

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 22, 2013

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THIS WEEK:

- **Child Hearsay; Right of Confrontation**
- **Commenting on Right to Remain Silent; Competency**
- **Jury Charges; Closing Arguments**
- **Jury Panels**
- **Paraprofessionals; O.C.G.A. § 16-6-5.1(b)(1)**
- **Mistrial; Double Jeopardy**
- **Reopening Evidence**
- **Sentencing; Merger**
- **Statute Of Limitations; Elder Abuse**
- **Motions For New Trial; Brady**
- **Indictments; Special Demurrers**

Child Hearsay; Right of Confrontation

Estrada v. State, A12A2475 (2/14/03)

Appellant was convicted of aggravated child molestation, aggravated sodomy and cruelty to children in the first degree. He contended that the trial court erred in allowing hearsay statements of the 6 year old victim to be admitted because the statements lacked sufficient indicia of reliability. The Court disagreed. When determining whether an out-of-court statement has sufficient indicia of reliability, a court may consider the following factors, without limitation: (1) the atmosphere and circumstances under which the statement was made (including the time, the place, and the people present thereat); (2) the spontaneity of the child's statement to the persons present; (3) the child's age; (4) the child's general demeanor; (5) the child's condition (physical

or emotional); (6) the presence or absence of threats or promise of benefits; (7) the presence or absence of drugs or alcohol; (8) the child's general credibility; (9) the presence or absence of any coaching by parents or other third parties before or at the time of the child's statement, and the type of coaching and circumstances surrounding the same; and the nature of the child's statement and type of language used therein; and (10) the consistency between repeated out-of-court statements by the child. These factors, however, are not to be mechanically applied but considered in a manner best calculated to facilitate the determination of the required degree of trustworthiness. Moreover, even if all factors do not indicate reliability, the trial court does not necessarily abuse its discretion in admitting the statement.

Here, the court held a pre-trial hearing and the court's determination that the statements provided sufficient indicia of reliability was not an abuse of discretion. Moreover, the victim testified and was subjected to cross-examination, thereby providing appellant with an additional safeguard to a fair trial.

Appellant also contended that the trial court erred by admitting the testimony from a forensic expert that the swab samples taken from the victim contained male DNA. Citing *Bullcoming v. New Mexico*, ___ U. S. ___, 131 SC 2705, 180 L.E.2d 610 (2011), appellant argued that the analyst's testimony violated his Sixth Amendment right to confrontation because the witness at trial was not the same person who performed the testing on the sample. The Court stated that *Bullcoming* disallowed surrogate testimony by a scientist who did not sign a lab certification or perform or observe the testing. Here, by contrast, the witness was a supervisor personally familiar with the techniques performed, and he testified that the sample was assigned to an analyst personally supervised by the witness. The analyst, who was still employed

at the lab but unable to testify due to a scheduling conflict, had documented each step of the process, which was reviewed by the supervisor to determine if all the procedures were performed correctly and whether the supervisor agreed with the outcome of the analysis. Based on this review, the supervisor testified (and was subject to cross-examination) as to his opinion of the data and results. Under these facts, the Court held, reversal was not required.

Commenting on Right to Remain Silent; Competency *Moore v. State, A12A1811; A12A2236 (2/15/13)*

Appellants, Moore and Phillips, husband and wife, were convicted of cruelty to children. The evidence showed that the 6 year old victim ran to a neighbor's house and told the neighbor that appellants were going to kill her because she "peed the bed." Subsequently, it was determined that appellants beat the victim with a belt, a hanger and leashes.

Moore contended that the trial court erred in denying his motion for a mistrial made on the ground that a State's witness improperly commented on his right to remain silent. The officer who first arrived at the neighbor's home testified to the course of events after he arrived on the scene. He explained that when he went to the victim's home to speak with her mother and Moore, "[a detective] . . . went inside the townhome to speak with [Moore]. And as I recall, he didn't - he didn't want to answer any questions." Trial counsel objected, and out of the presence of the jury moved for a mistrial arguing that the officer improperly commented on Moore's right to remain silent. Defense counsel argued further that a curative instruction would only "re-ring the bell, creat[ing] an even larger problem in this situation." The trial court denied the motion for mistrial finding that the officer's statement was unintentional. Prior to the return of the jury, the trial court instructed the officer to refrain from making any statements concerning Moore's right to remain silent. When the jury returned, the trial court instructed it to "disregard the last statement of the police officer."

The Court noted that testimony commenting upon the silence of the accused is, generally speaking, far more prejudicial than probative. But the improper admission of prejudicial testimony does not always require a mistrial. Testimony about the defendant re-

maining silent is not deemed to be prejudicial if it is made during a narrative on the part of the authorities of a course of events and apparently was not intended to, nor did it have the effect of, being probative on the guilt or innocence of the defendant. Indeed, to warrant a reversal of a defendant's conviction, the evidence of the election to remain silent must point directly at the substance of the defendant's defense or otherwise substantially prejudice the defendant in the eyes of the jury. The Court found this was exactly the circumstance presented here. The officer's statements were made during a narrative of the course of events and did not strike at or point directly at the substance of defendant's defense. Moreover, the trial court instructed the jury to disregard the comments. Under these circumstances, the trial court did not abuse its discretion in denying the motion for mistrial.

Phillips contended that the trial court erred in failing to inquire as to the competency of the victim. She argues that because the victim was under the age of 14, the court should have sua sponte made a determination as to her competency to ensure that she sufficiently understood the nature of the oath. O.C.G.A. § 24-9-5, which was effective at the time of trial, provided: "(a) Except as provided in subsection (b) of this Code section, persons who do not have the use of reason, such as idiots, lunatics during lunacy, and children who do not understand the nature of an oath, shall be incompetent witnesses. (b) Notwithstanding the provisions of subsection (a) of this Code section, in all cases involving deprivation as defined by Code Section 15-11-2, or in criminal cases involving child molestation, and *in all other criminal cases in which a child was a victim* of or a witness to any crime, any such child shall be competent to testify, and his credibility shall be determined as provided in Article 4 of this chapter." (Emphasis supplied.) Therefore, the Court found, because the child was a victim of a crime, she was excepted from a competency challenge based upon a claim that she does not sufficiently understand the nature of the oath.

Jury Charges; Closing Arguments

Wright v. State, A12A2146 (2/18/13)

Appellant was convicted of armed robbery, aggravated assault and other offenses. The record showed that at trial the victim and

one of appellant's cousins testified that appellant walked up to the victim, and by use of a handgun, robbed the victim of his cellphone and keys to his SUV. Another cousin, who was also with appellant at the time, did not see a weapon. Appellant had his mother, his aunt, and another witness provide an alibi for him.

Appellant contended that the trial court erred in not charging the jury on the lesser included offense of robbery. The Court stated that the "complete rule" regarding giving a defendant's requested charge on a lesser included offense is: Where the State's evidence establishes all of the elements of an offense and there is no evidence raising the lesser offense, there is no error in failing to give a charge on the lesser offense. Where a case contains some evidence, no matter how slight, which shows that the defendant committed a lesser offense, then the court should charge the jury on that offense. Appellant contended that the testimony of the cousin that did not see a weapon, the written statements given to the police by the two cousins, and the alibi witnesses, provided the evidence necessary to support the giving of the lesser included charge. The Court disagreed.

First, the cousin's "spotty account" testimony that she did not see a gun did not contradict the other cousin or the victim that appellant used a gun. Instead, there was no evidence from which the jury could believe that the victim was persuaded to part with his property other than by gunpoint. Second, the written statements of the two cousins to the police were not entered into evidence, so the only evidence in the record showed the completion of the greater offense of armed robbery. Finally, as to the alibi witnesses, that evidence, if believed, would have authorized the jury to conclude that appellant did not commit the charged offense of armed robbery; it did not authorize the jury to conclude that appellant committed the lesser included offense of robbery. Accordingly, the trial court did not err in failing to give the lesser included charge.

Appellant also contended that the prosecutor made improper closing arguments. The record showed that the prosecutor made in improper "future dangerousness" argument ("the next time he does this, he might shoot somebody"), to which defense counsel objected. Appellant argued that the trial court's response "fell short of satisfying O.C.G.A. § 17-8-75." The Court, however, found that the trial court cautioned the prosecutor, and given

the jury charges and strength of the State's case, it was highly probable that any error in failing to comply with O.C.G.A. § 17-8-75 based upon the single comment did not contribute to the verdicts.

Appellant also alleged ineffective assistance of counsel in failing to object to another part of the State's closing. After citing the testimony of appellant's cousin that appellant was the gunman who took the victim's property, the prosecutor reminded the jury that the girl had become upset while on the witness stand testifying against her cousin. The prosecutor added, "She took the hard road. Don't let that be for nothing. What do you think she will think about doing the right thing in the future if you tell her you don't believe her? Do you think she will think it is worth doing the right thing again if you tell her, no, you are a liar? If you came up here, you were brave enough to come up here and tell the truth against your family, but, no, sorry. How do you think that would affect her for the rest of her life? It's just not right."

The Court found that the wide range of discussion permitted in closing argument has its limitations, the first and foremost of which is the longstanding prohibition against the injection into the argument of extrinsic and prejudicial matters which have no basis in the evidence. This segment of the State's closing argument fell outside the wide permissible range. However, the Court stated, even assuming that defense counsel's decision not to object was not reasonable trial strategy, but deficient performance, that would not end the inquiry because deficient performance, alone, does not amount to ineffective counsel. Here, given the strength of the State's evidence, there was no reasonable probability that the outcome of appellant's trial would have been different had his trial counsel objected to the remarks.

Jury Panels

King v. State, A12A2110 (2/14/13)

Appellant was convicted of aggravated sodomy. He argued that the trial court abused its discretion by not striking the entire jury panel after a prospective juror's response to questioning during voir dire. The record showed that during voir dire, the panel was advised that the case involved an allegation of aggravated sodomy on a child. A prospective juror indicated that he had heard people talking

about the case and indicated that he was "not sure" whether he could set aside his knowledge about the case and deliberate based solely on the evidence. The juror stated: "I understand that a person is innocent until proven guilty but some of the stuff that I've heard, I don't know that I can put it aside. The juror also said that it was "very possibl[e]" that he had been influenced by what he had heard, but that he could follow the trial court's instructions. The trial court then excused the juror from the case, and voir dire continued. Defense counsel then made a motion to strike the entire panel on the ground that the juror intimated that appellant was guilty and that his comments infected the entire panel. The trial court disagreed, but offered to give a curative instruction which defense counsel declined.

The Court stated that the inquiry is whether the prospective juror's remarks were inherently prejudicial and deprived the appellant of his right to begin his trial with a jury free from even a suspicion of prejudice or fixed opinion. If so, failure to excuse the entire panel constitutes an abuse of the trial court's discretion. Of course, where the facts establish only "gossamer possibilities of prejudice," prejudice is not inherent. Here, as the trial court found, the juror's comments did not necessarily imply guilt of the offense, nor link appellant to other criminal violations, which were complete and separate from the offense for which he was being tried. Taken together with trial counsel's failure to accept the trial court's offer to give curative instructions, the Court found no abuse of discretion in refusing to disqualify the entire panel on the basis of the juror's comments.

Paraprofessionals; O.C.G.A. § 16-6-5.1(b)(1)

Hart v. State, A12A1864 (2/19/13)

Appellant appealed from the denial of his motion to quash his indictment charging him with sexual assault against a person in custody pursuant to O.C.G.A. § 16-6-5.1(b)(1). Specifically, appellant contended that the statute did not apply to him because he was a paraprofessional and thus not a "teacher" within the meaning of the statute. The Court disagreed.

O.C.G.A. § 16-6-5.1(b)(1) provides in relevant part that "[a] person who has supervisory or disciplinary authority over another individual commits sexual assault when that person . . . [i]s a teacher, principal, assistant

principal, or other administrator of any school and engages in sexual contact with such other individual who the actor knew or should have known is enrolled at the same school. . . ." The indictment alleged that appellant engaged in sexual contact with a person he knew was a student at the high school where he was employed as "a paraprofessional . . . who taught in the special needs class and who was an assistant coach with the high school track team, the same being a teacher with supervisory and disciplinary authority." The Court stated in construing statutes, courts must look diligently for the intention of the General Assembly. In so doing, the ordinary signification must be applied to all words. Where the language of a statute is plain and susceptible to only one natural and reasonable construction, courts must construe the statute accordingly. Here, the Court found, the ordinary, logical, and common meaning of the term "teacher" would include a paraprofessional who taught in a high school classroom. In fact, the Court noted, by holding otherwise, it would contravene the legislature's intention to criminalize sexual activity between a school administrator or a school employee who teaches and a student at the school. Moreover, although courts must generally refrain from expanding the scope of penal statutes by implication, holding that the indictment in this case sufficiently alleged that appellant was a teacher is not a judicial expansion of the term "teacher" beyond its ordinary, logical, and common meaning.

Mistrial; Double Jeopardy

Smith v. State, S13A0124 (2/18/13)

Appellant was indicted for felony murder (predicated on the underlying felony of either aggravated assault or aggravated battery), aggravated assault and aggravated battery. The jury found appellant guilty of aggravated assault and aggravated battery, but was unable to reach a verdict on the felony murder charge. The trial court granted a mistrial as to the felony murder charge. The State announced its intent to retry appellant on the felony murder count and appellant filed a plea in bar on double jeopardy grounds. The trial court denied appellant's plea in bar.

Appellant contended that the trial court erred in denying his plea in bar. The Court disagreed. Citing *Rower v. State*, 267 Ga. 46 (1996), the Court held that where, as here, the

State seeks to prosecute a defendant for two offenses in a single prosecution, one of which is included in the other, and the defendant receives a mistrial on the greater offense, the remaining conviction of the lesser offense does not bar retrial of the greater offense. Moreover, contrary to appellant's assertions, the Court found that its decision was not in conflict with *United States v. Dixon*, 509 U. S. 688 (1993), *Grady v. Corbin*, 495 U. S. 508 (1990), *Brown v. Ohio*, 432 U. S. 161 (1977), or *Price v. Georgia*, 398 U. S. 323 (1970) because these cases did not speak to the situation presented here, i.e., a prosecution following the declaration of a mistrial resulting from a hung jury.

Reopening Evidence

Young v. State, S12A1695 (2/18/03)

Appellant was convicted of murder and possession of a firearm during the commission of a crime. He contended that the trial court abused its discretion when it allowed the State to reopen the evidence after his lawyer had begun his closing argument. The record showed that during his closing argument, defense counsel pointed out that, although a jailhouse informant testified that appellant admitted using a Glock .40-caliber gun to shoot the victim, the State "could" have known from ballistics testing whether the victim was shot with a Glock. The State objected, arguing that appellant previously had stipulated that the ballistics report concluded that the victim was killed with bullets fired by a Hi-Point .40-caliber pistol and that the State, therefore, had no reason to present evidence about whether ballistics testing had ruled out the possibility that the victim was killed with a Glock. The trial court ruled that the State could reopen the evidence so that its ballistics expert could testify about his findings.

Whether to reopen the evidence is a matter that rests within the sound discretion of the trial court. The Court noted that although appellant cast his lawyer's statement during closing argument as a challenge to the credibility of the jailhouse informant - not a challenge to the thoroughness or accuracy of the State's ballistics testing - the trial judge also understood appellant to be attacking the State's failure to conduct adequate ballistics testing, which was not an unreasonable understanding of the closing argument. Here, appellant had stipulated that the weapon used to shoot the victim

was a .40-caliber Hi-Point pistol, so the trial court did not abuse its discretion in allowing the State to reopen the evidence after defense counsel said that the State "could" have shown through ballistics testing whether the weapon used in the crime was consistent with a different weapon mentioned by the jailhouse informant. Moreover, the Court found, appellant failed to show that he was harmed by the reopening of the evidence. The ballistics expert's testimony confirmed that the bullets found at the crime scene were consistent with having been fired by a Hi-Point .40-caliber pistol - just as provided in the stipulation - not a Glock. So, to the extent that appellant's closing argument was an attempt to discredit testimony that the weapon used was a Glock, the testimony of the ballistics expert did just that.

Sentencing; Merger

Thomas v. State, S12A1548 (2/18/13)

Appellant was convicted of multiple counts of felony murder, aggravated assault with a deadly weapon, and aggravated assault with intent to rob against three victims. Appellant contended his conviction for aggravated assault with intent to rob Victim 1 should have been merged for sentencing into his conviction for the felony murder of Victim 1 for which the crime of aggravated assault with a deadly weapon served as the underlying felony. The Court disagreed.

To determine if one crime is included in, and therefore merges with another, courts apply the "required evidence" test set forth in *Drinkard v. Walker*, 281 Ga. 211 (2006). Under this test, courts must examine whether each offense requires proof of a fact which the other does not. Here, the aggravated assault with intent to rob charge required the State to prove that appellant had the intent to rob (O.C.G.A. § 16-5-21(a)(1)), which the State did not need to prove for the felony murder conviction based on aggravated assault with a deadly weapon (O.C.G.A. § 16-5-1(c); O.C.G.A. § 16-5-21(a)(2)). Also, the felony murder count required the State to prove that appellant caused the death of the victim, (O.C.G.A. § 16-5-1(c)), and that he used a deadly weapon (O.C.G.A. § 16-5-21(a)(2)), neither of which the State had to prove for the conviction of aggravated assault with intent to rob (O.C.G.A. § 16-5-21(a)(1)). Accordingly, the Court found, the trial court

did not err in sentencing appellant on both of these convictions.

Appellant further argued that the trial court erred in sentencing him on both of his convictions for the aggravated assault of Victim 2, one with a deadly weapon and the other with intent to rob, claiming again that the convictions should be merged for sentencing. However, the Court found, under the *Drinkard* test, these two crimes did not merge. Aggravated assault with intent to rob requires proof of a fact - the intent to rob - that aggravated assault with a deadly weapon does not, and aggravated assault with a deadly weapon requires proof of a fact - the use of a deadly weapon - that aggravated assault with intent to rob does not (O.C.G.A. § 16-5-21(a)(1), (2)). Accordingly, the trial court did not err in sentencing appellant on both of these aggravated assault convictions.

Finally, the Court announced, to the extent *Duncan v. State*, 290 Ga.App. 32, 33-34 (2008), applied the "actual evidence" test that the Supreme Court rejected in *Drinkard* to hold that one of these aggravated assault crimes merges into the other, that case is disapproved. And to the extent that the Court of Appeals relied on the "actual evidence" test before *Drinkard* to merge these two crimes, e.g., *Adcock v. State*, 279 Ga.App. 473, 475 (2006); *Maddox v. State*, 277 Ga.App. 580, 582 (2006), "those cases should no longer be relied on."

Statute Of Limitations; Elder Abuse

Harper v. State, S12A1508 (2/18/13)

Appellants were charged with RICO violations and theft. The charges for which they have been indicted relate to property of Glock, Inc., and various entities associated with it. Appellants appealed from the denial of their motions to dismiss based on the statute of limitations. The record showed that the indictment was returned on January 22, 2010. The RICO count alleged that acts of racketeering activity occurred through February 17, 2009, within five years of the return of the indictment (O.C.G.A. § 16-14-8). The counts of theft and attempted theft were alleged to have occurred on various dates between November 6, 2001, and April 11, 2003, all of which were more than four years prior to the return of the indictment (O.C.G.A. § 17-3-1(c)). The State's essential argument was that, as Mr. Glock was a victim

over the age of 65, by operation of O.C.G.A. § 17-3-2.2, the statute of limitation applicable to the theft and attempted theft charges did not begin to run until the offense was reported to law enforcement personnel, which dates were within four years of the return of the indictment.

Appellants contended that O.C.G.A. § 17-3-2.2 violates the Equal Protection clauses of both the Federal and State Constitutions by treating them differently from similarly situated defendants on an arbitrary basis, exposing them to prosecution for a longer period of time based solely on the age of the alleged victim. Under O.C.G.A. § 17-3-2.2, the statute of limitation is tolled “if the victim is a person who is 65 years of age or older, . . . until the violation is reported to or discovered by a law enforcement agency, prosecuting attorney, or other governmental agency . . .” Each count of the indictment asserted that O.C.G.A. § 17-3-2.2 applied because one of the alleged victims, Mr. Glock, was over the age of 65 at the time each alleged offence occurred. Each count also asserted that the “accused defendants and crime were unknown to the State, as contemplated by [O.C.G.A.] § 17-3-2(2) until” some date that varied between June 8, 2007 and December 2009, depending upon the count.

The Court first noted that the age of the alleged victim does not implicate a suspect class or fundamental right, and thus, rational basis review is appropriate. The Court then noted that O.C.G.A. § 17-3-2.2 was enacted as part of the Georgia Protection of Elder Persons Act of 2000 (“Act”) and, as has been recognized, “[t]he care of aged persons in our society is a matter of great public concern.” The effect of O.C.G.A. § 17-3-2.2 is to provide that criminals who prey upon the elderly may face prosecution for their crimes even though the crimes are not timely reported to law enforcement officers. Thus, because the Act is rationally related to the protection of the elderly, who may not be in a position to discover or report crimes committed against them, the statute of limitations does not violate appellants’ equal protection rights. Moreover, even though appellants argued that the simple use of an age classification, without more, was overly broad, and that the General Assembly should have included some additional requirement of impaired capacity on the part of the victim before any extension of the statute of limitations could take effect, the mere fact that the classification

could have been more narrowly drawn does not render it constitutionally infirm.

Appellants also argued that O.C.G.A. § 17-3-2.2 did not necessarily apply in this case because, as to at least some counts of the indictment, the alleged acts involved theft from a corporation or other entity, and not from Mr. Glock. The trial court found that since Mr. Glock was a shareholder in, or a beneficial owner of, the entity from which the property in each count was alleged to be taken, this fact established him to be a potential victim within the meaning of O.C.G.A. § 17-3-2.2, so that the statute could be applied. The Court, however, disagreed with this analysis. To apply the tolling provision of O.C.G.A. § 17-3-2.2, it must be shown that the victim of the crime is a person over the age of 65. The protection of such persons is the purpose of the statute. O.C.G.A. § 17-3-2.2 offers no protection to the interest of any corporation or other entity which is not “a person who is 65 years of age or older.” O.C.G.A. § 17-3-2.2. This is in keeping with the principle that, generally, corporations are separate legal entities from their shareholders. Accordingly, in order to apply the statute of limitation tolling provision found in O.C.G.A. § 17-3-2.2, it must be shown that there was a theft directly from Mr. Glock; i.e., that the property taken was his, and not that of a corporation or other entity with a separate legal identity from Mr. Glock. Mr. Glock was the only person “65 years of age or older” alleged in the indictment to be a victim. Thus, if it was shown that the property taken in any theft was, at the time of the theft, in fact the property of Glock, Inc. or any other entity not a person over the age of 65, O.C.G.A. § 17-3-2.2 cannot be applied. Accordingly, the Court reversed that part of the trial court’s order denying the motion to dismiss based on the tolling provisions of O.C.G.A. § 17-3-2.2.

Motions For New Trial; Brady *State v. James, S12A1650 (2/18/13)*

The State appealed from an order of the trial court granting co-indictees James and Lawson (defendants) new trials after both were convicted in separate trials for malice murder. The trial court based its grant of new trials on the unavailability at each defendant’s trial of a piece of evidence that was available at the trial of a 3rd co-indictee who was acquitted. The evidence at issue was the second page of a

three-page investigative summary compiled by the Office of the County Medical Examiner. The trial court called the missing page a “critical piece of evidence” and ruled that new trials were required. The trial court reasoned that, without the missing page, the defendants were denied the ability to better fix the time of death, an important factor in the trials, and were unable to stress in their closing arguments and during their cross-examination of the only eyewitness who testified, that the deaths occurred anywhere from 30 to 90 minutes prior to the discovery of the bodies. Although the trial court’s order did not cite *Brady v. Maryland*, 373 U.S. 83 (1963), the Court concluded that the trial court granted the motion on a special ground: that appellees’ lack of access to the missing page was a *Brady* violation.

To prevail on their *Brady* claim, defendants were required to show four factors: (1) the State, including any part of the prosecution team, possessed evidence favorable to the defendant; (2) the defendant did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) a reasonable probability existed that the outcome of the trial would have been different had the evidence been disclosed to the defense. The Court stated that pretermittting a discussion on whether the medical examiner was part of the prosecution team and whether a reasonable probability existed that the outcome of the trial would have been different had the defense received the missing page, is the fact that defendants did not establish that the missing page could not have been obtained with any reasonable diligence. Evidence is not regarded as “suppressed” by the government when the defendant has access to the evidence before trial by the exercise of reasonable diligence. Defendants had in their possession before trial the medical examiner’s report, the clearly-marked pagination of which put them on notice that the report was three pages long and that they had not received a complete report since they had received only two pages. The defense team for the third co-indictee, which had received the same report received by these defendants, realized that a page was missing from the report and obtained the missing page prior to the trial of the third co-indictee. That their co-indictee’s defense team recognized that a page was missing and obtained it defeats the defendants’ claim of suppression. Thus, the Court found, “the

defendants are hoisted on their own petard: without [the co-indictee] having obtained [the missing page], they would not have a *Brady* argument, but the ease with which [the co-indictee] obtained [the missing page] defeats their claims.”

Having reversed the trial court’s grant of the motions for new trial, the Court reinstated their convictions and sentences and remanded the case to the trial court for a ruling on the remaining grounds set forth in appellees’ amended motions for new trial.

Indictments; Special Demurrers

Green v. State, S12A1898 (2/18/13)

Appellant appealed from the denial of her special demurrer alleging that his indictment was void because it failed to show that the charged offenses occurred on a date prior to the grand jury’s return of the indictment. The record showed that along with two co-defendants, appellant was indicted for malice murder and other felonies in connection with events that occurred on April 16, 2011. The grand jury returned the indictment in open court on May 17, 2011, but the court clerk entered March 17, 2011 as the date of return on the indictment and in the criminal docket book. At the hearing on the special demurrer, the clerk testified that she had made a mistake in recording the indictment’s return date and changed the date from March to May after she realized her mistake. Concluding that the error was an irregularity corrected by the clerk, the trial court overruled the special demurrer.

The Court stated that the purpose of an indictment is to inform the accused of the charges against him and to protect the accused against another prosecution for the same offense. A general demurrer challenges the sufficiency of the substance of the indictment, whereas a special demurrer challenges the sufficiency of the form of the indictment. When a special demurrer points out an immaterial defect, the trial court need not dismiss the defective charge, but may strike out or correct the erroneous portion of the indictment. The Court noted that among the defects previously found immaterial in an indictment are the misnaming of a code section, the misspelling of a drug or grand juror’s name, and the omission of the defendant’s middle initial.

Citing as authority *Newham v. State*, 35 Ga.App. 391(1) (1926) and *Chelsey v. State*,

121 Ga. 340(6) (1904), the Court held that the entry of the erroneous return date on the indictment was an immaterial defect. The body of the indictment clearly alleged that the crimes were committed on April 16, 2011, and the trial court correctly found that the indictment fully informed appellant of the charges against him. The court clerk testified that she made a mistake in entering March 17, 2011 as the date that the indictment was returned and subsequently corrected the date to May 17, 2011 on the indictment and in the superior court docket book. She further testified that the grand jury did not meet on March 17 and the indictment lists the meeting date as “March Term 2011/May Meeting.” Thus, the evidence did not support appellant’s contention that the alleged offenses were committed on a date after the return of the indictment. Because the indictment charged the correct date of the alleged crimes and the court clerk corrected the clerical error in the return date, the trial court correctly overruled the special demurrer.