

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 18, 2011

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THIS WEEK:

- Pre-trial Publicity
- Speedy Trial
- Competency; Right to be Present
- Hearsay; Explaining Officer Conduct
- Evidence
- Juveniles
- Prior Consistent Statements; Jurors
- Search & Seizure
- Closing Arguments; Mistrial
- Void Sentences
- Kidnapping; *Garza*
- Motive; Character Evidence
- DUI; Jury Charges
- Stalking; Merger
- Juveniles; Hearsay
- Similar Transactions

Pre-trial Publicity

Gear v. State, S10A1387 (2/7/2011)

Appellant contended that the trial court erred by denying his motion for a change of venue due to pretrial publicity. In a motion for a change of venue, the defendant must show (1) that the setting of the trial was inherently prejudicial or (2) that the jury selection process showed actual prejudice to a degree that rendered a fair trial impossible. As for the first showing, the record must establish that the publicity contained information that was unduly extensive, factually incorrect, inflammatory or reflective of an atmosphere

of hostility. The Court found that appellant made no such showing.

As to the actual prejudice prong, the Court stated that the question is not the number of jurors who had heard about the case; rather, the question is whether those jurors who had heard about the case could lay aside their opinions and render a verdict based on the evidence. Here, of the 140 persons who appeared for jury duty, a total of 24 (17%) were excused for cause because their knowledge of the case made it impossible for them to render a verdict based solely on the evidence. The Court found that this excusal percentage was not indicative of such prejudice as would mandate a change in venue. Therefore, the trial court did not abuse its discretion by denying appellant's motion.

Speedy Trial

Brewington v. State, S10A1857; S11A0017; S11A0018 (2/7/2011)

Appellants, Kevin, Tyrone and Gary, were charged in the death of two people. Kevin and Tyrone were arrested and incarcerated in March 2006. Gary was arrested and incarcerated in November 2006. Tyrone and Gary were tried from November 16, 2009 to November 24, 2009, with the matter resulting in a mistrial due to a hung jury. Tyrone, whose case was severed from the November 2009 trial of his co-defendants, had yet to be tried.

All three filed motions to dismiss based on constitutional speedy trial grounds. Under the *Barker-Doggett* test, it must be determined as a first tier analysis if the delay in question was presumptively prejudicial. If not, there has been no violation of the constitutional right to a speedy trial and the second tier of analysis is unnecessary. If, however, the delay

is determined to be presumptively prejudicial, then the court must engage the second tier of analysis by applying a four-factor balancing test to the facts of the case. Those four factors include: (1) whether the delay is uncommonly long; (2) Reason for delay (whether the government or the defendant is more responsible); (3) defendant's assertion of the right to a speedy trial; (4) and the prejudice to the defendant.

Tyrone and Kevin argued that the four year delay was presumptively prejudicial. The Court disagreed. The Court found that since appellants had been tried, the new time began to run from the date of the mistrial. Since appellants filed their motion only three months after the date of the mistrial, there was no presumption of prejudice, appellants' rights to a speedy trial were not violated, and there was no basis to engage in the four-factor *Barker-Doggett* balancing test.

As to Tyrone, the Court found that the four year delay was presumptively prejudicial requiring a balancing of the *Barker-Doggett* factors. First, the Court found that the delay was uncommonly long and attributed that against the State. However, the Court found that the reason for the delay was almost entirely the fault of defense counsel which included seeking a continuance days before the first trial was set in February 2008, pursuing her fee dispute in the midst of trial preparations, ceasing trial preparations, and announcing "not ready" at the opening of the November 2009 trial. Based on such an announcement, the trial court had no choice but to sever Tyrone from the trial and appoint a new attorney which further exacerbated the delay. The Court found this factor weighed heavily against Tyrone.

As to the assertion of the right, the Court found that Tyrone did, in 2008, assert his right to a speedy trial. However, he did not diligently pursue the demand and it was never disposed of by the trial court. He then waited 18 months before re-asserting the demand. The Court held that this too must weigh against him.

Finally, Tyrone's allegation of prejudice was that due to his incarceration, he was unable to be with his family, and was unable to participate in activities a non-incarcerated person could enjoy and thus, he contended he suffered from anxiety, depression and "all of that." The Court found that this was not sufficient to show prejudice rising to a level in violation of his constitutional rights.

Speedy Trial

State v. Porter, S10G0211 (2/7/2011)

The State was granted a writ of certiorari after the trial court granted Porter's motion to dismiss for violating his constitutional right to a speedy trial and the Court of Appeals affirmed. In a very lengthy decision authored by Justice Nahmias, the Court reversed, finding that "the trial court clearly erred in key factual findings and failed to enter a proper order balancing the relevant legal factors, [and] the Court of Appeals should have vacated the trial court's judgment and remanded for the trial court to exercise its discretion again based on the correct facts and law." Very briefly stated, Porter was indicted for child molestation in 2000, re-indicted in 2001, and then indicted again in 2006 on new charges of child molestation arising while he out on bond in 2005. Additionally, between February 2005, and April 2006, Porter was a fugitive from justice.

The Court held that the Court of Appeals failed to evaluate Porter's delay in asserting his right to a speedy trial in the final balancing. Also, the Court of Appeal's focus on the presumption of prejudice to the exclusion of another *Barker* factor, Porter's delay in asserting his right, strayed from the flexible balancing test that is the ultimate focus of the *Barker* analysis. Moreover, the Court of Appeals erred in not reversing the trial court's judgment and remanding the case with directions. The trial court clearly erred in its key factual findings regarding Porter's anxiety and concern and actual impairment to his defense. The trial court's order also revealed significant legal errors: It omitted any mention of the assertion-of-the-right *Barker* factor and attributed only eight months of delay to the State, without addressing the reasons for the nearly eight additional years of delay, including a year of delay caused, apparently deliberately, when Porter became a fugitive. As a result, the trial court could not properly balance the *Barker* factors, and the Court of Appeals could not properly affirm the trial court's judgment. Instead, the Court of Appeals should have vacated the order and remanded the case for the trial court to exercise its discretion again using properly supported factual findings and the correct legal analysis, reflected in an adequate written order.

Competency; Right to be Present

Weaver v. State, S11A0113 (2/7/2011)

Appellant was convicted of malice murder. Appellant contended that the trial court erred in not granting him a continuance for a competency evaluation when he acted out at trial and had to be removed from the courtroom. The record showed that prior to trial, a forensic psychologist concluded that appellant was provisionally competent to be tried. Several months later, the defense obtained a separate evaluation. The defense expert's report suggested that appellant was malingering and attempting to appear more incompetent than he actually was. Three months after the report, appellant refused to dress for trial and had to be brought in by eight deputies. Before and during voir dire, he yelled and screamed incoherently numerous times, tried to bite his attorney on the arm, and eventually had to be restrained and removed from the courtroom. When he could still be heard screaming in the holding cell, he was returned to the jail. The defense psychologist visited appellant at the end of the first day of trial, and alternately observed him through a window without his knowledge and spoke to him through a small window in the door to his cell. The trial court subsequently heard testimony from the defense psychologist that appellant most probably was exaggerating his symptoms, that the previous tests of malingering had very strongly led the psychologist to view appellant's motivation on all of the other tests as extremely suspect and had shown that those test results were invalid, that there was no clinical reason that appellant could not now cooperate, and that it was still the psychologist's opinion that appellant was competent to stand trial. Thus, the trial court did not abuse its discretion in not granting the continuance.

Appellant contended that the trial court violated his constitutional right to be present when it thereafter conducted the trial without his presence. The Court disagreed. A defendant can lose his right to be present at trial where, as here, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present

may be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings. Here, the trial court did not bring him back to the courtroom, but placed the burden on his defense attorney to determine if appellant wished to return. The Court found no error. Defense counsel repeatedly visited appellant in jail and informed the court that appellant did not wish to appear in the courtroom, even when the court met just two doors down from his cell. Furthermore, the trial court had firsthand knowledge of how difficult, explosive, and violent appellant could be, and the court also properly consulted with the sheriff regarding the serious safety issues in bringing appellant into the courtroom. Under all of the circumstances, therefore, the trial court did not abuse its discretion in proceeding with trial in appellant's absence.

Hearsay; Explaining Officer Conduct

Reeves v. State, S11A0345 (2/7/2011)

Appellant was convicted of the malice murder of one individual and the aggravated assault of another. He contended that the trial court, over his hearsay objection, erroneously admitted the testimony of a detective that two witnesses, who were present at the crime scene, stated that they would not come to court. Generally, it is error to permit an investigating officer to testify, under the guise of explaining the officer's conduct, to what other persons related to the officer during the investigation. The mere circumstance of an officer's initiation and continuation of an investigation, without more, is not a relevant inquiry. However, if the defendant puts the police conduct directly in issue, this can create the "rare instance" in which it is necessary to explain police conduct.

Here, prior to the admission of the alleged hearsay in this case, defense counsel cross-examined the detective in some detail about his investigation and specifically elicited testimony that the living victim had told the detective that one of the witnesses was present at the crime scene. Therefore, the statements of the two witnesses that they would not come to court were admissible under OCGA § 24-3-2 to explain that their lack of cooperation was the reason that the detective did not obtain further assistance from them in his investigation. Because their statements tended to

explain the officer's conduct, which appellant had called into question, the trial court did not err in admitting the statements.

Evidence

Evans v. State, S10A2042 (2/7/2011)

Appellant was convicted of murder and related charges. He contended that the trial court erred by permitting the prosecution to solicit statistics and information about the neighborhood where the crime occurred. This testimony included evidence regarding the crime rate of the neighborhood, five murders and multiple stabbings in the area between January and March of 2005, and the percentage of people in the neighborhood who had guns. Appellant argued that this evidence was irrelevant and highly prejudicial. The trial court admitted this evidence, over objection, based on the State's contention that the evidence was necessary to explain why the police had such a difficult time gaining any information from the 60 to 100 people at the crime scene, including the victim's brother, who witnessed the shooting.

The Court found that this evidence was not used to suggest that appellant had been involved in any other previous crimes committed in the neighborhood. Moreover, the statements were neither made to show that the police had been lax nor to convey to the jurors that it was up to them to enforce the law as a result of the ineffectiveness of police. Therefore, the trial court did not abuse its discretion in finding the questioned evidence to be relevant and admissible under the facts of this case.

Appellant also contended that the trial court erred in allowing testimony concerning the lengthy manhunt for him. Specifically, appellant argued that this testimony was prejudicial and irrelevant because there was no evidence showing that he knew an arrest warrant had been issued for him or that the police were looking for him. The Court stated that evidence as to whether a defendant tried to evade capture is admissible as evidence of flight and such evidence is relevant because a defendant's efforts to elude capture arguably provide circumstantial evidence of guilt. Although an officer testified that appellant never said whether he knew a warrant was issued for his arrest, evidence was presented by which a jury could infer that he had knowledge that the police were searching for him. Accordingly, the trial court did not err in admitting this testimony.

Juveniles

Adams v. State, S10A1563 (2/7/2011)

Appellant was convicted of child molestation occurring on and between May 1, 2007 and March 10, 2008, "the State being unable to narrow the range of dates or charge a specific date as the crime occurred during the period of time charged and the victim is a young child unable to state a specific date..." The indictment was filed on June 12, 2008. During a jury trial, appellant moved for a directed verdict, arguing that the State failed to prove that the crimes occurred during the period of time set forth in the indictment. The trial court ruled that the dates alleged in the indictment were not essential averments, and subsequently instructed the jury that any of the charged offenses could be proven as of any time within the applicable seven-year statute of limitations. Appellant argued that as a result of the trial court's ruling that the alleged dates were not essential averments, the indictment permitted prosecution for offenses occurring prior to his thirteenth birthday on August 4, 2005, and that the State failed to prove that the crimes did not occur before that date. Thus, he argued, the time period for which he was convicted included a period in which, because of his age, he could not be found criminally responsible. The Court disagreed.

OCGA § 16-3-1 provides that "[a] person shall not be considered or found guilty of a crime unless he has attained the age of 13 years at the time of the act, omission, or negligence constituting the crime." But, there is no authority that OCGA § 16-3-1 provides immunity from criminal prosecution. Rather, that statute simply raises a defense for children under 13 because of the social desirability of protecting those no more than 12 years of age from the consequences of criminal guilt. In other words, OCGA § 16-3-1 sets forth an affirmative defense, because such a defense admits the doing of the act charged, but seeks to justify, excuse, or mitigate it. With respect to any affirmative defense, unless the state's evidence raises the issue invoking the alleged defense, the defendant must present evidence thereon to raise the issue. But here, neither appellant nor the State raised the issue of appellant's age at the time of the crimes. Therefore, since neither an allegation nor proof of appellant's age was necessary to show his capacity for committing the crimes charged, the convictions were affirmed.

Prior to trial, appellant filed a motion to transfer the case to juvenile court pursuant to OCGA § 15-11-28 (b) (2) (B) which provides “[a]fter indictment, the superior court may after investigation and for extraordinary cause transfer any case involving a child 13 to 17 years of age alleged to have committed any offense enumerated in subparagraph (A) of this paragraph which is not punishable by loss of life, imprisonment for life without possibility of parole, or confinement for life in a penal institution.”

Although aggravated child molestation is an offense enumerated in subparagraph (A), the applicable sentencing statute was amended, effective July 1, 2006, so as to provide for mandatory punishment “by imprisonment for life or by a split sentence that is a term of imprisonment for not less than 25 years and not exceeding life imprisonment, followed by probation for life . . .” OCGA § 16-6-4 (d) (1). On this basis, the trial court denied the motion to transfer, finding that OCGA § 15-11-28 (b) (2) (B) was inapplicable. Appellant argued that because of the seven-year statute of limitations and the trial court’s rulings and instructions, the offense of aggravated child molestation could have occurred prior to July 1, 2006, when aggravated child molestation clearly was a transferable offense under OCGA § 15-11-28 (b) (2) (B). The Court held that because the indictment alleged and the evidence at trial authorized a finding that appellant committed aggravated child molestation on some date after July 1, 2006, the trial court could not be divested of jurisdiction pursuant to OCGA § 15-11-28 (b) (2) (B). Therefore, the trial court correctly denied the motion to transfer the case to juvenile court.

Appellant also argued that the sentence provided in the amendment to OCGA § 16-6-4 (d) (1) constitutes cruel and unusual punishment as applied to him because he was a juvenile. As a result of OCGA § 17-10-6.1 (b), that sentence was 25 years, “followed by life on probation, with no possibility of probation or parole for the minimum prison time of 25 years.” Citing the recent U. S. Supreme Court decision in *Graham v. Florida*, ___ U. S. ___, 130 SC 2011, 176 LE2d 825 (2010), the Court noted that nothing in the decision affects the imposition of a sentence to a juvenile to a term of years without the possibility of parole. Thus, *Graham* did not prohibit the sentence imposed on appellant and thus, the Court was

required to determine if the sentence was so harsh that it shocks the conscience. The Court found that based on appellant’s conduct, it did not. Therefore, his sentence did not violate the Eighth Amendment.

Prior Consistent Statements; Jurors

Moon v. State, S10A1668; S10A1671; S10A1672 (2/7/2011)

Appellants, Moon and Martin, were convicted of felony murder and attempted armed robbery. They contended that the trial court erred by allowing the prosecution to elicit testimony from an investigator regarding a prior consistent statement made by Herbert Brown, Martin’s cellmate, during a pre-trial interview. They argued that the investigator’s testimony improperly bolstered the credibility of Brown’s statements. A witness’s veracity is placed in issue so as to permit the introduction of a prior consistent statement only if affirmative charges of recent fabrication, improper influence, or improper motive are raised during cross-examination. At trial, defense counsel questioned Brown about the federal drug charges pending against him and whether he would receive a lesser sentence as part of a plea deal if he cooperated with the government by testifying against Martin and Moon. “This is a classic example of an implication of improper motive for testifying.” However, to be admissible to refute the allegation of improper motive, the prior statement must predate the alleged fabrication, influence, or motive. Brown made his prior consistent statement to the investigator in an interview only one week before trial, which was after Brown signed the plea deal. Since the prior statement did not predate the improper motive, the statement constituted hearsay and the trial court erred in permitting the investigator to testify about it. However, when the hearsay is a witness’s prior consistent statement, the erroneous admission of the witness’s hearsay statement is reversible error if it appears likely that the hearsay contributed to the guilty verdict. Here, the Court concluded, the error in admitting the prior statement was harmless.

Appellants also contended that the trial court erred in removing a juror after deliberations had begun. Specifically, that this juror was removed because she was the only holdout to convict. OCGA § 15-12-172 provides that

the trial court may remove a juror “at any time, whether before or after final submission of the case to the jury. . . [if] good cause [is] shown to the court [that the juror is] unable to perform his duty, or. . . for other legal cause. . .” The record showed that after deliberations had begun, the trial court was alerted to the fact that the juror was possibly more acquainted with appellants or their families than she admitted during voir dire. The trial court also received a note from another juror stating that the removed juror repeatedly made statements during deliberation about knowing appellants and many witnesses. The trial court then decided to hold an inquiry of all the jurors in order to determine if the juror had been truthful in her voir dire responses. The trial court learned that the juror knew more of the prosecution’s witnesses than she conveyed during voir dire and that the juror had made extra-judicial comments, such as referring to one of the witnesses as a drug dealer, although no evidence of this claim was presented. Additionally, the trial court learned that the juror had mentioned how difficult it would be to go back to their neighborhood after finding the defendant guilty. The Court found that the juror was not removed for refusing to deliberate but because of concerns over her truthfulness and impartiality as well as her extra-judicial comments. Since the trial court had ample factual and legal support for its decision to remove the juror, it did not abuse its discretion in doing so.

Appellants also argued that the trial court erred by not declaring a mistrial after jurors divulged the removed juror’s vote. The record showed that although the trial court was very careful in trying not to elicit the vote of any juror during its inquiry, two jurors inadvertently revealed that the removed juror was not willing to enter a guilty verdict. The Court found that when the trial court does not seek to obtain information as to the jury’s votes, a juror’s volunteering the information not sought does not require reversal.

Search & Seizure

Reggler v. State, A10A2067 (2/4/2011)

Appellant was convicted of burglary. He contended that the trial court erred in denying his motion to suppress. The evidence showed that a female officer, acting alone, responded to a burglary alarm at a townhouse. She found

appellant walking around the building from the back. When she asked what he was doing there, he replied that he lived in the building and had put his dog inside through his back door. The officer asked why he let his dog in the back door but was walking around to the front, and he responded that he lived there and that was his right. The officer checked his identification, confirmed that he lived in the townhouse next door to the one with the alarm, and asked him to wait in front while she looked at the back of the building. She saw that appellant's backyard was fenced in but the backyard of the townhouse with the alarm was not, and the screen in a window adjacent to the back door was bent and broken. Seeing that the window was open, the officer returned to appellant and said she was going to detain him because his actions were suspicious. She placed appellant in handcuffs, patted him down for weapons, and placed him in the back of her police car until backup arrived. When other officers arrived, further evidence was developed that lead to probable cause for his arrest.

Appellant contended that evidence found in his pockets and his statements were inadmissible because he was arrested at the point in time when he was handcuffed and placed in the squad car. The Court disagreed. The Court found that the officer's actions were permissible as part of a second tier *Terry* stop. Here, the officer was alone in the dark with the suspect whose actions were suspicious at best, and the location being investigated was close by. Thus, the officer's actions were reasonable under the circumstances because an "officer remains particularly vulnerable during such a stop precisely because a full custodial arrest has not been effected, [and] the officer must make quick decisions as to how to protect himself and others from possible danger."

Closing Arguments; Mistrial

Dix v. State, A10A2322 (2/1/2011)

Appellant was convicted of possession of cocaine, possession of marijuana (less than an ounce) and other offenses. He contended that the trial court erred in denying his motion for a mistrial during the State's closing arguments. The evidence showed that after appellant's vehicle was stopped, he attempted to flee into the woods, leaving his pre-teen child behind by the car. The record showed that the prosecutor, after reminding the jurors that, when

appellant fled the scene, his obviously upset child was screaming for him, the prosecutor said: "Does that make the defendant stop? Oh, [the child is] so upset. No. He keeps running into the woods. Suspended license? No. Little misdemeanor marijuana?" Defense counsel objected and the court gave a curative instruction. Shortly thereafter, however, the prosecutor asked the jury to "[r]ender a verdict that speaks the truth in this case. Not that he's just guilty of suspended license. Not that he's just guilty of obstruction. Not that he's just guilty of possession misdemeanor." Thereupon, defense counsel again objected and moved for a mistrial, which was denied. However, the court instructed the jurors, "Again, ladies and gentlemen, that is highly improper to say anything about what the punishment would be and what kind of case it is in relationship to a misdemeanor or felony." The Court found that because the trial court gave prompt and correct curative instructions each time and because it must be presumed that the jury followed the court's instructions, the trial court did not abuse its discretion in denying the motion for a mistrial.

Void Sentences

Jones v. State, A10A1800 (2/4/2011)

In 2006, appellant entered a negotiated plea of guilty to voluntary manslaughter and possession of a firearm during the commission of a crime. The possession count charged that appellant "did unlawfully have a firearm within arm[s] reach of his person, during the commission of a felony, to wit: Murder." In 2010, the trial court denied his motion to withdraw his guilty plea because it was out-of-term. Appellant appealed, arguing that the trial court had jurisdiction because his sentence was void.

The Court stated that since a void sentence is the same as no sentence at all, a defendant stands in the position of having pled guilty and not having been sentenced, and so may withdraw his guilty plea as of right before re-sentencing, even following the expiration of the term of court in which the void sentence was pronounced. Thus, if appellant's sentence was void, his motion was timely and he had a right to withdraw his guilty plea. A sentence is void if the court imposes punishment that the law does not allow. A judgment of conviction and a sentence imposed on that conviction

are void if the offense is included as a matter of law or fact in another crime for which the defendant was convicted and sentenced. But here, the possession of a firearm during the commission of a felony does not merge into a conviction for voluntary manslaughter. Since the sentences imposed by the trial court are punishment the law allows, the sentences were not void. In so holding, the Court stated that *Prather v. State*, 259 Ga. App. 441 (1) (2003) did not mandate a different result because appellant's sentence for possession was based on a negotiated plea of guilty to the lesser included offense of voluntary manslaughter. He also plead guilty to the possession charge. Since he was fully apprised that the voluntary manslaughter charge he was pleading to was a felony, and that his possession of a firearm conviction was based on the voluntary manslaughter plea, his sentence was not void and the trial court did not err in denying his motion to withdraw his plea of guilty.

Kidnapping; Garza

Williams v. State, A10A2025 (2/1/2011)

Appellant was convicted of kidnapping, aggravated assault, and VGCSA. He contended that the evidence was insufficient to support his conviction for kidnapping under *Garza*. Appellant contended that the movement of the victim from a hotel bedroom to the bathroom was incidental to the aggravated assault and did not increase the danger to the victim. The Court disagreed. It found that the movement of the victim from one room to another within the hotel room, even though of minimal duration, created an additional danger to her by enhancing appellant's control over her. Additionally, it was not an inherent part of the aggravated assault because the aggravated assault was completed when appellant pointed a gun at the victim and grabbed her around the neck prior to dragging her into the bathroom. Since the asportation occurred after the aggravated assault, the evidence was sufficient.

Appellant also contended that the trial court erred in its instruction to the jury regarding asportation. The Court found that the trial court did in fact err by giving an instruction that told the jury that only slight movement constitutes asportation. However, the standard for weighing nonconstitutional error in criminal cases is known as the "highly probable test," i.e., whether it was "highly probable that the er-

ror did not contribute to the judgment.” Under this test, a reversal is not required if the evidence of guilt was overwhelming in that there was no reasonable probability that the verdict of the jury would have been different in the absence of this error. The Court concluded that it was highly probable that the charge that “slightest movement” sufficiently established asportation did not contribute to the judgment.

Motive; Character Evidence

Grant v. State, A10A2217 (2/1/2011)

Appellant was convicted of burglary of a jewelry store. The evidence showed that after he was arrested for the burglary, he gave a statement to an investigator that that his vehicle ran out of gas, so he began walking down the street where the victim’s store was located. He said that he saw two black juveniles, whom he could not describe, exit the store. According to appellant, he pulled back the damaged glass on the front door, cutting his hand, and “placed one foot inside the store and looked around to see if the boys were inside the store.” Appellant also stated, however, that he fled as soon as he saw a police car. He further stated that he picked up 25 to 30 rings as he was walking down the street, traded two of them “for a dime bag of crack rock,” gave his daughter “7 to 12 pieces of jewelry,” and then sold the rest for crack cocaine. He contended that the trial court erred in denying his motion in limine to redact references to his drug transactions from his statement to the police. Specifically, he contended that the references were irrelevant to the burglary charge and impermissibly placed his character in evidence. However, the Court found, the State was entitled to present evidence to establish that there was a motive, and evidence that the defendant used drugs was relevant to prove that he had a motive for committing the crime and was not rendered inadmissible by the fact that it incidentally put his character in issue. Here, the jury was entitled to infer from appellant’s statement that one motive for the burglary was to obtain jewelry to sell or exchange for crack cocaine.

DUI; Jury Charges

Miller v. State, A10A2269 (2/2/2011)

Appellant was convicted of DUI, and other traffic offenses. He argued that the trial

court erred in failing to give the following jury charge that he requested: “While a witness may give an opinion as to whether a person was under the influence of alcohol to the extent that it was less safe for him to drive, that opinion, if supported by sufficient evidentiary foundation, does not establish any fact as a matter of law and you the jury are not bound by that opinion.” Specifically, he argued that because his sole defense at trial to the DUI charges was to challenge the opinion testimony of the arresting officer, the trial court was required to give the requested charge. The Court disagreed. A trial court is not required to instruct the jury in the exact language of a requested charge, and when the principle of law is covered in another charge, that is sufficient. Here, the principles contained in the requested charge were substantially covered by the trial court’s standard jury charge on the credibility and believability of witnesses, which included the instruction that “[i]t is for you to determine what witness you will believe and which you will not believe,” and by the court’s charge that “the jury makes decisions as to all matters of fact.” Therefore, the trial court did not err in declining to give the specific charge requested.

Stalking; Merger

Louisyr v. State, A10A2309 (2/4/2011)

Appellant was convicted of two counts of aggravated stalking. Citing *State v. Burke*, 287 Ga. 377 (2010), appellant contended that the evidence was insufficient to support his conviction. In *Burke*, the Court held that “a single violation of a protective order, by itself, does not amount to aggravated stalking.” Appellant contended that *Burke* not only requires a pattern of harassing and intimidating conduct, but a pattern of violating a protective order. In other words, proof of a pattern of harassing and intimidating behavior that includes some act in violation of a protective order is not enough. Instead, he argued, the State must prove multiple violations of a protective order. The Court disagreed.

OCCA § 16-5-91 prohibits even a single violation of a protective order, if that violation is, as *Burke* explained, part of a pattern of harassing and intimidating behavior. Although *Burke* requires a pattern of behavior, multiple violations of a protective order are not required. In determining whether a defendant

has exhibited such a pattern of behavior, the jury can consider a number of factors, including the prior history between the parties, the defendant’s surreptitious conduct, as well as his overtly confrontational acts, and any attempts by the defendant to contact, communicate with, or control the victim indirectly, as through third parties.

Here, the jury was entitled to find from the evidence that appellant arranged for his cousin to contact the victim (because appellant knew he was prohibited from doing so by the protective order), that together the men planned for the cousin to lure the victim to Georgia with a false offer of assistance, and that the men agreed the cousin would travel to Florida and retrieve the victim and her children from a domestic violence shelter for the purpose of driving them to a particular hotel in Georgia. The jury was also entitled to find that, unbeknownst to the victim, appellant reserved the hotel room in his name, thereby guaranteeing him access to that room, that appellant went to the hotel with the knowledge that the victim was there, and that he obtained a key to the room where the victim was staying. Finally, the jury was entitled to find that when the people in the room refused to answer the door, appellant used his key and attempted to enter the room, and when he was thwarted by the safety chain, he attempted to force his way into the hotel room. The evidence, therefore, was sufficient to prove beyond a reasonable doubt that appellant engaged in a pattern of harassing and intimidating behavior, which culminated in a violation of a protective order.

Appellant argued that the trial court should have merged his convictions for purposes of sentencing because the two convictions were based on precisely the same conduct, his going to the victim’s hotel room. The Court stated under OCCA § 16-5-91 (a), the aggravated stalking statute prohibits a person from following the victim, placing the victim under surveillance, or contacting the victim in violation of a protective order. The State alleged, and the jury found, that appellant violated the statute in two ways, both by following the victim to the hotel and, once there, by making contact with her. The Court found that the act of following was complete at the time appellant arrived at the premises of the hotel, went to the front desk, and asked for the key to the victim’s hotel room. At that time, appellant

had violated the protective order by coming within 500 feet of a place where the victim was residing. Because the act of following was completed before appellant attempted to make contact with the victim, the convictions for aggravated stalking based on appellant's following and his contacting the victim, did not merge for sentencing purposes.

Juveniles; Hearsay

In the Interest of J. C., A10A2124 (2/4/2011)

Appellant was adjudicated a delinquent for shoplifting. Citing *In the Interest of C. G.*, 261 Ga. App. 814 (1) (2003), appellant contended that the security guard's testimony was inadmissible hearsay because it was "based on a video that was not introduced into evidence at the adjudicatory hearing." In *C.G.*, the Court found a police officer's testimony identifying the juvenile to be inadmissible hearsay because the officer did not actually see the offense, but only reviewed a videotape of the incident, which was not placed in evidence. Here, however, the guard did not testify based on his review of a recording that showed appellant shoplifting; he testified based on his observation, via closed-circuit television, of the event as it happened. A witness's testimony about an event he saw unfold live is original evidence, not inadmissible hearsay. Therefore, the guard's testimony was not based on hearsay and was admissible.

Appellant also argued that under OCGA § 15-11-21 (e), the juvenile court failed to conduct a de novo hearing from the findings of the associate juvenile court judge who held him to be delinquent. The order of the judge stated as follows: "The undersigned has reviewed the matter in accordance with Rule 19-2 of the Uniform Rules for the Juvenile Courts of Georgia by reviewing the pleadings and the electronic recordings of the original proceeding. Upon review and consideration of the same, IT IS HEREBY ORDERED that the Motion for Rehearing be DENIED." The Court found that while the language of this order may suggest that the judge conducted a de novo review, the judge plainly erred in "denying" appellant's motion for rehearing. The Court determined that the only way to determine if the juvenile court did in fact conduct a de novo review was to remand the case for further proceedings to ensure that appellant's statutory rights were not violated.

Similar Transactions

Hickson v. State, A10A2051 (2/2/2011)

Appellant was convicted of voluntary manslaughter and other related offenses. The evidence showed that he argued with the victim in a parking lot and then pulled out a gun and shot him. Appellant contended at trial that he acted in self defense.

Appellant argued that the trial court erred in admitting as similar transaction evidence that he pointed a handgun at the brother of his former girlfriend during a verbal altercation; he pulled out a handgun and struck his former girlfriend in the head with it during a quarrel; and he again pulled out a handgun while arguing with his former girlfriend. Appellant contended that the three prior incidents were too dissimilar to the crimes charged such that proof of the former did not tend to prove the latter. The Court held that the three incidents all involved circumstances in which appellant pulled out a handgun during a verbal altercation, thereby demonstrating his "propensity to settle disagreements with a gun, to act violently and impulsively to disappointment or misunderstanding, and to resort to the use of a gun with little provocation." With respect to the current charges, the other handgun incidents helped prove appellant's bent of mind and course of conduct, since the incident here likewise involved appellant pulling out a handgun and drastically escalating what was a mere verbal altercation with little or no provocation for doing so. The trial court, therefore, did not abuse its discretion in admitting the similar transaction evidence.