

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING NOVEMBER 9, 2012

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## THIS WEEK:

- **Child Molestation; O.C.G.A. § 16-6-3**
- **Merger; Waiver**
- **Similar Transaction; Prosecutorial Misconduct**
- **Venue; Jury Charges**
- **Juries; Merger**

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### **Child Molestation; O.C.G.A. § 16-6-3**

*Brown v. State, A12A1540 (11/05/12)*

Appellant was convicted of child molestation, statutory rape, and enticing a child for indecent purposes. The record showed that appellant hosted a cookout and met the victim, and soon afterward invited the 14-year old victim and her cousin to a motel. The girls agreed, and after the victim's aunt fell asleep, Appellant took them and the cousin's boyfriend to a hotel that night and had sex with the victim. The victim's cousin heard appellant and the victim having sex from the bathroom of the motel room, and the boyfriend of the cousin saw appellant naked upon entering the motel room from the bathroom. Another cousin told the victim's mother and aunt about the night at the motel, whereupon the victim reported appellant's attacks. Appellant was charged and convicted of molestation, statutory rape and enticing a child for indecent purposes in connection with the incidents at the motel, and sentenced to 30 years. Appellant argued that the evidence was insufficient to the statutory rape count and that the trial court erred in excluding evidence that could have impeached

the victim's aunt. Specifically, appellant contended that O.C.G.A. § 16-6-3 required more than a victim's unsupported testimony to prove the offense of statutory rape.

The Court disagreed. While O.C.G.A. § 16-6-3 does specify that "no conviction shall be had on the unsupported testimony of the victim," the Court stated that the quantum of corroboration needed is not that which is in itself sufficient to convict the accused, but only that amount of independent evidence which tends to prove that the incident occurred as alleged. Slight circumstances may be sufficient corroboration and ultimately the question of corroboration is one for the jury. The Court found that there was sufficient corroboration. First from the statements the victim gave to police that were consistent with her testimony at trial, and second that the cousin and boyfriend's recollections and testimony provided circumstantial evidence as to appellant's access to and contact with the victim. Thus, the Court held, this evidence provided "slight circumstances" sufficient to corroborate the victim's account.

### **Merger; Waiver**

*Osborne v. State, A12A1154 (11/05/12)*

Appellant entered a guilty plea to misdemeanor charges of statutory rape, fornication and battery. Prior to sentencing, he requested that the trial court merge the statutory rape and fornication offenses for the purpose of sentencing. Appellant acknowledged that he understood the State recommended "three years, with the first one year on house arrest as a cap; or that the defendant serve three years, with the first 180 days in jail as a cap." Appellant made an oral motion to merge the fornication and statutory rape charges. The

trial court refused to merge the offenses, and appellant proceeded to plead guilty to all three offenses. Appellant contended that sentence was improper because the trial court failed to merge the fornication and statutory rape charges.

The Court found that appellant was incorrect in his contention. Upon the decision of the trial court not to merge the charges, appellant was free to withdraw his guilty plea for all charges. The Court found that by knowingly and willingly pleading guilty to each of the crimes that he was charged with, appellant waived the issue of whether the offenses of fornication and statutory rape merged as a matter of law or fact.

### **Similar Transaction; Prosecutorial Misconduct**

*Howard v. State, A12A1465 (11/02/12)*

Appellant contended that proof of his 2003 and 2006 domestic violence convictions was not sufficient to support their admission into evidence as similar transactions because the victims themselves did not testify at trial. The record showed that at trial, the State introduced certified copies of the appellant's convictions from both the 2003 and 2006 offenses and testimony of the officer and detective, respectively, to prove these prior crimes. Appellant objected, characterizing the evidence as "inadmissible hearsay." The Court disagreed. "Although a certified copy of a prior conviction generally is not sufficient, by itself, to prove the similarity of another crime, it is relevant evidence of that crime when taken together with testimony or other evidence regarding that crime." *Rose v. State, 275 Ga. 214, 216 (2002)*. The Court found that the certified copy of the conviction and the testimony was sufficient to establish proof of a similar transaction.

Appellant contended that the trial court erred by failing to intervene as required by O.C.G.A. § 17-8-75 when the State sought to impeach him based upon attorney-client communications. The record showed that appellant was on cross-examination when the court took a short recess. Upon return, the prosecutor questioned appellant concerning the conversation that appellant had with his attorney during the recess. The line of questioning suggested that appellant and his attorney were "getting his story straight." After objection, the trial court judge "reminded the

jury that nothing the lawyers have to say is evidence in this case." The Court found that the trial judge had obligation to rebuke counsel, give curative instructions or grant a mistrial after a proper objection was made under the plain terms of O.C.G.A. § 17-8-75. The Court further found that reversal was not required because "it is highly probable that any error did not contribute to the verdict."

### **Venue; Jury Charges**

*Liger v. State, A12A1107 (11/06/12)*

Appellant was convicted of child molestation, rape and incest. He argued that the State failed to prove venue as to the child molestation count charging him with placing his penis on the victim's anus. Specifically, that the evidence that appellant showed only that this crime was committed in the Virgin Islands and not Paulding County. The evidence, however, showed that appellant began to molest the victim while the two lived in the Virgin Islands, but continued after they moved to Georgia and after the victim began living with her aunt in Paulding County. Where crimes have been committed continuously, evidence that the defendant committed the crimes in one county even though he may have also committed them elsewhere is sufficient to establish venue.

Appellant also argued that the trial court's instructions to the jury led the jury to believe that they could convict him of rape in a manner not charged in the indictment. The record showed that the trial court gave appellant's requested charge on rape. During deliberations, the jury asked for a definition of penetration. In response, the trial court gave the jury a recharge on the definition of rape, and also charged that "the element of penetration requires proof of a slight penetration of the anterior of the female sexual organ known as the vulva or labia by the sexual organ of the male. It is not essential in a rape case for there to be proof that the vagina was entered or that the hymen was ruptured, but there must be some penetration of the female sex organ." Appellant contended that the instruction violated his due process rights. Specifically, that the charge allowed the jury to believe that it could convict him for penetration of any part of the victim's sexual organ, rather than penetration of her vagina as alleged in the indictment.

A due process violation can occur

when an indictment charges the defendant with committing a crime in a specific manner and the trial court's jury instruction defines the crime as an act which may be committed in a manner other than the manner alleged in the indictment. Here, however, in objecting to the trial court's penetration charge, appellant specifically requested that the trial court respond to the jury's question by repeating his requested rape charge, which stated the offense included "any penetration of the female sex organ by the male sex organ." Therefore, the Court found, given that he received his requested rape charge, he failed to demonstrate how the trial court's penetration charge, which merely described the female sexual organ, violated his due process rights. Moreover, the trial court's instruction defining penetration was an accurate statement of the law. Consequently, the trial court's penetration charge did not instruct the jury that the rape could be committed in a manner different than charged in the indictment.

### **Juries; Merger**

*Reed v. State, A12A1647 (11/08/12)*

An eleven-person jury found appellant guilty of aggravated assault, aggravated assault with intent to rob, and attempted armed robbery. After finding that the three counts merged as a matter of fact, the trial court merged the other two counts into the count for aggravated assault with intent to rob and sentenced him to twenty years imprisonment. Appellant first contended that the trial court erred in allowing the case to proceed with only eleven jurors. The record showed that after the evidence had closed, the trial court discovered that one of the jurors had previously read a newspaper article about the case, and defense counsel asked that the juror be removed from the panel. The record reflects that appellant was present when his trial counsel requested that the case be allowed to proceed with only eleven jurors, did not object to his counsel's request, and, in fact, expressly consented to the request when questioned about the issue by the trial court. Counsel for an accused can validly waive the accused's right to a jury of twelve if (1) the waiver is made, without objection, in the accused's presence or (2) the accused otherwise acquiesces in the waiver. The Court held that appellant waived his right to a twelve-person jury.

Appellant also contended that the trial court erred in merging the count of aggravated assault and the count for attempted armed robbery into the count for aggravated assault with intent to rob. Appellant argued that the aggravated assault counts were lesser offenses included in the attempted armed robbery count as a matter of fact, and that the trial court should have merged the aggravated assault counts into the count for attempted armed robbery and sentenced him only on the latter count, which carries a maximum 10-year sentence. The Court stated that when the same conduct establishes the commission of more than one crime, a defendant may be prosecuted and found guilty of each crime but may not be sentenced for both. When the jury finds the defendant guilty of both crimes, the lesser offense merges into the greater offense and the court sentences on the greater offense only. Here, the State did not dispute that the two counts of aggravated assault and the one count of attempted armed robbery merged as a matter of fact. Therefore, the Court agreed that the trial court failed to merge the aggravated assault counts into the armed robbery count for purposes of sentencing. The judgment was accordingly vacated and remanded for resentencing on appellant's conviction for attempted armed robbery.