

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 2, 2012

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THIS WEEK:

- **Circumstantial Evidence**
- **Right of Confrontation; Child Hearsay Statute**
- **Habeas Corpus; Kidnapping with Bodily Injury**
- **Sentencing; First Offender**
- **Sentencing; Merger**
- **Jury Charges; Justification**

Circumstantial Evidence

Bailey v. State, A12A1458 (10/25/12)

Appellant and his brother were jointly indicted on 26 felony counts, including aggravated assault, burglary, entering a car with the intent to commit theft, firearms possession by a convicted felon, and other theft charges related to a burglary and a string of automobile break-ins and thefts. Appellant's brother pled guilty to the charges against him and testified as a defense witness that he committed all of the crimes by himself except one, which he committed with someone other than appellant. Appellant was convicted of all charges except the aggravated assault, and the trial court sentenced him to an aggregate of 20 years, 12 to be served in custody. Appellant argued that the State's circumstantial evidence was insufficient to authorize a rational trier of fact to find him guilty of the crimes for which he was convicted because it did not eliminate the reasonable possibility that appellant's brother committed the offenses alone or with another man. The Court affirmed.

In reviewing the evidence the Court noted that the State called 46 witnesses and introduced hundreds of exhibits, many of them photographs of stolen items later found in residences connected to appellant and the issue before them was whether the State presented sufficient evidence for the jury to conclude that appellant, with or without his brother, committed the offenses. Appellant argued that the existence of the evidence against him could be explained in a manner consistent with him being not guilty. Specifically, appellant asserted that his brother had access to the houses where stolen property was recovered. He also stated that a Cheez-It box, which had his fingerprint on it, could have been taken by his brother from their residence and dropped at the crime scene. Furthermore, appellant asserted that although his fingerprints were found on the outside of the stolen vehicle, this did not prove he stole it or was ever inside the car.

In addressing appellant's assertions, the Court noted that appellant's fingerprints were also recovered on a cracker box near the scene of the car theft, and on a stolen item found at his residence. Furthermore, the Court noted that there was a recorded telephone call between appellant and his brother in jail which was incriminating. Moreover, the Court noted that the State impeached his brother's testimony that appellant had nothing to do with the crimes by introducing evidence of appellant's three prior felony convictions. Furthermore, the Court stated that circumstantial evidence need not exclude every conceivable hypothesis of a defendant's innocence, only reasonable ones, and whether appellant's alternative hypothesis was reasonable was a question for the jury to decide. Thus, the Court held that the evidence was sufficient to authorize a rational jury to find that the State had excluded every

reasonable hypothesis other than appellant's guilt and to find him guilty beyond a reasonable doubt of the crimes for which he was convicted.

Right of Confrontation; Child Hearsay Statute

Welch v. State, A12A1080 (10/25/12)

Appellant challenged the denial of his motion for new trial following his conviction of two counts of child molestation, arguing that the trial court erred by failing to call the non-testifying child victim as a witness and that trial counsel was ineffective for failing to call the victim. The Court affirmed.

The evidence showed that R.F.'s mother noticed that her 12-year-old daughter, R. F., was "walking funny," and R. F. told her that "she was hurting in her private area." The mother examined R. F. and observed that the child's genital area was swollen, had "a bump," and was "split open." When the mother asked R. F. "who messed with [her]," R. F. and her 11-year-old sister simultaneously responded that appellant, their step-father, had done so. The mother took R. F. to the hospital, where she was examined and given medication to treat herpes. An investigator responded to the hospital and spoke with R. F., who told him that appellant had forced her to have sexual intercourse multiple times in the preceding four to five months. The investigator arranged for a forensic interview, which was recorded. Later, appellant gave a recorded statement to police in which he admitted having sexual intercourse with R. F. on more than one occasion.

Prior to trial, appellant made a motion to exclude any child hearsay, arguing that R. F.'s accounts to several witnesses lacked indicia of reliability, that she recanted her statements, and that introduction of the hearsay evidence violated his rights under the confrontation clauses of the U. S. and Georgia Constitutions. The trial court denied the motion. In reviewing the trial court's denial of appellant's motion, the Court found no reversible error. In reaching its decision, the Court relied on the Supreme Court of Georgia's recent ruling in *Hatley v. State* that held "if the defendant objects, and the State wishes to introduce hearsay statements under O.C.G.A. § 24-3-16, the State must present the child witness at trial; if the defendant does not object, the State can

introduce the child victim's hearsay statements subject to the trial court's determination that the circumstances of the statements provide sufficient indicia of reliability." However, the court in *Hatley* also specifically noted "that when hearsay evidence is erroneously admitted in violation of the Confrontation Clause, the error can be deemed harmless beyond a reasonable doubt where the hearsay is cumulative of other admissible evidence." Thus, in the present case, while the Court noted that appellant did raise a Confrontation Clause objection to the State's introduction of the child hearsay evidence, the Court found that even if the trial court erred by admitting child hearsay, such error was harmless beyond a reasonable doubt. Specifically, the Court pointed to the evidence against appellant - the testimony of the emergency room physician, appellant's written statement and recorded confession, and appellant's admissions to R.F.'s mother, another witness, and the police investigator. The Court found that this evidence was overwhelming and cumulative of the hearsay evidence. Thus, the Court found that there was no reversible error.

Habeas Corpus; Kidnapping with Bodily Injury

Chatman v. Brown, S12A0674, S12X0675 (10/29/12)

Appellant was convicted of kidnapping with bodily injury, aggravated assault upon a person 65 years or older, robbery by force, and burglary in connection with the beating and robbing of Margaret Logan. Appellant's convictions were upheld on appeal. Appellant then sought habeas relief based on the Court's then-controlling decision in *Garza v. State*, 284 Ga. 696 (2008), which established new factors for assessing the asportation element as required for kidnapping. Appellant also sought habeas relief based on *Brodes v. State*, 279 Ga. 435 (2005), alleging error in the jury instructions for the reliability of Logan's identification. Analyzing the *Garza* factors, the habeas court granted relief and set aside the conviction and sentence for kidnapping. The habeas court denied relief on *Brodes* grounds, finding that *Brodes* announced a new procedural rule that did not apply retroactively. In Case No. S12A0674, the warden appealed from the habeas court's ruling on the *Garza* issue, and in

Case No. S12X0675, appellant appealed from the habeas court's ruling on the *Brodes* issue. The Court reversed in Case No. S12A0674, and affirmed in Case No. S12X0675.

S12A0674

The evidence showed that appellant pushed his way into the home of the 83-year-old victim, hit her on the back of her head with a table lamp, twisted her arm behind her back to force her to the floor, dragged her into another room, tied her wrists and ankles together, and kicked her in the back. Appellant and an accomplice then rummaged through the house and left with several guns and the victim's pocketbook. The Court found that these facts established the asportation requirement of *Garza*. The Court noted that under *Garza*, the question whether asportation was more than "merely incidental" to another crime is decided based on the consideration of four factors: (1) the duration of the movement; (2) whether the movement occurred during the commission of a separate offense; (3) whether such movement was an inherent part of that separate offense; and (4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense. However, the Court noted that while all of these factors must be considered, not all of the factors must necessarily be satisfied in order for the evidence to support a proper finding of asportation. Indeed, the Court stated that with respect to the second factor, the moving of the victim was separate from the offenses of burglary and aggravated assault, as those offenses had already been completed before appellant ever moved the victim to a separate room. Similarly, the Court stated, the violent and forceful movement of the victim and tying her up in a separate room was not an inherent or necessary part of the burglary or the actual robbery of the victim's home. Furthermore, the Court found that the movement itself presented a significant danger to the victim because she was left isolated and tied up with no ability to defend herself, call for help, or escape the attacker who was in her home. Thus, the Court held that the evidence was sufficient to support a finding of asportation under *Garza*.

Appellant contended that just as the Court's decision in *Garza* constituted a substantive change in the law that can be applied retroactively to his case, the Court's decision in *Brodes v. State*, also constituted a substantive change in the law that can be applied retroactively. The Court disagreed. The Court noted that in *Brodes*, it disapproved the use of jury instructions that authorized the jury to consider an eyewitness' "level of certainty" when deciding the reliability of the witness' identification of someone as the perpetrator of a crime. However, the Court noted that the disapproval of such a jury instruction constituted a procedural, rather than substantive, change in the criminal law, and the new rule did not "alter the range of conduct or the class of persons that the law punishes." In this regard, the Court found that the habeas court correctly concluded, because of its decision in *Brodes* "involve[d] an issue of state procedural law that does not rise to the level of constitutional significance, it cannot be the basis for a collateral attack [through habeas corpus]." Thus, the Court affirmed.

Sentencing; First Offender

Higdon v. State, S12G0033 (10/29/12)

Appellant was charged with eight criminal offenses in three accusations filed in the Catoosa County Superior Court and one indictment returned in the Walker County Superior Court, each of which was assigned its own case number. The first Catoosa County accusation charged appellant with three counts of deposit account fraud for delivering a bad check for \$850, in exchange for currency, and two bad checks in exchange for jewelry. The second Catoosa County accusation, filed on the same day as the first, charged appellant with three more counts of deposit account fraud for delivering a bad check in exchange for a mattress and foundation; a bad check in exchange for a microwave oven and an iron; and a bad check in exchange for reserving a public swimming pool. The Walker County indictment charged appellant with the felony burglary of a dwelling house. The third Catoosa County accusation, filed later, charged appellant with one count of misdemeanor theft by taking, alleging that he stole a utility trailer.

Appellant entered guilty pleas to all four charging instruments during a hearing in the Catoosa County Superior Court, and asked the trial court to sentence him as a first offender as to all eight crimes in the four charging instruments. The trial court ruled that it had no authority to treat appellant as a first offender on all eight crimes, because he was pleading to different offenses separated by time and place and charged in separate indictments and accusations. Although the court offered appellant first offender status on the crime or crimes alleged in any one of the charging instruments, he declined the offer as providing him no benefit. The trial court then entered four separate sentences and judgments, three in Catoosa County Superior Court and one a week later in Walker County Superior Court. Appellant filed four separate appeals in the four cases, which the Court of Appeals resolved in a single opinion, affirming the trial court's ruling on the first offender issue.

The Court of Appeals held that the term "one occasion" as used in the sentence, "No person may avail himself . . . of this [first offender] article on more than one occasion," O.C.G.A. § 42-8-60(b), means that first offender treatment is allowed for one or more offenses set forth in one charging instrument for one trial, or for one or more offenses set forth in multiple charging instruments consolidated or joined for one trial. The Court of Appeals concluded that "one occasion" of first offender treatment means in a single prosecution of related offenses. However, appellant contended that "one occasion" refers to "one hearing" at which any number of criminal charges brought in any number of indictments and accusations are resolved.

The Supreme Court of Georgia agreed with the Court of Appeals and held that once a "a verdict or plea of guilty or a plea of nolo contendere" has been entered on a charging instrument, and the trial court grants a defendant first offender status for the offense or offenses alleged in that instrument, the defendant has availed himself of the first offender article on "one occasion" and may not benefit from it as to a sentence entered on another indictment or accusation. The fact that the court's sentencing decisions on multiple charging instruments may be orally announced during the same hearing, or may be formally entered close in time, does not change the fact that, when the

first judgment is entered, the defendant has benefitted from first offender treatment on a verdict or plea and may not do so again.

Sentencing; Merger

Johnson v. State, S12A1149 (10/29/12)

Appellant was jointly indicted with two co-defendants for malice murder, felony murder, and possession of a firearm during the commission of a crime. He was tried first and convicted of all counts. Appellant contended that the trial court erred in admitting evidence of a similar transaction, in charging the jury that it was permitted but not required to infer that a person in possession of a vehicle possessed the contents of that vehicle, and in ruling against his claim that the State was collaterally estopped from admitting evidence that, on March 5, 2000, he possessed the gun used to kill the victim on March 4. The Court rejected those claims and affirmed all of the judgment except for appellant's life sentence for felony murder, which it held must be vacated.

The Court found that when viewed in the light most favorable to the verdict, the evidence presented at trial was sufficient for a rational jury to find appellant guilty beyond a reasonable doubt of malice murder, felony murder, and possession of a firearm during the commission of a crime. However, the Court found that appellant's felony murder conviction was vacated by operation of law. The Court cited *Malcolm v. State*, 263 Ga. 369 (1993) which states, "When valid guilty verdicts are returned on both alternative counts of malice and felony murder, the alternative felony murder count is vacated by operation of O.C.G.A. § 16-1-7." Accordingly, the Court vacated the life sentence imposed on appellant for the felony murder count.

Jury Charges; Justification

Woods v. State, S12A1143 (10/29/12)

Appellant challenged his convictions for malice murder, aggravated assault, possession of a firearm during the commission of a felony, and concealing the death of another, all in connection with the death of Travis Sauls. The Court reversed.

The Court noted that the evidence authorized the jury to find appellant guilty beyond a reasonable doubt of the crimes for which he

was convicted. However, appellant presented evidence that he suffered from a mental disease that could have produced a seizure causing a temporary delusion that Sauls posed a threat to appellant's life, even though Sauls may not, in fact, have posed any immediate threat. Appellant filed a written request that the jury be instructed on the law regarding a verdict of not guilty by reason of insanity in that he was suffering from a delusional compulsion. During the charge conference, the trial court agreed to give that instruction, as well as certain other written instructions appellant requested. The next day, immediately before argument, appellant verbally requested that the jury be instructed on the law regarding the defense of justification in defense of self, using pattern charges; appellant had not submitted a written request for such an instruction. The State objected that no written request for such an instruction had been submitted, the charge conference had been completed the day before, argument was about to commence, and that inclusion of justification instructions would require a number of other instructions to be added. The trial court stated that the instructions would remain as had been decided during the charge conference. The court did not instruct the jury on any principle of justification in defense of self, and appellant objected to the failure to so charge the jury after the court's instructions.

It is only in those instances where an individual, who is able to distinguish right from wrong, commits a criminal act while suffering under a delusional compulsion which leads him to believe his action is right, i.e., "justified," that Georgia law accepts insanity as a defense. Hence, "if the delusion is as to a fact which would not excuse the act with which the prisoner is charged, the delusion does not authorize an acquittal of the defendant." The delusional compulsion defense is available only when the defendant is "suffering under delusions of an absurd and unfounded nature [and] was compelled by that delusion to act in a manner that would have been lawful and right if the facts had been as the defendant imagined them to be." In other words, the Court found, the legal concept of justification is a necessary component of the delusional compulsion defense. Accordingly, the jury could not determine whether appellant was suffering from a delusion that satisfied the legal definition without an understanding

of what constituted an act that would have been justified, if the circumstances were as appellant contended he believed them to be, without being instructed as to what conduct would constitute justification. Absent such an instruction, the jury was not provided "with the proper guidelines for determining guilt or innocence." Accordingly, the Court found that appellant must be afforded a new trial.

The Court also rejected the State's argument that appellant's failure to submit a written request for the instruction precluded him from asserting error on the failure to give the instruction. A criminal defendant is ordinarily required to present written requests for any desired jury instructions, O.C.G.A. § 5-5-24(b), and the trial court is not required to charge without written request as to any collateral matter. However, a criminal defendant is relieved of this duty where the omission is clearly harmful and erroneous as a matter of law in that it fails to provide the jury with the proper guidelines for determining guilt or innocence.