidence from seizure to trial.

And here, the Court found, the State failed to establish a chain of custody accounting for the safekeeping and transport of the alleged marijuana sample that was tested. Since the suspected marijuana was a fungible item, i.e., it was not identifiable by its own characteristic appearance, the test results were not admissible and had no probative value absent other evidence sufficient to show with reasonable certainty that the substance tested was the same as the substance seized. Consequently, the Court held, because the State made no showing of such other evidence, the results of the marijuana test were inadmissible. The trial court's admission of the evidence of the test results, which likely affected the outcome of the trial proceedings on the charge for possession of marijuana with intent to distribute, constituted plain error. Accordingly, the Court reversed appellant's conviction on that marijuana charge.

## Statements; Merger

*Dukes v. State, A22A0633 (9/2/22)*

Appellant was convicted of two counts of making a false statement, one count of hindering apprehension or punishment of a criminal, and one count of concealing the death of another. Very briefly stated, the evidence showed that McCullough was an army buddy of appellant and in 2006, went to visit appellant in Georgia. Appellant told McCullough that a friend of his named Ryan killed a victim that had been missing for a year, and appellant helped Ryan dispose of the body. Ten years later, McCullough divulged this information to the GBI. The GBI interviewed appellant on June 16, 2016, and appellant denied making any statements about the victim. Nevertheless, on February 19, 2017, appellant and his counsel met with the District Attorney and during the course of a thirty-minute conversation, and with the understanding that appellant was willing to cooperate with the GBI, the DA told appellant that “if he was truthful with us, cooperated, and was not involved with [the victim's] homicide, only the cover-up, that we were in a position that we could help him.” On February 21 and 22, 2017, appellant after being advised of his *Miranda* rights by the GBI, admitted his involvement in burning the body of the victim and burying her remains.

Appellant contended that his February 2017 statements were not given voluntarily and therefore, the trial court improperly admitted them at trial. Specifically, he argued that the DA's statement that the prosecutors were “in a position that we could help” appellant was an impermissible hope of benefit that induced appellant's February 19, 21, and 22 statements. The Court disagreed.

The Court stated that based on controlling case law, it was clear that the DA's statement to appellant that he and his fellow prosecutors were in a position to “help” if appellant cooperated and told the truth was merely an exhortation or encouragement to tell the truth and not a promise for a shorter sentence, lesser charges, or no charges at all. The Court did not see any meaningful distinction between statements made by police officers which were held to be exhortations to tell the truth and the statement made by the DA that he and the other prosecutors were able to “help” if appellant cooperated and was truthful. Here, there was no evidence that anyone made any promises to appellant for a shorter sentence, lesser charges, or no charges at all. In fact, the subject of punishment and potential charges was never discussed. Therefore, the Court concluded, the DA's statement that he and the other prosecutors were in a position to “help” appellant is not a prohibited “hope of benefit” within the meaning of OCGA § 24-8-824 and did not render appellant's subsequent statements inadmissible.

Appellant next contended that the trial court erred by failing to merge his convictions for making a false statement under Count 1 and Count 2 because these convictions arose from the same act. The Court noted that Count 1 charged appellant with making a false statement under OCGA § 16-10-20 by concealing Ryan's confession that he had killed the victim. Count 2 charged appellant with making a false statement under OCGA § 16-10-20 by concealing the fact that appellant helped Ryan destroy and dispose of the victim's body. The Court noted that although Ryan's confession and appellant's subsequent assistance with the destruction of the victim's body did not occur at the same place or time, the crimes of making a false statement did. They arose from a single course of conduct at the same time and place, i. e., the June 16, 2016 interview about the victim's disappearance.

The Court stated that where, as here, two crimes arise from a single course of conduct, the merger analysis requires careful interpretation of the criminal statute at issue to identify the unit of prosecution — the precise act or conduct that the legislature criminalized. Under OCGA § 16-10-20, a person commits the crime of making a false statement when he “knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device *a material fact* . . . , in any matter within the jurisdiction of any department or agency of state government. . . .” (Emphasis supplied.) The Court found that the use of the article “a” is instructive and indicates an intent by the General Assembly to define the unit of prosecution

as the concealment of a single material fact. Accordingly, the Court concluded that OCGA § 16-10-20 is unambiguous and permits prosecution for the concealment of each individual material fact. Here, there were two such material facts and, hence, no merger of these two counts.

## Sentencing; Juries

*Keys v. State, A22A0852 (9/6/22)*

Appellant was convicted of two counts of fleeing or attempting to elude a police officer and five misdemeanor traffic offenses. The trial court imposed a total sentence of five years in prison, to be followed by five years on probation, consisting of: five years on each count of fleeing or attempting to elude a police officer, to run concurrently with each other, and twelve months each, to run consecutively to each other and to the fleeing and attempting to elude counts, on the misdemeanor traffic convictions.

Appellant argued that the trial court erred in imposing consecutive sentences on the misdemeanor traffic offenses. According to appellant, "[t]he jury fixes the sentence within the limits prescribed by law and the judge imposes the sentence fixed by the jury as provided by law." Therefore, he contended, he should not have received consecutive misdemeanor sentences because the jury did not specify that the sentences should run consecutively. The Court disagreed.

The Court noted that appellant relied on cases decided under former Code Ann. § 27-2534 which stated that "[t]he jury shall fix a sentence within the limits prescribed by law" and that "[t]he judge shall impose the sentence fixed by the jury as provided by law." But appellant's misdemeanor traffic offenses were committed in 2019, well after the old sentencing guideline was repealed in 1974, and former Code Ann. § 27-2502 — now codified at OCGA § 17-10-1 — was amended to provide that a person convicted of a misdemeanor or felony shall have his sentence fixed by the trial judge except in cases in which life imprisonment or capital punishment is imposed. Under the new sentencing code, the judge and not the jury passes sentence after a determination of guilt.

Therefore, the Court held, the jury in his case had no authority over his sentence. The discretion as to whether the sentences were served concurrently or consecutively resided entirely and solely within the breast of the trial judge, unaffected and uninfluenced by any recommendation of the jury. Accordingly, the trial judge therefore properly exercised his discretion to impose consecutive twelve-month sentences for the misdemeanor traffic offenses.

## Sufficiency of the Evidence; Merger

*Shropshire v. State, A22A0838 (9/6/22)*

Appellant was convicted of aggravated child molestation, incest, cruelty to children in the first degree, and two counts of child molestation for acts that occurred in 2001. The victim was appellant's niece.

The Court stated that it was necessary to address the sufficiency of the evidence in support of appellant's conviction for incest. The Court noted that at the time of the offense in 2001, incest was defined, in pertinent part, as follows: "A person commits the offense of incest when he engages in sexual intercourse with a person to whom he knows he is related either by blood or by marriage as follows: . . . Uncle and niece." OCGA § 16-6-22 (a) (6) (2001). In 2010, the General Assembly amended the statute to include "sodomy, as such term is defined in Code Section 16-6-2," in an effort "to provide for gender neutrality with regard to the offense of incest." 2009 Georgia House Bill No. 571 (May 20, 2010). The current version of OCGA § 16-6-22 pertinently provides that "[a] person commits the offense of incest when such person engages in sexual intercourse *or* sodomy, as such term is defined in Code Section 16-6-2, with a person whom he or she knows he

or she is related to either by blood or by marriage as follows: . . . Uncle and niece." (Emphasis supplied.) OCGA § 16-6-22 (a) (6). Thus, the definition of incest at the time the offense occurred did not include "sodomy."

Thus, the Court stated, it must decide whether "sexual intercourse," as employed in OCGA § 16-6-22 (2001), encompassed licking the victim's vagina. The Court, in looking at the definitions of "sodomy" and "intercourse" found that it did not. The Court stated that to conclude that "sexual intercourse" in the former incest statute already included acts of sodomy is to conclude that the addition of "sodomy" made no change to the statute's application. Such a reading violates a core principle of statutory interpretation that changes in statutory language generally indicate an intent to change the meaning of the statute. Therefore, the Court concluded, "sexual intercourse" does not include sodomy. Accordingly, the evidence presented at trial was insufficient to show that appellant committed incest as that crime was defined in 2001, and his conviction was reversed.

Next, appellant argued that the trial court erred by not merging his aggravated child molestation and two child molestation convictions into a single conviction. The Court noted that once again, because a crime is to be construed according to the law existing at the time of its commission, it must look to the statutes that were in effect in 2001. Relying on *Scott v. State*, 306 Ga. 507, 509 (2) (2019) ("*Scott I*") and *Scott v. State*, 356 Ga. App. 152 (2020) ("*Scott II*"), the Court stated that in determining whether appellant's convictions for aggravated child molestation and child molestation merge, it must apply a unit-of-prosecution analysis.

The Court stated that while neither it nor the Supreme Court has evaluated the language of OCGA § 16-6-4 (c), the definition of aggravated child molestation, by its plain terms, includes the language of OCGA § 16-6-4 (a), defining child molestation. Thus, the Court found, its unit-of-prosecution analysis with regard to child molestation is applicable to its analysis of aggravated child molestation. In evaluating the language of OCGA § 16-6-4 (a), defining the offense of child molestation, the Court noted that it previously has found that the General Assembly has not, by clear and unambiguous language, provided that multiple touches to a victim, during a single uninterrupted course of conduct, authorize multiple prosecutions and convictions for separate acts of child molestation. Indeed, the child molestation statute does not contain any qualifying language with respect to acts of molestation involving different enumerated parts of the defendant's body during a single uninterrupted course of conduct. Therefore, the Court determined, it must resolve this ambiguity in favor of the defendant.

And here, Counts 1, 3, and 4 charged appellant with acts against the victim by touching her vagina with his tongue, finger, and penis, respectively, with the intent to arouse and satisfy his sexual desires. All counts alleged the abuse occurred on or about November 1, 2001, and the evidence presented at trial, including the victim's testimony, showed that the touching occurred in a single, uninterrupted incident in a bedroom at her grandmother's house, lasting until just after sunrise. Accordingly, the Court concluded, it must vacate appellant's convictions and sentences for Counts 1, 3, and 4, and remand the case for the trial court to convict and resentence appellant on only Count 1 for aggravated child molestation.

## Jury Charges; Rape and Incest

*Wright v. State*, A22A0940 (9/6/22)

Appellant was convicted of rape and incest. Appellant argued that the trial court erred when it charged the jury as to general criminal intent when he was charged with specific intent crimes. Specifically, appellant contended that the charge on general intent was erroneous, misled the jury, and potentially resulted in convictions based on a lower intent than is required by the relevant statutes. The Court disagreed.

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING NOVEMBER 18, 2022

Issue 46-22

Here, appellant was convicted of forcible rape under OCGA §16-6-1 (a) (1) and incest under OCGA § 16-6-22 (a) (1). OCGA § 16-6-1 (a) (1) provides that "[a] person commits the offense of rape when he has carnal knowledge of [a] female forcibly and against her will[.]" Under OCGA § 16-6-22 (a) (1), "[a] person commits the offense of incest when such person engages in sexual intercourse or sodomy . . . with a person whom he or she knows he or she is related to either by blood or by marriage as follows: Father and child or stepchild[.]" The Court found that neither statute contains any particular provisions defining any specific intent required by the perpetrator, nor do they specify that any particular result must be intended to come about as a result of the criminalized acts. These statutes instead only require proof that the offender engaged in the acts specified. Therefore, the Court concluded, only a general criminal intent is required under each statute. Thus, because rape and incest are general intent crimes, the trial court correctly denied appellant's request that the jury be instructed on specific intent.

Next, appellant argued that the trial court erred when it charged the jury that sexual intercourse with an intoxicated, asleep, or unconscious woman can constitute rape because this instruction needlessly raised the issue of consent before the jury when consent was not at issue. The record showed that the trial court instructed the jury that "[s]exual intercourse with a woman whose will is temporarily lost from intoxication or unconsciousness arising from the use of drugs or other causes or sleep is rape." This legal tenet describes the doctrine of "constructive force," which reduces the amount of force required to show forcible rape in situations where a victim is physically or mentally unable to give consent because she is intoxicated or asleep. In the ordinary case, the force to which reference is made is not the force inherent in the act of penetration but is the force used to overcome the resistance of the female.

However, the Court found, the doctrine of constructive force applies only where children are not involved. And here, the victim was 15 years old. Thus, because the doctrine of constructive force did not apply in this case as a matter of law, the trial court erred by instructing the jury on this principle.

Nevertheless, the Court stated, the trial court's giving of an erroneous jury instruction does not necessarily require reversal. An erroneous jury instruction is not judged in isolation, but rather is considered in the context of the entire jury charge and the trial record as a whole and does not constitute grounds for reversal unless the error causes harm. And here, after reviewing the entire record, including the evidence of guilt against appellant on the issue of force, the Court concluded that the evidence was overwhelming such that any erroneous instruction was harmless. Accordingly, the Court determined that appellant failed to show that the trial court committed reversible error when it charged the jury.