

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 12, 2010

Legal Services Staff Attorneys

Chuck Olson
General Counsel

Joe Burford
Trial Services Director

Laura Murphree
Capital Litigation Director

Fay McCormack
Traffic Safety Coordinator

Gary Bergman
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

THIS WEEK:

- **Mutually Exclusive Verdicts**
- **Search & Seizure; Hospital Records**
- **Sufficiency of Evidence**
- **Jury Pools; Constitutionality**
- **Opening Statements**
- **Guilty Pleas; *Alford***
- **Accusations**
- **Search & Seizure**
- **Juries; Jury Commissioners**
- **Sexual Exploitation of Children; Sentencing**
- **Jury Charges**
- **Voir Dire; *Batson***
- **Motion for Directed Verdict; Character Evidence**
- **Res Gestae; Jury Charges**
- **Similar Transactions; Voir Dire**

Mutually Exclusive Verdicts

Drake v. State, S10A1207 (11/1/10)

Appellant was charged with malice murder, felony murder and first degree cruelty to children. The trial court charged the jury on the misdemeanors of reckless conduct, simple battery and battery and instructed the jury that it could find appellant guilty of involuntary manslaughter in the commission of a misdemeanor as a lesser included offense of both malice murder and felony murder. The jury found appellant guilty of misdemeanor-involuntary manslaughter as to the malice murder count, using a verdict form that did not require the jury to identify which of the

three charged misdemeanors was the basis for the involuntary manslaughter verdict. However, the jury also found appellant guilty of felony murder based on the underlying felony of cruelty to children, rejecting the option of finding him guilty of misdemeanor-involuntary manslaughter as to that charge. Appellant argued that his conviction for involuntary manslaughter and felony murder were mutually exclusive. Specifically, he alleged that because the jury was charged that it could find involuntary manslaughter based on the underlying misdemeanor of reckless conduct, a misdemeanor offense committed by criminal negligence, this would be logically inconsistent with the criminal intent required of the felony murder/cruelty to children conviction.

The Court disagreed. While there was certainly the potential for a mutually exclusive verdict, the verdict as returned eliminated any possibility that the involuntary manslaughter verdict was predicated on reckless conduct. Qualified jurors under oath are presumed to follow the instructions of the trial court. Despite being given the option of finding involuntary manslaughter as a lesser included crime for both the malice murder charge and the felony murder charge, the jury nevertheless chose to find appellant guilty of involuntary manslaughter solely as to the malice murder charge. The jury did so after hearing the trial court's instructions, which clearly differentiated the criminal negligence that was required to prove reckless conduct from the criminal intent required to prove battery and simple battery as well as the cruelty to children felony on which the felony murder count was predicated. Had the jury determined that an act of reckless conduct was the basis for its involuntary manslaughter verdict as the lesser included offense of malice murder, under the charge it

received, it would have necessarily returned the same verdict of involuntary manslaughter as the lesser included offense of the felony murder count.

Search & Seizure; Hospital Records

Herrera v. State, S10A1030 (11/1/10)

Appellant was convicted of malice murder and other crimes. He contended that the trial court erred in denying his motion to suppress hospital records showing his use of drugs on the day in question. Appellant contended the affidavit in support of the warrant lacked probable cause. The affidavit for the warrant was based primarily on the statements of appellant's wife who said he used drugs and was addicted to methamphetamine. However, the affidavit did not include facts that would have undercut the reliability of the statements made by appellant's wife: 1) appellant and his wife were estranged; and 2) appellant told his wife he stopped using drugs, and that his father-in-law said appellant did not appear to be under the influence on the night in question. Moreover, the affiant failed to corroborate the information given to him by the wife.

The Court held that on its face, the affidavit demonstrated a fair probability that evidence of appellant's drug use would be found in the hospital records. If an affidavit contains omissions, the omitted truthful material must be included, and the affidavit must be reexamined to determine whether probable cause exists to issue the warrant. Here, the alleged omissions had the potential to impeach the statements made by the wife, but they did not eliminate the existence of probable cause because if the omitted material were included in the warrant, probable cause would still exist.

Appellant also contended that the hospital records should not have been admitted because of a failure to prove a chain of custody and because admission of the lab report constituted testimonial hearsay and violated his right of confrontation. The Court rejected appellant's contention that because the lab director who testified at trial was not the individual who received and processed the sample at the lab, a chain of custody was unproven. The lab director testified as to the procedures used to maintain the chain of custody in the lab and that no discrepancies in the chain of

custody were noted by the crime lab employees. Thus, the State demonstrated with reasonable certainty that the substance tested was the same as that obtained.

The Court also rejected appellant's contention concerning the lab report. In addition to the lab report itself, the lab supervisor, an expert in toxicology, testified that he developed the lab procedures and trained the staff as to how to perform the lab tests; that he supervised the employees who conducted the tests; and that, in his opinion, based on the results of the tests, appellant tested positive for amphetamine, methamphetamine and cocaine metabolites.

Sufficiency of Evidence

Brown v. State, S10A1315 (11/1/10)

Appellant was convicted of felony murder of his girlfriend during the commission of aggravated assault, criminal damage to property in the second degree, and hindering a person making an emergency telephone call. The evidence showed that appellant poured gasoline on the victim and then threw a lighted paper towel on her, causing her to burst into flames. He then snatched the phone from the victim's friend who was calling 911. The victim, who suffered third-degree burns over 90% of her body, remained in a medically induced coma for several months and died just two weeks after returning home.

Appellant contended that his felony murder conviction must be reversed because the evidence was insufficient to show that he caused the victim's death. Specifically, he argued that the victim died of community-acquired pneumonia and would have survived if she had gone to the hospital on the day before her death as her doctor directed, where she would have received antibiotics. However, the Court found, the forensic pathologist who conducted the autopsy testified that the victim died as a delayed result of extensive thermal injuries, that her heart problems, pneumonia, and death were all related to those injuries, and that consideration of any refusal of antibiotics would not change his opinion. The victim's doctor testified that 1) antibiotics would not have made any difference in her chance of recovery; 2) she died of respiratory insufficiency which was consistent with her previous burns; 3) she did agree to home care including an unsuccessful IV, and 4) he seriously doubted

that hospital care would have caused her to live. Therefore, a rational jury was authorized to conclude that the victim's thermal injuries directly and materially contributed to the happening of a subsequent accruing immediate cause of her death.

Justice Hunstein, wrote a concurring opinion, in which she urged the Court to overturn the proximate cause case of *State v. Jackson*, 287 Ga. 646 (2010)(overruling *State v. Crane*, 247 Ga. 779(1981)). Justice Nahmais, also wrote a concurring opinion, stating that the Court "properly decline[d] the invitation to overrule *Jackson*, and it should do the same in future cases where the issue is actually relevant."

Appellant also argued that his conviction for hindering an emergency phone call must be reversed because there was no evidence that he ever intended to cause or allow physical harm to the person making the call. OCGA § 16-10-24.3 applies to "[a]ny person who verbally or physically obstructs, prevents, or hinders another person with intent to cause or allow physical harm or injury to another person from making or completing a 911 telephone call . . ." The Court held that the statute does not require that the perpetrator intend to cause or allow harm only to the person who is hindered from making a 9-1-1 call. Therefore, the evidence was sufficient to support his conviction for hindering an emergency phone call.

Jury Pools; Constitutionality

Foster v. State, S10A1004 (11/1/10)

Appellant was convicted of malice murder, aggravated assault, burglary, and criminal damage to property in the second degree. Appellant contended that the traverse jury source list was compiled by a board of jury commissioners that was comprised of only five members, rather than six members as directed by OCGA § 15-12-20. However, the Court held, this circumstance does not rise to such disregard of the essential and substantial provisions of the statute as would vitiate the arrays. Moreover, to the extent that he argued that the failure to have the commission composed of six members as called for by OCGA § 15-12-20 constituted a violation of the Sixth or Fourteenth Amendments, he failed to show that the five-member jury commission established a jury source list that did not represent a fair cross-section of the community, or that the list was the product of intentional discrimination.

Appellant also contended that Hispanics were misrepresented in the composition of the grand and traverse jury pools, in violation of the Sixth and Fourteenth Amendments, and OCGA § 15-12-40. “The standards for proving a prima facie jury pool composition violation are virtually identical under the Sixth and Fourteenth Amendments.” To prevail on a Sixth Amendment jury pool composition challenge, a defendant must show: (1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in jury pools is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury selection process. To prevail on a Fourteenth Amendment challenge to the composition of a jury pool, a defendant must show: (1) the group is one that is a recognizable, distinct class; (2) the degree of under-representation, by comparing the proportion of the group in the total population to the proportion called to serve as jurors over a significant period of time; and (3) a selection procedure that is susceptible of abuse or is not racially neutral which supports a presumption of discrimination raised by the statistics.

After a pre-trial hearing, the trial court ruled that Hispanic persons in the county were not a cognizable group for grand and traverse jury purposes under the Sixth Amendment. However, the Court found, this issue need not be addressed because appellant failed to show any actual misrepresentation of this group. His own expert witness testified that when using 2000 Census data, absolute disparity figures for Hispanics were under the five percent threshold, although when adjusted to account for the citizenship rate of Hispanic persons, the absolute disparity figure showed over-representation by 6.12 percent for the grand jury list. Thus, the absolute disparity figures were well within constitutional requirements. The failure to show any such misrepresentation was also fatal to appellant’s claim under OCGA § 15-12-40.

Finally, appellant contended that the jury commission engaged in improper forced balancing to achieve representation of racial groups in the grand and traverse jury pools. “Forced balancing to ensure that the racial balance in a grand or traverse jury pool reflects the racial balance in the county population is not unconstitutional.” According to appellant, the grand jury and traverse

jury certificates did not reflect the correct 2000 Census figures. However, the evidence of his expert upon which he relied, showed that the differences between data used by the expert and that of the jury commission was due to the different manner in which the expert treated Hispanic persons. And, again, appellant failed to show any unconstitutional under-representation or over-representation of any cognizable group, even using what he contends are the correct figures.

Opening Statements

Jennings v. State, S10A1089 (11/1/10)

Appellant was convicted of malice murder and concealing the death of another person. He argued that the State made an improper opening statement by indicating that a witness, Nixon, would testify that he saw appellant with a gun, because Nixon did not later testify that appellant had a gun. The Court held that while it is true that “a prosecutor’s opening statement must be confined to what he or she expects the evidence to prove at trial . . . a conviction will not be reversed if the opening statement was made in good faith, and the trial court instructs the jury that opening statements are not to be considered as evidence during deliberations.” Here, the record revealed that the prosecutor had a good faith belief at the time that he made his opening statement that Nixon would testify that he saw appellant with a gun. Specifically, Nixon told the prosecutor in a pre-trial interview that he had seen appellant with a gun. However, after the prosecutor gave his opening statement and he met with Nixon in the hallway before putting him on the witness stand, Nixon then told the prosecutor that he did not recall seeing Jennings with a gun. The prosecutor reviewed his notes from the interview and discovered that, while it was clear that Nixon had told the prosecutor that he had seen appellant with a gun, it was not clear whether or not Nixon had seen appellant with a gun at his apartment. Thus, although the prosecutor wanted to show the jury that appellant had been seen with a gun at his apartment, it only became clear to the prosecutor that he may not have been able to do this after he had already given his opening statement. Further, the trial court explicitly instructed the jury that the opening statements of counsel were not evidence. Accordingly, because the prosecutor’s opening

statement was made in good faith, and because the jury was instructed that counsel’s opening statement was not evidence, no reversible error was committed.

Guilty Pleas; Alford

McKiernan v. State, S10A1746 (11/1/10)

Appellant pled guilty to the felony murder of his wife. The trial court denied his timely motion to withdraw his plea and he appealed. He contended that because he continued to maintain that the shooting was accidental during his guilty plea, the trial court committed a manifest injustice by accepting his guilty plea without the safeguards set forth in *North Carolina v. Alford*, 400 U.S. 25, 91 SC 160, 27 LE2d 162 (1970). Under *Alford*, the trial court may accept a guilty plea from a defendant who claims innocence if the defendant has intelligently concluded that it is in his best interest to plead guilty and the court has inquired into the factual basis for the plea and sought to resolve the conflict between the plea and the claim of innocence. If the defendant later challenges the validity of his guilty plea, the State may meet its burden of demonstrating that the plea was intelligently and voluntarily entered by (1) showing on the record of the plea hearing that the defendant was aware of the rights he was waiving and the possible consequences of his plea; or (2) pointing to extrinsic evidence affirmatively showing that the guilty plea was knowingly and voluntarily entered.

The Court held that although the record does not indicate that appellant intended to enter an *Alford* plea, the transcripts of the guilty plea hearing and the motion to withdraw the plea show that the plea was proper, even if it was considered under *Alford*. The transcript of the guilty plea hearing unequivocally showed that appellant was fully aware of all the rights he was waiving by pleading guilty, and there was no question that he was aware of the mandatory life sentence which he faced. In addition, record showed that appellant was motivated to plead guilty because he thought it would be in his best interests to avoid trial and a potentially longer sentence. In addition, trial counsel testified that appellant chose to plead guilty in order to avoid having to put his family through a trial. Therefore, the Court found, the record showed that appellant intelligently concluded that pleading guilty was

in his best interest and that the trial court properly reviewed and considered the basis for his plea. Under these circumstances, the record showed that appellant voluntarily and knowingly entered his guilty plea, and his contentions based on *Alford* failed.

Accusations

Ford v. State, A10A1305 (10/27/10)

Appellant was convicted on three counts of cruelty to animals. She contended that the accusation was fatally defective because 1) all of the counts were worded identically and thus it was uncertain as to whether she was being charged with abusing three separate dogs or the same dog on three separate occasions; and 2) the accusation lacked “legal specificity” because the individual counts did not identify which “dog” she was accused of treating cruelly. The Court stated that the true test of the sufficiency of an indictment or accusation is not whether it could have been made more definite and certain or, for that matter, perfect, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

OCGA § 16-12-4 (b), provides in pertinent part: “A person commits the offense of cruelty to animals when he or she causes death or unjustifiable physical pain or suffering to any animal by an act, an omission, or willful neglect.” The three counts of the accusation each charged that appellant caused “the unjustifiable physical pain or suffering of a dog by an act or omission to wit by failing to provide adequate food or water or medical care” on a certain date. The Court held that accusation was sufficient. Thus, the accusation clearly specified that the acts were committed “on or about the 19th day of June 2007,” and that the dogs were deprived of food, water, and medical care. Moreover, pictures of the subject dogs were introduced at trial. Even if the accusation was couched in more descriptive terms such as the breed or color as argued by appellant, the same issue as to the uniqueness of the dog would have been present because color and breed, while identifying characteristics, are not unique to a specific dog.

Search & Seizure

Floyd v. State, A10A1243 (10/27/10)

Appellant was convicted of trafficking in methamphetamine. He contended that the trial court erred in denying his motion to suppress. The evidence showed that while an officer was patrolling and observing a trailer park based upon reports of drug activity, he saw a truck driven by appellant pull into the driveway of a trailer that police had kept under observation for several months. The officer then saw the trailer’s resident stand near the driver’s door “and it appeared he was reaching in the window.” The officer continued past the trailer and by the time he turned around, appellant had already pulled out of the driveway. While following appellant, the officer noticed that the passenger repeatedly went into the console and the left side of his jacket. The officer followed appellant for about a mile and then activated his blue lights. He testified in the motion to suppress hearing that he stopped appellant to investigate what had happened at the trailer. Appellant consented to a search of his vehicle. The passenger, however, took flight. The passenger was subsequently apprehended and a trafficking amount of methamphetamine was discovered along his flight path. A set of scales was found in the console of the vehicle.

Appellant contended that the officer lacked reasonable suspicion to stop his vehicle. The Court disagreed. Appellant drove to a trailer under surveillance based upon numerous citizen reports of drug activity, he spent a brief period of time there, and the officer observed an exchange between the trailer’s resident and appellant. This evidence created a reasonable articulable suspicion of criminal activity.

Ortiz v. State, A10A1200 (10/27/10)

Appellant was convicted of carrying a weapon on school property. He contended that the trial court erred in denying his motion to suppress. The evidence showed that appellant was smoking a cigarette in a bus lane at a high school. When confronted by an administrator, he admitted to being a student and was brought into the school for questioning. The administrator also called the school resource officer because appellant looked to be “high” and it was customary for such an officer to be present whenever a threat may be involved. The

resource officer advised appellant that “this is an administrative action. I’m just here for everybody’s safety, the safety of the students, for your safety, et cetera.” The administrator then asked appellant to “dog-ear” his pockets so that she could search him. Appellant told her that he did not want her to cut herself and took a razor blade from his breast pocket.

Citing *State v. Young*, 234 Ga. 488 (1975), the Court held that in applying Fourth Amendment search and seizure law, and the associated exclusionary rule, in a public school setting, three groups of actors exist: private individuals; governmental agents whose conduct constitutes state action covered by the Fourth Amendment; and law enforcement personnel who are governed by both the Fourth Amendment and the exclusionary rule. This case involved the second classification. Here, the officer did not physically conduct the search and testified that he was asked to come into the office for safety reasons because of appellant’s altered state and “because at the time they didn’t know who they had,” and he would be available to “step in and act for safety reasons.” He further testified that he walked in as the search was being done, and that because Ortiz was identified as a student it was “strictly an administrative situation” and he was there only for safety reasons.

“Premitting whether the school administrator’s search violated the Fourth Amendment, the exclusionary rule would not apply in these circumstances because there was no evidence that the resource officer was involved in administering the search, either directly or at his bequest. While we recognize that police involvement need not be substantial to remove the case from the intermediate group of governmental actors ... an officer’s mere presence in the room, without more evidence of his involvement, does not indicate police participation thereby implicating the exclusionary rule.”

Search & Seizure

Boykins v. State, A10A1182 (10/28/10)

Appellant was convicted of possession of cocaine. The contraband was found in the center console of his vehicle during a search conducted incident to his arrest for a probation violation. Appellant challenged the trial court’s findings that 1) the stop was a first-tier encounter; and 2) the search was valid under *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710

(2009). The evidence showed that an officer observed appellant talking to a woman in a high crime area. Suspecting prostitution, the officer turned his car around and after speaking to the woman, entered an apartment complex where he noticed appellant backing his car into a spot. The officer pulled in front of the car, blocking it. He got out, approached appellant, and asked to see identification. The officer then determined that appellant had an outstanding warrant and arrested him and placed him in handcuffs. The officer then searched appellant's person and the "wing span within his vehicle," finding cocaine in the center console. At the time of the search, appellant was standing outside of his vehicle.

The Court found that actions of an officer approaching a stopped vehicle, requesting to see a driver's license, and inquiring about possible criminal or suspicious activity clearly fall within the realm of the first type of police-citizen encounter and do not amount to a stop. The fact that the officer parked his police car in front of his vehicle did not, as a matter of law, create the impression that appellant was not free to leave. The evidence showed that when the officer approached appellant, he had driven into his apartment complex and was parked in front of his own apartment. Thus, the Court inferred, appellant intended to walk inside, not drive away, so the trial court was authorized to find that the manner in which the officer parked his car was not dispositive under the circumstances. Moreover, the officer did not have his blue lights on and did not restrain appellant until probable cause existed for his arrest; i.e., upon learning that he had no identification and had an outstanding warrant. Therefore, trial court did not err in denying the motion to suppress on this basis.

The Court also held that the search was valid under *Gant*. The Court interpreted *Gant* to mean that the police may still conduct a search of the passenger compartment of an arrestee's vehicle incident to his lawful arrest in the "rare case" in which the arrestee still has a "real possibility of access" to his vehicle. Here, the officer testified that, at the time of the search, appellant was standing outside of his automobile. The trial court apparently inferred from the officer's testimony that appellant was within arm's reach of the passenger compartment. The officer also testified that appellant was handcuffed and standing with a second officer in that officer's custody at the time of

the search, but unlike the defendant in *Gant*, appellant had not been placed in the back of the patrol car at the time of the search; he was standing outside of his vehicle. "In the final analysis, we hold that whether he had any 'real possibility of access' to the passenger compartment of his vehicle was a mixed question of fact and law for the trial court to determine. We will not second-guess the trial court's finding that the search was justified under *Gant* ... on the basis of officer safety."

Jury Charges; Justification

Luke v. State, A10A1116 (11/3/10)

Appellant was convicted of speeding, driving on the wrong side of the road, reckless driving, cocaine possession, possession of a firearm by a convicted felon, possession of a firearm during the commission of a crime, driving under the influence, aggravated assault and two counts of simple assault. The evidence showed that appellant was driving at 97 miles per hour, when a GSP officer attempted to stop him. A high speed chase ensued which covered over 50 miles and resulted in the charges. At trial, appellant stated that he was high on crack and believed he had to run from assassins armed with Uzi's who were after him because he ripped off a drug dealer. Appellant argued that the trial court erred in not sua sponte charging on his sole defense of justification.

The Court disagreed. First, the Court found that justification was not his sole defense and, in fact, may have contradicted his other defenses, including that of accident. While a defendant may choose to pursue alternative defense theories, a trial court has no obligation to charge the jury sua sponte on all possible theories of defense. Second, the proper test under appellant's theory of defense is whether the existing situation would have excited the fears of an objective, reasonable person to the point that violating the law was justified. Appellant's subjective beliefs about unknown men with Uzis from an earlier incident did not meet this test. There was no immediate threat of would-be assassins at the time of the crimes charged, only a pursuit by law enforcement vehicles, with lights flashing and sirens blaring. Under these circumstances, his fear based upon an earlier encounter with unidentified men could not provide justification for the crimes in the indictment. Thus, the circumstances did not support a charge on justification.

Juries; Jury Commissioners

Worthy v. State A10A1388; A10A1389 (11/4/10)

A Lamar County grand jury returned an indictment against appellant for false imprisonment, aggravated assault, and pointing a gun at another. He contended that the trial court erred in finding that the indictment was valid because at least one jury commissioner and the clerk of the board of jury commissioners did not take and subscribe to the oaths of office required by OCGA §§ 15-12-22 and 15-12-23. The Court held that the oath subscribed to by the jury commissioner did not comply with OCGA § 15-12-22 and thus was not a proper oath; however, his official acts as a jury commissioner were valid. And while the oath subscribed to by the clerk of the board of jury commissioners did not meet the requirements set out in OCGA § 15-12-23 and thus was not a proper oath, the official acts of the jury commissioners were nonetheless valid. Generally, in deciding whether the failure of the clerk of the board of jury commissioners or jury commissioners to take and subscribe to the oath of office as provided by statute constituted reversible error, the courts consider whether there was harm. Here, appellant failed to show that, as a result of improper oaths, the jury commissioners failed to properly enter into their duties or to follow statutory guidelines in selecting the jury lists. Thus, the error in the clerk's oath was harmless.

Appellant also argued that the trial court erred in finding that the indictment was valid when African-Americans were over-represented on the grand jury list by 6.429 percent in relation to the number of such persons in the community. A defendant bears the burden, under a Fourteenth Amendment equal protection claim, a Sixth Amendment fair cross-section claim, and a claim under OCGA § 15-12-40, of making a prima facie showing of under-representation of a particular group of persons. The Constitution requires only that the State not deliberately and systematically exclude identifiable and distinct groups from jury lists; hence, to prevail on a constitutional challenge to the composition of the grand or petit juries in his case, a defendant must establish prima facie that a distinct and identifiable group in the community is substantially under-represented. Once a defendant makes a prima facie case of discrimination, the burden of going forward shifts to the State to explain the fig-

ures in a non-discriminatory way. “A violation of OCGA § 15-12-40 is proven by showing a wide absolute disparity between the percentage of the group in the population and its percentage in the jury pool.” Generally speaking, an absolute disparity between the percentage of a group in the population and its percentage on the jury list of less than five percent is almost always constitutional; an absolute disparity between five and ten percent is usually constitutional; and an absolute disparity of over ten percent is probably unconstitutional.

Here, appellant’s asserted error states that the indictment was invalid because the grand jury list was *over*-represented by African-Americans. The Court, assuming, *arguendo*, that the laws pertaining to under-representation of distinctive groups on jury lists also apply to the over-representation of such groups, found appellant’s argument without merit. The absolute disparity in over-representation on the grand jury list of 6.429 percent of African-Americans fell within a range that generally meets constitutional requirements. Therefore, appellant failed to meet his burden of showing that this disparity violated the Constitution or OCGA § 15-12-40.

Furthermore, The Court found his argument concerning application of Rule II of Georgia’s Unified Appeal Procedure (“UAP”) misplaced. The UAP applies only in cases where the death penalty is sought, and this was not such a case, and even if the rule were applicable, appellant failed to show *under*-representation of any group by more than five percent.

Sexual Exploitation of Children; Sentencing

Tindell v. State, A10A0945 (10/27/10)

Appellant pled guilty to four counts of sexual exploitation of children, OCGA § 16-12-100, and was sentenced to 15 years, to serve the mandatory minimum of five years in confinement. Appellant contended that the trial court erred in interpreting OCGA § 17-10-6.2 (c) (1) (F) to disqualify him, as a matter of law, from consideration of a statutory provision authorizing the deviation from the mandatory minimum sentence. The record shows that appellant entered a plea of guilty to four counts of sexual exploitation of children based on his knowing possession of a computer containing digital video and digital

images of minors engaged in sexually explicit conduct. The child in the video at issue in one count was restrained and bound during the sexual acts. The Court found that this case was controlled by *Hedden v. State*, 301 Ga. App. 854 (2010). Thus, “[a]lthough [appellant] argues that the legislature intended that “the commission of the offense” be the sexual act rather than the viewing of the sexual act, we do not think the legislature intended for a digital third wall to protect static actors, or punish them less severely than the actual actors in these types of crimes against children. We are not inclined, as [appellant] requests, to overrule *Hedden*.”

Jury Charges

Snell v. State, A10A1514 (10/28/10)

Appellant was convicted of felony involuntary manslaughter as a lesser included offense of felony murder. The evidence showed that appellant and the victim had been arguing. Appellant left, but then returned with a pistol concealed in his jacket. The victim was playing cards at a table. Some witnesses testified that appellant pulled the weapon out and shot the victim at point blank range. Appellant testified that the weapon fell out of his jacket and as he attempted to catch it before it hit the floor, it went off, killing the victim.

Appellant contended that the trial court erred in failing to give his requested charges of reckless conduct and misdemeanor involuntary manslaughter. The Court held that since there was no evidence of appellant’s allegedly reckless conduct other than that directly related to the death of the victim, a charge on reckless conduct had to be in the context of involuntary manslaughter. Therefore, the trial court committed no error in declining to charge the jury on reckless conduct as a separate lesser included offense.

The Court also held that the trial court did not err in failing to give a charge on misdemeanor involuntary manslaughter. A person commits the offense of misdemeanor involuntary manslaughter when the person causes the death of another human being without any intention to do so, by the commission of a lawful act in an unlawful manner likely to cause death or great bodily harm. Here, appellant conceded that his act of carrying a concealed weapon was a criminal act, but argued that his possession of the weapon was legal. The

Court found that this was nothing more than “splitting hairs.” “[E]ven under his own version of events, [appellant] was not engaged in the commission of a lawful act and thus was not entitled to a charge on misdemeanor involuntary manslaughter.”

Voir Dire; Batson

Bell v. State, A10A2148 (10/26/10)

Appellant was convicted of burglary. He argued that the trial court erred in denying his *Batson* challenge when eight of the State’s nine peremptory strikes were used against black members of the jury pool. Specifically, that the trial court erred in finding that appellant had failed to carry “his burden of showing the proffered reasons were merely designed to ‘cover up’ purposeful racial discrimination.” The State gave various reasons for each strike: 1) the juror did not appear to understand one or more questions the prosecutor asked, and the State was concerned about the juror’s ability to understand the evidence; 2) the juror worked in the healthcare industry, had a disabled husband, and the State believed appellant might produce some evidence of his own disabilities, which the prosecutor felt might cause the juror to have “some conflicts”; 3) the juror was employed at a government technically-oriented “logistics facility,” and as a rule, the prosecutor tried to exclude technically-oriented people from his juries because they often “try to over think things;” 4) a white and black juror were struck because of their youth and lack of “life experience;” 5) two jurors were struck based on the fact that the prosecutor had a hard time understanding responses given by each one and he thought that indicated “either an inability to articulate [their position] or an inability to reason;” 6) the juror stated she had negative experiences with law enforcement, that she had a close friend or family member who had been prosecuted, and that she had something weighing heavily on her mind that rendered her unable to serve freely as a juror; and 7) a juror who had either been prosecuted himself or had a close family member or close friend who had been prosecuted.

The Court reviewed each reason for the strike and found that the trial court did not err in denying appellant’s *Batson* challenge. Specifically, the Court found that each strike had a race-neutral reason and was not pretextual.

Motion for Directed Verdict; Character Evidence

Nyane v. State, A10A0940 (10/27/10)

Appellant was convicted of single counts each of attempted armed robbery, aggravated assault, possession of a firearm during the commission of a crime, and possession of tools for commission of a crime. He contended that the trial court erred in denying his motion for directed verdict of acquittal. The standard of review for the denial of a motion for directed verdict of acquittal is the same as that for reviewing the sufficiency of the evidence to support a conviction, i.e., whether after viewing the evidence in the light most favorable to support the verdict, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. The Court held that since the victim testified that appellant approached him with a handgun while attempting to obtain money from the cash register, the evidence was sufficient to authorize appellant's convictions for attempted armed robbery and possession of a firearm during the commission of a felony. There also was ample evidence of appellant's guilt of aggravated assault based on his act of firing two shots in the victim's direction, wounding him in the chest and leg. The evidence, however, was insufficient to support appellant's conviction of possession of tools for the commission of a crime. Thus, no evidence was produced showing that body armor, which appellant wore during the robbery, was a tool commonly used in the commission of attempted armed robbery. See OCGA § 16-7-20 (a). The Court therefore reversed appellant's conviction of possession of tools for the commission of a crime.

Appellant also contended that the trial court erred in denying his motion for mistrial after the investigating officer violated the trial court's ruling on his motion in limine. The record showed that the trial court granted appellant's motion in limine to exclude any evidence of his admitted involvement in another criminal matter occurring in a different county. During cross-examination, defense counsel inquired about appellant's statement and whether he denied committing the attempted armed robbery. The officer replied, "Yes, he did. He admitted to other—to another incident in another county." Defense counsel moved for a mistrial, which the trial court denied *sub silentio*, stating "he came close, but he caught

himself." Defense counsel did not ask for a curative instruction and the witness made no further mention of any other incidents. The Court found no error because the officer's testimony referred to another incident and not another crime per se. Moreover, appellant failed to show that a mistrial was essential to preserve his right to a fair trial.

Res Gestae; Jury Charges

Daniels v. State, A10A2042, A10A2043 (10/26/10)

Appellants were tried and convicted on two counts of armed robbery, three counts of hijacking a motor vehicle, three counts of aggravated assault, two counts of theft by taking, one count of theft by receiving, and three counts of possession of a firearm during the commission of a felony. The evidence showed that appellants attempted to hijack a vehicle from individuals at two gas stations before successfully hijacking a vehicle from a third victim at a third gas station. During this crime spree, they were driving in a white Lexus. They contended that the trial court erred in admitting testimony concerning the hijacking of the white Lexus on the day before the gas station incidents. Specifically, they argued that such testimony constituted similar transaction evidence that was improperly admitted without a pre-trial hearing conducted pursuant to Uniform Superior Court Rule 31.3.

The Court disagreed. Appellants were both indicted on one count of theft by receiving stolen property, that property being the white Lexus automobile. Under OCGA § 16-8-7 (a), "[a] person commits the offense of theft by receiving stolen property when he receives, disposes of, or retains stolen property which he knows or should know was stolen." The State introduced the testimony of vehicle's owner concerning the hijacking of that vehicle to show that it was stolen. Furthermore, the State is entitled to inform the jury of all the circumstances surrounding the commission of the crime or crimes charged. Therefore, this evidence was part of the *res gestae* and its admission was not error even though it may have incidentally placed appellants' character in evidence.

Appellants also contended that the trial court erred in charging the jury on the full text of the hijacking statute, because they were charged in their respective indictments only with having completed the crime, not

attempting to commit it. For each of the three hijacking counts, the indictment provided that the appellant "did . . . unlawfully . . . while in possession of a firearm obtain a motor vehicle from the presence of another." The only difference in the counts was that each referenced a different victim. The Court charged the jury on the entirety of the hijacking statute as follows: "A person commits the offense of hijacking a motor vehicle when such person while in possession of a firearm or weapon obtains a motor vehicle from the person or presence of another by force and violence or intimidation or attempts or conspires to do so."

Specifically, appellants argued that since they were not indicted for attempting to obtain a motor vehicle by force, the trial court should not have given the jury the opportunity to convict them of attempting to obtain a motor vehicle by charging the entire statute. However, the Court found, a person indicted for a specific crime may be convicted of attempt of the specific crime without an attempt charge being listed in the indictment. OCGA § 16-4-3. The specific statutory inclusion of attempt as a method of committing the crime of hijacking a motor vehicle does not alter the general rule that an attempt can be proven and charged without being indicted. Therefore, the trial court did not err in charging the jury on the entirety of hijacking statute despite the fact that defendant was only charged with having completed the crime.

Similar Transactions; Voir Dire

Blanch v. State, A10A2252 (10/27/10)

Appellant was convicted of aggravated sodomy, robbery, and aggravated battery. He contended that the trial court erred in admitting three similar transactions. The evidence at trial showed that appellant approached the victim concerning drugs. When the victim began to walk away, appellant viciously struck him in the head from behind, knocking him down so that his face struck the ground hard. Pinning the victim down on his belly, appellant pulled off the victim's pants and forcibly had anal intercourse with him. Appellant then threatened to kill the victim if he reported the assault, and after taking the victim's license and money, he escaped. The State introduced three similar transactions. The first involved the rape of a woman. The second two involved attempts to

have non-consensual anal intercourse with two different male inmates. In each these two incident, the attempt was stopped because of intervention by prison guards.

Appellant first contended that the State failed to prove that he committed the other offenses. But since the victim in each of the three similar transactions appeared in court and identified appellant as the perpetrator of the offense, the Court found this argument to be without merit. Appellant next argued that the crimes were not sufficiently similar. The Court disagreed. Courts must focus on the similarities, not the differences, between each transaction and the crime in question and the rule is most liberally extended in cases involving sexual offenses against a victim who did not give consent because such evidence tends to establish that a defendant has such bent of mind as to initiate or continue a sexual encounter without a person's consent. Where, as here, the defense was that the sexual encounter was consensual, the evidence of the prior rape tended to rebut that defense by establishing a propensity to initiate or continue a non-consensual sexual encounter and further tended to corroborate the victim's testimony that the defendant acted in the manner charged. The fact that two of the similar transactions were attempts to sexually assault a victim that were unsuccessful due to intervening law enforcement authorities was "unimportant" because testimony about a defendant's similar behavior that could have resulted in, but did not actually result in, an attack could be admitted as similar transaction evidence. Also, the Court found, appellant's claim that one of the forced encounters was dissimilar in that it was heterosexual, carried little weight, particularly in light of his trial testimony that he was bisexual. Thus, the Court held, the evidence was admissible because the similar transactions showed a "bent of mind as to initiate or continue a sexual encounter without a person's consent."

Appellant also contended that the trial court erred in denying his motion to strike a juror for cause. The juror was a former police officer who was certified as a Georgia Peace Officer but who was currently not employed as an officer, and did not possess any arrest powers. The Court found no error. Here, the juror was not employed as a sworn police officer with arrest power at the time of trial. Therefore, the trial court did not err in ruling that he was not subject to challenge for cause.