

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING OCTOBER 25, 2013

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## THIS WEEK:

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- **Severance; Character Evidence**
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- **Solicitation of Sodomy; Sufficiency of Evidence**
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### **Search & Seizure; Roadblocks**

*Williams v. State, S13G0178 (10/24/13)*

*Brown v. State, S12G1287 (10/24/13)*

In *Brown* and *Williams*, the Supreme Court of Georgia overturned two convictions of defendants stopped at separate unconstitutional police roadblocks. According to the Court, the long-standing analytical framework used by Georgia courts to determine the constitutional validity of roadblocks (first framed by the Court of Appeals in *Baker v. State*, 252 Ga.App. 695 (2001)) improperly merged two distinct constitutional requirements relating to the authorization of roadblocks by supervisory personnel pursuant to a roadblock program established for “an appropriate primary purpose other than general crime control[.]”

In *Brown*, the Court traced the history of the roadblock exception to the Fourth Amendment’s requirement that traffic stops be justified by individualized suspicion. The Court noted that the U. S. Supreme Court recognized a narrow exception to that general requirement which authorized roadblocks implemented pursuant to a “plan embodying explicit, neutral limitations on the conduct of individual officers.” *Brown v. Texas*, 443 U.S. 47, 51 (1979). Such limitations strike a constitutionally acceptable balance between the public interests served by checkpoints and the right of individuals to be free from arbitrary and oppressive government interference. Responding to the U.S. Supreme Court’s concerns, the Georgia Supreme Court, in *LaFontaine v. State*, 269 Ga. 251 (1998), articulated five minimum requirements that a particular checkpoint must satisfy in order to be found constitutional, rather than arbitrary or oppressive. Those requirements are that (1) the decision to implement the roadblock be made by supervisory personnel rather than by officers in the field; (2) all vehicles be stopped, rather than random vehicle stops; (3) the delay to motorists be minimal; (4) the roadblock be well identified as a police checkpoint; and (5) screening officers possess sufficient training and experience to qualify him or her to make an initial determination as to which motorists should be subjected to field sobriety testing.

Two years after *LaFontaine*, the U.S. Supreme Court revisited the constitutional validity of roadblocks in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). There, the Court held that in order to comply with the Fourth Amendment, a checkpoint program must have (in addition to the sort of safeguards on the implementation and operation of checkpoints embodied in *LaFontaine*) a primary purpose

other than a general interest in crime control. Following the *Edmond* decision, the Georgia Court of Appeals considered what impact that decision had upon Georgia's *LaFontaine* requirements. See *Baker v. State*, 252 Ga.App. 695, 697-709 (2001) (whole-court decision). Unfortunately, instead of recognizing that *Edmond* added to the *LaFontaine* analysis, the Court of Appeals erroneously held that *Edmond* simply modified the first *LaFontaine* factor, such that the State was required to prove both "that the decision to implement the checkpoint in question was made by supervisory officers in the field and that the supervisors had a legitimate primary purpose."

In other words, the *Baker* Court merged the *Edmond* requirement that a roadblock program have a primary purpose other than general crime into the first *LaFontaine* factor that the roadblock be implemented by a supervisor and not a field officer. Properly understood, the two criteria "involve different factual inquiries, and they serve different objectives in the Fourth Amendment scheme." The focus of the *Edmond* "primary purpose" requirement is on *why a law enforcement agency uses checkpoints*; in contrast, the *LaFontaine* factors focus on *when, where, how, and by whom specific checkpoints are implemented and operated*. Therefore, the Court disapproved of *Baker* and its progeny to the extent that they merged these two separate inquiries.

Having corrected the constitutional analysis applicable to roadblocks generally, the Court applied it to the facts of both *Brown* and *Williams*. In *Brown*, the defense challenged the roadblock based upon two alleged shortcomings in the evidence offered by the State regarding the sergeant that authorized it. First, the defense argued that the sergeant did not qualify as a "supervisor" within the meaning of *LaFontaine* because the State failed to prove that he was an "executive" or "programmatic level" supervisor. Second, the defendant asserted that the sergeant had authorized the roadblock while in the field rather than in advance, while acting in his supervisory capacity. At the motion hearing, the defense presented some evidence supporting the theory that the sergeant had authorized the roadblock from the field, and based on that evidence, the trial court granted the motion to suppress.

According to the Supreme Court, the facts in *Brown* did not present a problem in

regard to the *Edmond* "primary purpose" requirement because the police department policy governing roadblock implementation (which was introduced by the State and which provided that roadblocks were to be used "to monitor and check driver's licenses, driver condition, vehicle registrations, vehicle equipment, and various other requirements of the Georgia State Motor Vehicle and Traffic Code") sufficiently demonstrated that the purpose of the roadblock program was not general crime detection. In addition, the Court rejected the argument that the sergeant who authorized the roadblock in his case failed to qualify as "supervisory personnel" within the meaning of *LaFontaine* because he was not an "executive" or "programmatic level" supervisor. Instead, the Court held that a "supervising officer" under *LaFontaine* was simply one to whom the authority to implement roadblocks was delegated, and that the authorizing sergeant in *Brown* qualified. However, the Court found that because there was evidence in the record to support the trial court's determination that the sergeant made the decision to implement the roadblock while in the field rather than in advance of the roadblock, that determination was not clearly erroneous. Therefore, the Court held that the Court of Appeals erred in reversing the trial court's grant of the motion to suppress.

In *Williams*, the defense challenged the constitutionality of the roadblock on the ground that the State failed to establish the first of the *LaFontaine* factors. Referencing *Brown*, the Court interpreted this as a challenge to whether the roadblock was established in advance by a supervising officer and to whether the law enforcement agency's roadblock program had a primary purpose other than general crime detection. After analyzing the facts adduced by the State at the motions hearing, the Court concluded that the record supported the trial court's determination that the officer who authorized the roadblock was a supervisor, and that he decided to implement the roadblock in advance and while acting in his supervisory capacity. In that regard, the Court noted that the assistance the authorizing officer provided while at the scene of the roadblock did not deprive him of supervisory status for purposes of the first *LaFontaine* requirement. However, the Court held that the State failed to prove that the roadblock program in this case was

properly limited as required by *Edmonds*. Specifically, the Court noted that the short written law enforcement policy governing the agency's utilization of roadblocks did not contain sufficient limitations preventing roadblock usage for general crime detection purposes. The Court stated that while nothing in the Constitution requires law enforcement agencies to have written policies governing the use of roadblocks, the existence of such policies and the use of written forms documenting the implementation of roadblocks make it easier to establish the purposes of a roadblock program. Here, the Court found, the record contained no testimony or other evidence beyond the written policy regarding the law enforcement agency's purposes for roadblock implementation. Furthermore, the trial court's finding that the supervisor in this case had been given the authority to implement roadblocks for legitimate law enforcement purposes did not establish that the agency's checkpoint program *as a whole* had a primary purpose other than general criminal deterrence. Therefore, because the State failed to make an adequate showing in regard to *Edmond*, the Court of Appeals erred in upholding the trial court's denial of the motion to suppress.

## **Constitutional Right to a Speedy Trial; Motions for Reconsideration**

*State v. Ross*, S13A0996 (10/21/13)

Ross was arrested in December 2004 and indicted in March 2011 for murder in connection with a 2002 death. Ross filed a motion to dismiss the indictment on the grounds that his constitutional right to a speedy trial had been violated, which the trial court denied after a hearing in October of 2011. Ross appealed in February 2012, and the Court of Appeals dismissed his appeal in October 2012 after he failed to file a brief and enumeration of errors. After the case returned to the trial court, Ross filed a motion for reconsideration and a renewed motion to dismiss the indictment, again alleging the denial of his constitutional right to a speedy trial. Following a hearing in December 2012, the trial court granted his motion for reconsideration and plea in bar. The State appealed.

The State argued that the dismissal of Ross's first appeal established the law of

the case and precluded the trial court from addressing his motion for reconsideration or renewed motion for dismissal. The State further argued that the trial court should not have reconsidered its earlier interlocutory ruling because Ross filed his motion for reconsideration after the end of the term in which the decision was entered and there had not been a change in the evidentiary posture of this case since the initial ruling in February 2012. The Court agreed and reversed.

The general rule in criminal cases is that a trial court's inherent power to revoke interlocutory rulings ends with the expiration of the term in which the order was entered. However, there is a well-recognized and important exception to this rule, which allows after-term reconsideration, at least of constitutional issues, where the evidentiary posture of the issue has changed. Thus, a court retains broad discretion over interlocutory evidentiary rulings which may be modified at any time until entry of final judgment. In its order granting the plea in bar, the trial court applied the changed-evidence exception to reconsider the merits of Ross's speedy trial claim. It found that Ross had revealed gaps in the evidence due to the passage of time and shown that the evidence was more degraded than previously believed. Under certain circumstances, the Court stated, the passage of time and resulting degradation in evidence may constitute a change in the evidentiary record permitting the out-of-term reconsideration of an interlocutory ruling on a speedy trial claim. If, for example, a defendant files a constitutional speedy trial claim after his arrest and files a renewed motion five years later after his indictment and extradition, then the passage of time alone may be sufficient to permit reconsideration of the speedy trial claim, especially if the defendant articulates specific ways in which the evidence has changed.

Here, however, the Court noted that the trial court did not refer to any new evidence that would permit the out-of-term reconsideration of its order denying Ross's speedy trial claim. The record did not show any change in the evidence between the first hearing on Ross's motion to dismiss the indictment in October 2011 and the second hearing on his motion for reconsideration in December 2012. The State had presented all of its discovery to Ross prior to the 2011 hearing,

and Ross did not introduce any additional documents or witnesses at the 2012 hearing. In fact, the Court noted, Ross acknowledged at the second hearing that he was "not actually presenting any more evidence" and asked the trial court to reconsider its ruling by reviewing the evidence presented at the earlier hearing on the changes in the crime scene since 2002 and the unavailability of an alibi witness due to a stroke suffered in 2007. When questioned about whether he had continued to investigate the case and contact witnesses since the court's initial order, Ross's attorney stated that he had not personally spoken to the two critical witnesses. Later, asked if he had done additional investigation that showed a change in the evidentiary posture of the case, the attorney responded that he had "done the investigation" and "gone through every piece of discovery" without detailing any specific action taken since the first hearing. The Court additionally noted that regarding the passage of time, of the 11 months that elapsed between the denial of the original motion to dismiss and the grant of the motion to reconsider, eight were attributable to Ross's abandoned appeal. Accordingly, the Court concluded that there has been no showing that the evidence had materially changed since the trial court's initial hearing and order denying Ross's motion to dismiss the indictment. Without a material change in the evidentiary posture of the case, the trial court erred in reconsidering its order and granting the plea in bar.

### **Severance; Character Evidence**

*Thomas v. State, S13A0977 (10/21/13)*

Appellant and three co-defendants were indicted on malice murder of one victim, aggravated assault upon four other victims, and other charges. Appellant was convicted of all counts, except one of the aggravated assault charges. The evidence showed that appellant and his co-defendants went to a party where they were subsequently asked to leave. Later that evening, as the victims (some of the other party-goers) were leaving, appellant and his co-defendants opened fire on them.

Appellant argued that the trial court erred when it denied his motion to sever his trial from that of his co-defendants. The Court stated that when several defendants are indicted together for a capital crime, but the

State does not seek the death penalty, whether the defendants are to be tried together or separately is a matter committed to the sound discretion of the trial court. In such a case, the burden is on the defendant requesting the severance to do more than raise the possibility that a separate trial would give him a better chance of acquittal. He must make a clear showing that a joint trial would lead to prejudice and a consequent denial of due process.

Appellant contended that he was prejudiced by a joint trial because he and a co-defendant are similar in appearance, and for that reason, a joint trial posed a substantial risk of confusion. But, the Court found, several of the witnesses had known appellant and each of his co-defendants for years, and others were able to identify appellant by his distinctive clothing. Although one witness did seem to confuse appellant and a co-defendant briefly, she did so only as to an isolated aspect of her testimony, and she later clarified her testimony on that point. Moreover, that witness implicated two of the co-defendants in the shooting, but not appellant or the other co-defendant, so any confusion on her part could not possibly have harmed appellant. The Court found no other meaningful indication of confusion in the record. Because any confusion at trial was limited to one particular aspect of the testimony of one witness, because that same witness cleared up the confusion, and because the confusion could not have harmed appellant, any confusion at the joint trial did not amount to a denial of due process.

Appellant also argued that he was prejudiced by the admission of evidence that was properly admissible only against another of his co-defendants. In support of this argument, appellant pointed to testimony by several witnesses that this co-defendant had made statements in which he suggested that he—the co-defendant, that is—had been involved in the shooting. But, the Court noted, even if that testimony were not admissible against appellant, appellant was not prejudiced by its admission because the jury acquitted that co-defendant of all charges, and there was no indication that the jury relied upon testimony about his incriminating statements when it returned its verdict as to appellant.

Additionally, appellant argued that he and his co-defendants presented antagonistic

defenses. But, the Court found, this argument was belied by the record, which showed that appellant and his co-defendants urged defenses that were, for the most part, consistent, including, for instance, that prosecution witnesses were not credible, that the area from which the shots were fired was too dark and distant for accurate identification of the shooter, and that the police investigation was beset with problems.

Finally, appellant contended that the trial court erred when it admitted prejudicial character evidence. In particular, appellant argued that, after a witness denied that appellant had given him a gun following the shooting, the trial court admitted a recording of a prior inconsistent statement given by that witness to police. Appellant argued that this recording—on which the witness said not only that appellant had given him a gun following the shooting, but also that he had seen appellant with a handgun a few weeks before the shooting—impugned his character. The Court disagreed. First, the Court noted, the right to bear arms is a constitutional right of American citizens, and “we do not understand how evidence of the *lawful* carrying of a firearm could ever amount to a showing of bad character.” But, to the extent that the recording suggested that appellant was unlawfully carrying a handgun a few weeks before the shooting, it nevertheless was relevant to a disputed issue at trial—whether appellant did, in fact, carry, brandish, and fire a handgun at the time of the party—inasmuch as it tended to show that he had access to such a gun. If evidence is relevant and material to an issue in the case, it is not inadmissible solely because it incidentally places a defendant’s character in issue. Accordingly the trial court did not abuse its discretion in the admission of the recording of the prior inconsistent statement.

## **Motions to Withdraw Guilty Plea**

*Phelps v. State, S13A1294 (10/21/13)*

Appellant sought to withdraw his guilty plea to felony murder of one victim and aggravated assault of a second victim. The record showed that appellant was indicted on 12 counts including felony murder, aggravated assault and possession of a firearm during the commission of a felony. At the plea hearing,

a mistake was noticed as to the aggravated assault charge. A separate accusation was prepared, addressing that crime alone, with a separate case number, and appellant pled guilty to felony murder under Count One of the indictment as to the first victim, and guilty to the aggravated assault of the second victim under the separate accusation. The remaining charges were nolle prossed. Appellant timely sought to withdraw his pleas of guilty and after a hearing, the trial court denied his motion.

Appellant contended that he was not adequately advised that he had the rights not to incriminate himself, to confront the witnesses against him, to subpoena witnesses in his defense, to testify in his own behalf, and that he would be presumed innocent. Specifically, he argued that the information he was given about these rights was inadequate because, as to each, the trial court did not specify that the right applied “at trial.” Moreover, he argued, *Wilson v. Kemp*, 288 Ga. 779 (2011), imposed a requirement that the trial court use the term “at trial” when discussing the waiver of each of these rights. The Court disagreed.

Informing a defendant of his rights during a guilty plea proceeding does not require any particular language or “magic words.” *Wilson* did not impose such a requirement, and, the Court stated, none would have been appropriate in that case because the trial court in *Wilson* specifically limited its discussion of *Wilson*’s right to remain silent to the guilty plea hearing itself, without ever informing *Wilson* that, by pleading guilty, he would waive that right at trial. Here, however, the trial court repeatedly spoke of appellant’s right to a jury trial; the court enumerated his rights in the context of such a trial, and stated: “if you wish to have a trial by a jury or exercise any of these rights, all you have to do is enter a plea of not guilty and a jury trial will be held for you in the case.” The court further informed appellant that if he pled guilty, “you’ll be giving up all these rights [and] you’ll be giving up the presumption of innocence.” Thus, the Court found, even though each sentence the court spoke to inform appellant of his rights did not use the words “at trial,” the court adequately advised him of the rights he was forgoing by choosing not to go to trial.

Appellant also contended that the trial court erred in verbally informing him during the plea hearing that counsel would “assist” him at any trial if he chose not to plead guilty,

and that the court should have instead used the word “represent.” Again, the Court stated, no specific “magic words” are required to be used during a guilty plea proceeding to inform a defendant about his rights. But, even if it were necessary that the word “represent” be used, regarding this right, the Court noted that on the document that appellant signed appeared the text: “you have a right to be represented by counsel at any such trial, and that if you cannot afford to hire counsel, counsel will be appointed.”

Finally appellant argued that his guilty plea to the accusation setting forth the aggravated assault was invalid because his signed plea to that charge waived “formal arraignment, copy of accusation, list of witnesses, [and] jury trial,” but it did not waive indictment, and thus did not meet the requirements of O.C.G.A. § 17-7-70 (a). The Court stated that normally, a defendant may be tried based on an accusation if the defendant has agreed in writing to a waiver of indictment by a grand jury. However, if, as here, a defendant has entered a guilty plea, then such plea would waive any defense known and unknown, and this would include any deficiency in the written waiver requirement. The fact that the aggravated assault upon the second victim was factually connected to the felony murder of the first victim did not mean that O.C.G.A. § 17-7-70 (a) required that the State prosecute appellant only on the indictment charging him with felony murder.

## **Solicitation of Sodomy; Sufficiency of Evidence**

*Watson v. State, S13A0784 (10/24/13)*

Appellant, a police officer, was convicted of solicitation of sodomy pursuant to O.C.G.A. § 16-6-15 and violation of oath of office. He challenged the constitutionality of the sodomy statute and the sufficiency of the evidence to support his convictions. The evidence showed that the victim, a 17-year-old, was at the scene of an incident and was given a ride home by appellant in appellant’s police car. Appellant then asked for “payment” for the ride home. Thereafter, appellant contacted the victim on Facebook and MySpace, again seeking “payment” and using sexual innuendo to explain what he wanted. After the victim told his high school coach of this, the police got involved. Although the victim had

told appellant he was not interested, after police involvement, he contacted appellant. Eventually, the police got a tape of appellant soliciting the victim to engage in consensual sodomy.

Appellant challenged the constitutionality of the statute. The Court held that as construed by its previous decisions in *Powell v. State*, 270 Ga. 327 (1998) and *Howard v. State*, 272 Ga. 242 (2000), the statute is constitutional. Under *Powell* and *Howell*, a person violates O.C.G.A. § 16-6-15 if he (1) solicits another individual (2) to perform or submit to a sexual act involving the sex organs of one and the mouth or anus of the other and (3) such sexual act is to be performed (a) in public; (b) in exchange for money or anything of commercial value; (c) by force; or (d) by or with an individual who is incapable of giving legal consent to sexual activity. Moreover, the Court added, this definition of the crime of soliciting sodomy is sufficiently precise to give a person of ordinary intelligence fair warning that specific conduct is forbidden or mandated.

Nevertheless, the Court found, although the statute is constitutional, the evidence was insufficient to support appellant's conviction. Specifically, there was a lack of evidence regarding the third element of the offense. Thus, the Court found, appellant did not propose acts of sodomy that were to be (a) of a public nature; (b) in exchange for money or anything of commercial value; (c) compelled by force; or (d) performed by those not legally capable of consenting. First, appellant never suggested that any encounter occur in a public place, and the only specific places he proposed meeting were private homes. The mere fact that appellant was a public officer did not render "public" his offer to engage in sex in a private residence. Second, there was never any suggestion, express or implied, that money or anything of commercial value would be exchanged in connection with the encounter. Construed in context, appellant's references to "payment" simply did not bring this situation into the commercial realm. Third, though the repeated suggestion that the victim owed appellant something in exchange for the car ride home was certainly inappropriate, particularly as directed from a uniformed, on-duty police officer to a 17-year-old boy, such conduct did not rise to the level of intimidation or coercion that would give rise

to a finding of sexual contact by force. In the context of sexual offenses, the term "force" means acts of physical force, threats of death or physical bodily harm, or mental coercion, such as intimidation such as would be sufficient to instill in the victim a reasonable apprehension of bodily harm, violence, or other dangerous consequences to oneself or others. Here, while the victim testified that appellant's contacts made him feel "very awkward," there was no evidence that the victim believed appellant posed any danger to him or others. Rather, the evidence showed that appellant repeatedly told the victim that he would not have to do anything he did not want to do. Moreover, the victim actually declined appellant's overture, after which the parties had no further contact until the victim contacted appellant while in the presence of law enforcement. And the mere fact that appellant occupied a position of authority with respect to the victim was not sufficient to show "force" in this context. Accordingly, the State failed to prove that the proposed sodomy would have been accomplished by "force" as that term is defined in the realm of sexual offenses. Finally, because sixteen is the age at which persons are deemed legally capable of consenting to sexual intercourse, both parties here were legally capable of consenting to sexual contact. Therefore, though the evidence was sufficient to prove the first and second elements of solicitation of sodomy, it was insufficient to prove the third element. Consequently, appellant's conviction for solicitation of sodomy was reversed.

Appellant was also convicted of violating his oath of office. The Court noted that the charge was based solely on appellant soliciting sodomy from the victim. Since the Court held that the facts did not show that appellant committed the offense of solicitation of sodomy, the basis for appellant's conviction on violation of oath of office was now "non-existent." Therefore, the Court held, it was "constrained" to reverse appellant's conviction for this offense as well.

### **Identification; Photographic Line-ups**

*Johnson v. State*, S13A1298 (10/21/13)

Appellant was convicted of malice murder and related crimes. The evidence showed that appellant entered a book store,

waited until the victim-owner was alone, then stabbed her and took the rings off her finger and the cash from the cash register. Appellant had been into the store many times before, and shortly before the victim was killed, she called her husband and told him that the "creepy guy" was back and she wished he'd leave. The husband, who had worked in the store at times, knew who she was referring to as he had seen him there himself on occasion.

Several days after the crimes, police gathered together for the purpose of creating a sketch of the suspect several individuals, including the husband, who stated they previously had seen the individual believed to have been alone with the victim just prior to her death. The group assisted the sketch artist, but due in part to their varying descriptions, no usable sketch was completed. Police then created a photographic lineup comprised of two six-person photographic arrays for the group to view, including a photograph of appellant. No individual at that time identified appellant as the suspect, but three days later, the husband was shown the arrays again, at his request, and he identified appellant. The husband then requested to see just a photograph of appellant and confirmed his identification. Appellant argued that the collaboration of the group attempting to create an accurate sketch and to later identify a suspect from the photographic arrays impermissibly affected the husband's recollection when he returned to review the arrays a second time. In addition, he argued there was a substantial likelihood of irreparable misidentification once the husband was shown the single photograph of appellant. The Court disagreed.

An unduly suggestive procedure is one which leads the witness to the virtually inevitable identification of the defendant as the perpetrator, and is equivalent to the authorities telling the witness, "This is our suspect." Where the identification procedure is not unduly suggestive, it is not necessary to consider whether there was a substantial likelihood of irreparable misidentification. The Court found that the record established that the first time the arrays were shown, witnesses quietly reviewed the photographs without making any comment. In fact, there was no evidence of any discussion amongst the witnesses or between witnesses and police concerning the lineup, the crimes, or the

individual police were trying to identify. They were not told a suspect was in the lineup, in part because no suspect had yet been identified. Moreover, the lineup shown on both occasions was identical and there was no suggestion by appellant or in the record that any photograph was emphasized over another at either viewing. Accordingly, the Court found nothing about the identification procedures used in this case that required suppression of evidence related to the husband's identification of appellant. Moreover, the weight to be given the husband's delayed identification of appellant was for the jury to decide.

### **Prosecutorial Misconduct; Influencing Witnesses**

*McKibbons v. State, S13A1051 (10/21/13)*

Appellant was convicted of murder, kidnapping with bodily injury, and concealing the death of another. He contended that the prosecutor made three statements in the presence of the jury that were improper and prejudicial, and in light of those statements, the trial court should have declared a mistrial. First, in her opening statement, the prosecutor remarked that “this is by far the worst case I’ve ever seen.” The Court stated that generally speaking, a lawyer—and a prosecuting attorney especially—should not offer comparisons in the presence of the jury between the case at hand and other cases with which the lawyer is personally familiar. Nevertheless, the Court stated, no one reasonably could dispute that this case involved especially gruesome crimes, and it appeared that the prosecutor was only attempting to prepare the jury for the evidence that would be forthcoming in the trial. Moreover, the issue disputed at trial did not concern the nature of the crimes—whether they were gruesome or not—but instead concerned whether appellant was culpable in those crimes. Citing *Conklin v. State*, 254 Ga. 558 (1985), the Court held that this remark did not require a mistrial, explaining that it was not so much an invocation of prosecutorial expertise as it was an apology for having to bring gruesome items of evidence to the jury’s attention. Moreover, in light of the undeniably gruesome nature of the evidence adduced at trial, it was unlikely that prosecutorial experience or expertise played a discernable role in the jury’s evaluation of the vileness and brutality of the crime. Thus,

the Court concluded, the first remark did not require a mistrial.

Second, also in her opening statement, the prosecutor said that “[y]ou could be next.” Appellant argued that this statement amounted to an improper “Golden Rule” argument. The Court stated that a “Golden Rule” argument is one that importunes the jury to place itself in the position of the victim for any purpose and must be carefully scrutinized. But, the Court noted, it is important to consider the context in which the statement was made, and in light of that context, a different understanding of the statement appeared here. The most reasonable understanding of the statement was that the prosecutor was commenting on the motives of appellant, suggesting that appellant—who involved many of his associates in the events that led up to the victim’s death, sometimes by asking them to undertake rather mundane tasks—was trying to send a message to his own associates that, if they stole from him, “[they] could be next.” The Court stated that the reference to “[y]ou” referred most naturally to appellant’s associates, not to the jury. And so, the statement was not a “Golden Rule” argument. Accordingly, the trial court did not abuse its discretion when it denied a mistrial as to this statement.

Third, in closing argument, the prosecutor said, “I detest [Rico] Green as much as I detest [appellant].” The evidence showed that Rico Green had assisted appellant in killing the victim, but testified for the State. The Court noted that the trial court not only sustained the objection, but it admonished the prosecutor in the presence of the jury and told the jury to disregard the statement. In other words, the trial court acted immediately, ruled out the offensive statement, and properly instructed the jury to disregard the statement. Moreover, the Court added, to the extent that appellant was, in fact, culpable in the abduction, killing, and dismemberment of the victim, no one could reasonably dispute that his actions were “detest[able].” Although the prosecutor should not have shared with the jury that she “detest[ed]” appellant, it was not likely to surprise anyone. This was not like a case in which a prosecutor explicitly asked a jury to rely upon improper considerations in reaching their verdict, nor was it like a case in which a prosecutor injected unproven and prejudicial facts in his argument. In light of

the considerable discretion afforded the trial court to deal with improper argument, and especially because the trial court promptly admonished the prosecutor and told the jury to disregard the statement, the Court concluded that the trial court had not abused its discretion when it denied a mistrial.

Finally, appellant argued that the trial court erred when it allowed two letters—which he allegedly wrote in an attempt to influence witnesses—to go out with the jury during its deliberations. As a general rule, the Court stated, testimonial documentary evidence—such as affidavits, depositions, written confessions, statements, and dying declarations—should not be permitted in the jury room. But when there is original documentary evidence of the defendant’s attempt to influence witnesses, such evidence may go out with the jury. The letters in this case were original documentary evidence of an attempt to influence witnesses, and thus, the trial court did not err in permitting the jury to have the letters during its deliberations.

### **Sleeping Jurors; Hearsay**

*Mathis v. State, S13A1034 (10/24/13)*

Appellant was convicted of felony murder (two counts), armed robbery (three counts), aggravated assault (eight counts), and possession of a weapon during a crime. The evidence showed that appellant and two co-defendants, Armstrong and Kilgore, went into a video store where they shot and killed the store owner and robbed the customers before fleeing. Shortly thereafter, Armstrong met with his then-girlfriend, gave her close to \$1,300, which he asked her to hold for him, and told her that he, Kilgore and appellant had robbed the video store and that Kilgore had shot and killed the owner.

Appellant argued the trial court erred in failing to question or excuse an allegedly sleeping juror. The record showed that during presentation of the State’s case, appellant’s counsel expressed concern to the court that one of the jurors appeared to be sleeping. In response, the court instituted a “buddy system” between jurors to have them help each other stay awake. Later in the trial, counsel revisited the issue, asking that the juror in question be replaced with an alternate. The State objected, arguing there was no proof that the juror had been sleeping and the trial court

denied appellant's motion. However, prior to jury deliberations at the end of trial, the court gave appellant's counsel the opportunity to renew her motion to replace the juror and she declined. The Court found that as counsel made no contemporaneous request for the trial court to conduct an inquiry and later declined to move to excuse the juror, this issue was waived.

But, even assuming this issue was properly before the Court, there was no error. Pursuant to O.C.G.A. § 15-12-172, a trial court is statutorily vested with the discretion to replace a juror with an alternate at any time during the proceedings as long as the court has a sound legal basis to do so. An appellate court will not interfere with a trial court's decision regarding removal of a juror from a panel absent an abuse of discretion. When confronted with a situation involving a juror who appears to have fallen asleep during trial, counsel has a duty to bring the matter to the attention of the trial court and the trial court has a duty to awaken the juror. Here, the trial court took prompt action when the allegedly sleeping juror was brought to its attention by reminding all of the jurors to stay awake and instructing them to help each other stay awake.

Nevertheless, appellant argued that in addition to the actions taken, the trial court was required to conduct an inquiry to determine whether the juror had, in fact, been sleeping or was incapacitated. The Court disagreed. Given that the only juror irregularity alleged in this case consisted of a relatively brief, single act of dozing, the Court found no abuse of discretion on the part of the trial court in concluding that its immediate remedial actions were sufficient. As there appeared to have been no sound legal basis to replace the juror, the trial court did not abuse its discretion in denying appellant's request that it do so.

Appellant also contended that the trial court erred in allowing the girlfriend to testify about Armstrong's statements to her pursuant to the co-conspirator exception to the hearsay rule which provides that "[a]fter the fact of conspiracy is proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." O.C.G.A. § 24-3-5. The Court stated that in order for this exception to apply, the State must show the existence of a conspiracy

without regard to the declarations of the co-conspirator. Existence of a conspiracy may be shown by direct or circumstantial evidence. Further, conduct which discloses a common design, even without proof of an express agreement between the parties, may establish a conspiracy.

Here, the Court found, evidence was presented that appellant and his co-defendants knew each other prior to the crime, they went to the video store together, Kilgore shot the owner who put a gun to Armstrong's head, and they worked together to rob the other victims before fleeing the store together. These facts showed a common design and purpose to commit the robbery and establish the existence of a conspiracy. Armstrong's concealment of the robbery proceeds in his girlfriend's car at the time he made his statements established that the criminal enterprise was not at an end. Because there was evidence independent of the challenged statements to establish the conspiracy and the conspiracy was still in the concealment stage when the statements were made, the State met its burden under O.C.G.A. § 24-3-5 and the trial court did not err in concluding that Armstrong's statements were admissible as those of a co-conspirator.

### **Cross-Examination; Right of Confrontation**

*Baker v. State, S13A0738 (10/21/13)*

Appellant was convicted of malice murder and numerous other felonies in relation to two home invasions. He contended that his right to cross-examine a witness was frustrated because his trial counsel was interrupted repeatedly by the prosecution and the trial court. The Court stated that a criminal defendant has the right under the Sixth Amendment to cross-examine witnesses who testify against him. And at the time of appellant's trial, Georgia statutory law provided that "[t]he right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against him." Former O.C.G.A. § 24-9-64. However, the extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court, so long as the court does not cut off all inquiry on a subject on which the defense is entitled to reasonable cross-examination.

Here, the Court found, the record showed that the trial court allowed appellant

considerable leeway to question the witness on cross-examination, and appellant also called the witness in the defense case, where he was asked a substantial number of additional questions. Nevertheless, there was one point during cross-examination when appellant's counsel asked the witness about a statement that he had made and the prosecutor interrupted to ask which statement counsel was referring to; the trial court then asked appellant's counsel to clarify if the question related to the witness's statement to the police or his testimony on direct examination. When counsel complained about the interruptions, the court told him that he could question the witness "all day" if he wished. In a further colloquy outside the presence of the jury, the court explained that counsel needed to pose clear questions so as not to confuse the witness and the jury but added, "You can ask [the witness] all night long, but be clear with your question." The Court therefore concluded that it was apparent from the record that the trial court did not abuse its discretion to regulate cross-examination, and appellant's right of confrontation was not violated, because a trial court does not abuse its discretion in preventing questions that could confuse or mislead the jury.

### **Jury Instructions; Kidnapping with Bodily Injury**

*Ward v. State, A13A1183 (10/10/13)*

Appellant was convicted of kidnapping with bodily injury pursuant to O.C.G.A. § 16-5-40. He contended that the trial court erred in charging the jury on kidnapping with bodily injury. Specifically, appellant argued that the indictment alleged the offense of rape with regard to the bodily injury element, whereas the trial court charged the jury that they could convict him if they found any injury.

The Court stated that kidnapping with bodily injury is a separate and distinct offense that can be committed in multiple ways, depending on the type of bodily injury alleged in the indictment. The indictment in this case charged appellant with the offense of kidnapping with bodily injury by unlawfully abducting and stealing away the victim without lawful authority and holding her against her will. The indictment further charged that the victim "received bodily

injury, to wit: rape, in violation of O.C.G.A. § 16-5-40.” In charging the jury, the trial court stated: “when during a kidnapping, the person abducted receives any bodily injury, however slight, then that constitutes the offense of Kidnapping with Bodily Injury.” The Court noted that since appellant failed to object to the jury charge as given, review of this issue was limited to that of whether there was plain error. Under this standard, the Court must determine whether there was an error that had not been affirmatively waived, was clear and obvious, affected the defendant’s substantial rights, and seriously affected the fairness, integrity or public reputation of the judicial proceedings.

The Court stated that where the indictment charges a defendant committed an offense by one method, it is reversible error for the court to instruct the jury that the offense could be committed by another method with no limiting instruction. The defect is cured, however, where the court provides the jury with the indictment and instructs jurors that the burden of proof rests upon the State to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt. Here, the trial court read the indictment to the jury verbatim at the beginning of trial, and the trial court sent the indictment out with the jury after instructing them that the State had the burden of proving “every material allegation of the indictment and every essential element of the crimes charged beyond a reasonable doubt.” The trial court also charged the jury that they would be authorized to find appellant guilty of kidnapping with bodily injury only if they found that he committed that offense “as it is alleged in the indictment[.]” The Court found that the evidence supported a finding that the victim was forcibly raped. The State proved the asportation element of the kidnapping charge, and the trial court cured the defect in the jury charge with respect to bodily harm. Moreover, the evidence was clearly consistent with the jury’s verdict. Accordingly, the Court affirmed appellant’s conviction.

## ***Motions for Directed Verdict; Statements***

*Clowers v. State, A13A1625 (10/16/13)*

Appellant was convicted of selling marijuana, possessing marijuana with the

intent to distribute, and obstructing law enforcement officers. Appellant contended that the trial court erred in denying his motion for a directed verdict because the trial judge erroneously injected his personal observations and opinion and relied thereon in considering the motion. The record showed that at the close of the State’s case, defense counsel made a motion for a directed verdict. After hearing argument, the trial court denied the motion outside the presence of the jury, explaining its ruling as follows: “I find that [appellant’s] suspicious backing in, coupled with his running, coupled with his passenger jumping out, and execution of a drug transaction, coupled with dope left in the car, coupled with something that has not really been mentioned, and that is the odor of this marijuana. This marijuana—of course, there was a small nick in one of the bags yesterday, but even after sealing—and personally, I have helped reseal one of the bags of marijuana—but the odor was still so strong coming through sealed, vacuum[-]sealed bags, one can only imagine what the odor was of the marijuana in a car in July. So I think there is evidence to where a jury could conclude that he certainly was well aware of the great quantities of marijuana, and the fact that his passenger was participating in a drug deal[,] and he was helping therein. I think there’s sufficient evidence to go to the jury on all issues.”

Appellant argued that the trial court’s comments violated O.C.G.A. § 17-8-57, which prohibits a judge from “express[ing] or intimat[ing] his opinion as to what has or has not been proved or as to the guilt of the accused.” However, the Court found, because the purpose of O.C.G.A. § 17-8-57 is to prevent the jury from being influenced, and the jury was not present at the time of these remarks, the statute was not violated. Moreover, after the jury has returned a verdict of guilty, and the defendant seeks a reversal of his conviction on appeal by arguing either that the trial court erred in failing to direct a verdict of acquittal or denying a motion for new trial on the general grounds, the only question presenting itself to the appellate court is whether there is any evidence to support the verdict. It is the function of the jury, not the appellate court, to determine the credibility of witnesses and weigh any conflicts in the evidence. Here, the Court found, the evidence was sufficient to support the jury’s verdict.

Thus, the trial court did not err by denying appellant’s motion for a directed verdict.

Appellant also argued that the trial court erred by failing to admit his statement to police that he was not acting in concert with his co-defendant and that he had no knowledge of his co-defendant’s criminal activity, which was appellant’s sole defense. The record showed that during cross-examination of one of the officers, defense counsel elicited testimony that appellant made a statement to the officer. When defense counsel asked the officer about the substance of the statement, the State objected, and a bench conference ensued. The bench conference was not recorded by the court reporter, nor was the trial court’s ruling thereon. Thus, the Court found, appellant failed to show any clear ruling by the trial court and as the appellant, he had the burden to affirmatively show error in the record.

But, the Court added, self-serving declarations, such as appellant’s purported statement, are inadmissible hearsay unless the declarant testifies and is subject to cross-examination. The defendant is allowed to declare his innocence in court; he is not allowed to avoid this opportunity by pre-trial declarations of innocence. That the defendant faces a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.