

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 28, 2014

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THIS WEEK:

- **Vagueness; Impersonation of a Public Employee**
- **Garza; Asportation**
- **Similar Transactions; USCR 31.1**
- **Double Jeopardy; Speedy Trial**
- **Co-conspirator Statements; Hearsay**
- **Character Evidence**
- **Severance; Antagonistic Defenses**
- **DUI; Implied Consent**
- **Jury Charges; Merger**
- **Rule of Lenity**
- **Similar Transactions; Cross Examination**
- **Character Evidence**
- **Sentencing**

Vagueness; Impersonation of a Public Employee

Kennedy v. Carlton, S13A1717 (2/24/14)

Carlton entered an *Alford* plea on three counts of “impersonation of [a] public employee” under O.C.G.A. § 16-10-23. The evidence showed that Carlton made several telephone calls to neighbors of the foster mother of Carlton’s three children. Representing himself as an employee with the Georgia Division of Family and Children Services, Carlton questioned the neighbors regarding the foster mother’s treatment of his children. Neighbors brought the foster mother over to listen in on a conversation with Carlton, at which point the foster mother identified the caller as Carlton and telephoned the police. Following conviction, Carlton petitioned

for writ of habeas corpus. He asserted that the original indictment did not charge him with a crime because O.C.G.A. § 16-10-23 only criminalizes impersonating an “officer,” while he impersonated an “employee.” The habeas court agreed, holding that O.C.G.A. § 16-10-23 was unconstitutionally vague because it failed to adequately hold itself out as applicable to public *employees* as opposed to public *officers*, and thus, the statute “did not provide [Carlton] with the appropriate notice that he could be criminally responsible for impersonating a Department of Family and Children Services Employee.” The Warden appealed.

The Court noted that O.C.G.A. § 16-10-23 provides, “[a] person who falsely holds himself out as a peace officer *or other public officer or employee* with intent to mislead another into believing that he is actually such *officer* commits the offense of impersonating an officer and, upon conviction thereof, shall be punished by a fine of not more than \$1,000.00 or by imprisonment for not less than one nor more than five years, or both.” (Emphasis supplied.) The Court held that the plain language of the statute applies to public employees, as well as peace officers and other public officers. The mere fact that the remainder of the sentence does not expressly again recite “employee” did not render the statute ambiguous. Further, the Court noted that if it were to adopt the statutory meaning offered by Carlton, the word “employee” as used in the statute would constitute “mere surplusage.” Moreover, the intent of the legislature in enacting the statute was to protect the public from the very act that Carlton committed, misrepresenting

oneself with the authority and power of the State to achieve personal ends. Thus, the Court reversed and vacated the judgment of habeas corpus, holding that O.C.G.A. § 16-10-23 was not unconstitutionally vague and furnished sufficient warning to a reasonable person of the statute's command.

Garza; Asportation

Wilkerson v. Hart, S14A0036 (2/24/14)

Appellant was convicted of one count of burglary, four counts of armed robbery, one count of criminal attempt, six counts of kidnapping, one count of aggravated sexual battery, and one count of possession of a firearm or knife during the commission of certain crimes. The evidence related to the kidnapping offenses showed that in 2001, appellant and his co-defendants broke into a home occupied by six victims. As to three of the victims, the perpetrators covered their eyes with duct tape, tied their hands behind their backs, piled them on top of each other, and placed a coffee table on top of them. A fourth victim was ordered to the floor, where his hands and feet were bound with duct tape. The remaining two victims, a male and female, were in a bed in a bedroom. The perpetrators threw a bedcover over their heads. The male victim was bound with duct tape and thrown to the floor. The female victim was dragged to the side of the bed, where she was sexually assaulted.

Appellant filed a petition for a writ of habeas corpus which was denied. He argued that the habeas court erred because the evidence was insufficient to support his kidnapping convictions under *Garza*. The Court agreed and reversed his kidnapping convictions.

The Court noted that in *Garza*, it held that, with respect to the asportation element of Georgia's pre-2009 kidnapping statute, the movement necessary to establish asportation must be more than "merely incidental" to other criminal activity, and four judicially created factors must be considered before a court can conclude that more than "merely incidental" movement had occurred. Because the rule created in *Garza* constituted a substantive change in the law with respect to the elements required to prove the crime of kidnapping at the time that the case was decided, the rule became retroactively applicable. Thus, the

Court held, the substantive change to the interpretation of the asportation requirement set forth in *Garza* satisfied the "cause and prejudice" analysis and was procedurally cognizable in appellant's habeas corpus proceeding.

To determine whether asportation was more than "merely incidental," *Garza* requires a court consider (1) the duration of the movement; (2) whether the movement occurred during the commission of a separate offense; (3) whether such movement was an inherent part of that separate offense; and (4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense. However, the satisfaction of all four factors is not required in order for the evidence to support a proper finding of asportation under *Garza*.

Here, the Court found, the movement of the victims, which was mainly to subdue them with duct tape, occurred during the commission of the separate crimes being committed in this situation and did not expose any of the victims to danger independent of the crimes already in progress. For example, the duct taping of individuals was an incidental part of the commission of burglary and armed robbery, and the movement of the female victim was part of the manner in which aggravated sexual assault was committed against her. Moreover, there was no showing that the slight movement of the victims presented a significant danger outside of the danger from the crimes already being committed. Therefore, the Court held, the evidence was insufficient to show asportation under *Garza*.

Similar Transactions; USCR 31.1

Hanes v. State, S13A1428 (2/24/14)

Appellant was found guilty of malice murder and aggravated assault. He contended that the trial court erroneously permitted the admission of similar transaction evidence from a 2009 traffic stop. The evidence showed a .45 caliber bullet fired from a Taurus pistol was recovered from the murdered victim. Sixteen days later, appellant was arrested with a .45 caliber Taurus pistol in his possession, but it was later ruled out as the murder weapon. Additionally, the State introduced a 2009

similar transaction in which appellant fled on foot from a traffic stop after a Taurus .9mm pistol was found in the car that he was driving.

Appellant contended that the trial court erroneously admitted the similar transaction evidence regarding the 2009 traffic stop in which a Taurus .9mm pistol was recovered. The Court stated that for similar transaction evidence to be admissible, the State must show that (1) it seeks to introduce the evidence not to raise an improper inference as to the accused's character, but for some appropriate purpose which has been deemed to be an exception to the general rule of inadmissibility; (2) there is sufficient evidence to establish that the accused committed the independent offense or act; and (3) there is a sufficient connection or similarity between the independent offense or act and the crime charged so that proof of the former tends to prove the latter.

The Court held that the trial court did not abuse its discretion in admitting the similar transaction evidence. First, the similar transaction evidence was offered to prove course of conduct or bent of mind which was a legitimate and proper purpose. Second, appellant stipulated to the fact that he was a convicted felon at the time of the 2009 crime of possession of a firearm, and the State properly showed that appellant committed the act. Finally, there was sufficient similarity to admit the evidence because appellant had been found to be in possession of a firearm similar to the type used to commit the murder for which he was accused.

Nevertheless, appellant asserted that he received insufficient notice of the State's intent to use the similar transaction evidence. The record showed that the State filed notice of its intent to use the similar transaction pursuant to USCR 31.1 and a hearing was conducted. At that time, the trial court found the similar transaction evidence admissible. Following that ruling, the original indictment was dismissed, and appellant was re-indicted. Because the State filed a new indictment, appellant specifically contended that the State was required to re-file its notice of intent and that the trial court was required to hold another hearing to provide sufficient notice under USCR 31.1. The Court disagreed, finding that the record clearly demonstrated appellant's awareness of the State's intent. Thus, even if there was procedural error, there

was no harm, as it was clear that the notice given to appellant was sufficient to satisfy the purpose USCR 31.1.

Double Jeopardy; Speedy Trial

Jenkins v. State, S13A1387 (2/24/14)

Appellant was indicted on multiple charges including the murder of two individuals in 1993. He was tried in 1995 and sentenced to death. In 2005, he was granted habeas relief because his defense counsel rendered ineffective assistance during the guilt/innocence phase of his trial. The judgment of the habeas court was affirmed in 2006. In 2007, he filed a motion to dismiss and plea in bar, alleging 1) his retrial was barred by double jeopardy due to prosecutorial misconduct during his trial; and 2) his retrial was barred because the his constitutional right to a speedy trial has been violated. The trial court denied the motion on both grounds.

Appellant argued that the trial court erred in denying his motions and pleas in bar because his retrial would constitute double jeopardy for the reason that the prosecution committed intentional misconduct which violated due process, and thus, denied him his right to a fair trial. The Court stated that as a general rule, a post-conviction reversal or grant of a motion for new trial which is not based on insufficiency of the evidence does not preclude retrial. There is an exception to this general rule, however: The defendant cannot be retried if the retrial is necessitated by prosecutorial misconduct which was intended to subvert the protections afforded by the Double Jeopardy Clause.

Appellant argued that double jeopardy should preclude a defendant's retrial whenever the prosecutor's intentional misconduct is egregious and prejudicial so that it denies the defendant a fair trial. However, the Court stated, for it to interpret the double jeopardy bar so expansively would be tantamount to making the constitutional protection a type of exclusionary rule. Generally, the Double Jeopardy Clause does not protect a defendant in the case of the grant of a new trial following conviction or when there is a mistrial. However, double jeopardy does prohibit the retrial of a defendant when the State does not produce sufficient evidence at the initial trial to sustain a conviction. It also precludes retrial when the defendant is granted a mistrial or

a reversal on appeal of his or her conviction in the case of intentional prosecutorial misconduct, which is purposefully designed to secure an opportunity to retry the case.

Here, the Court found, the evidence at appellant's initial trial was sufficient to enable a rational trier of fact to find him guilty of the crimes charged beyond a reasonable doubt. Moreover, there was no showing that the State's conduct was aimed at aborting the trial and securing an opportunity to retry the case. In fact, the Court noted, appellant acknowledged in his argument to the Court that "[t]he evidence is clear that the State was not trying to induce a mistrial," but rather was trying to obtain his convictions. Thus, the trial court properly concluded that double jeopardy did not bar appellant's retrial.

Appellant also argued that the trial court erred in denying his plea in bar based on his constitutional right to a speedy trial. The Court noted that since the delay was almost seven years, it was presumptively prejudicial and thus, appellant's argument must be analyzed under the four-part balancing test of *Barker v. Wingo*. First, the State conceded that the length of the delay was uncommonly long and should be weighed against it. The Court found that the period between 1999 and 2006 was not to be included in the determination, but rather the time to be examined was from April of 2006 to the date of the trial court's order in 2013. The Court found that from 2006 until mid-2011, both the State and appellant shared equally in the responsibility for the delay and thus, this was neutral in weight. From mid-2011 to 2013, the Court found the trial court appropriately concluded that the delay should be weighed against appellant, but that inasmuch as it was, *inter alia*, in the pursuit of legitimate motions and pleas, it was "relatively benign."

As to the assertion of the right, appellant did not assert his right to a speedy trial until November of 2012. But, appellant asserted, this should not be weighted heavily against him because he was unable to assert his right to a speedy trial from the time of his indictment in 1993 until January 2011 due to the government's failure to appoint him conflict-free counsel and its decision to withhold exculpatory evidence. But, the Court found, the trial court held appellant properly accountable for his failure to demand a speedy trial from the 2006 affirmance of his grant of

habeas relief until 2012. During this time, there was no evidence of any conflict of interest of defense counsel or of any government action which would have prevented him from raising his right to a speedy trial. Thus, this factor was weighed heavily against appellant.

The Court also found no prejudice to appellant. First, he did not suffer some degree of anxiety and concern "outside the norm" nor was there any evidence of an extraordinary impact upon him resulting from anxiety and concern. Second, appellant was not prejudiced by the loss of a witness in his defensive theory that a third-party committed the crimes. Additionally, upon retrial, appellant would be able to avail himself of the evidence withheld by the State at his first trial. Accordingly, in balancing the factors, the Court found that the trial court did not abuse its discretion in denying his plea in bar on speedy trial grounds.

Co-conspirator Statements; Hearsay

Hassel v. State, S13A1382 (2/24/14)

Appellant was convicted of felony murder. He asserted that the trial court erred by admitting the hearsay statements by a co-conspirator made to a friend in audiotaped telephone conversations. The trial court held these statements admissible as declarations of a co-conspirator under former O.C.G.A. § 24-3-5 (under the new Georgia Evidence Code, the co-conspirator hearsay exception is codified under O.C.G.A. § 24-8-801(d)(2)(E)) which provided that "the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." This exception to the hearsay rule applied to statements made by co-conspirators not only leading up to and during the underlying crime but also afterwards, during the concealment phase of the conspiracy.

The Court noted there was ample evidence to establish the existence of a conspiracy between appellant and the co-conspirator to exact revenge against the victim in some form for his role in a prior robbery against their friend. The statements reflected an agreement between appellant and the co-conspirator to confront the victim and appellant's statement in his letter to a friend that he was holding up "his end of the bargain" further supported the

finding of such an agreement. Therefore, the statements of the co-conspirator, made after the shooting and while the identity of those complicit were still being concealed clearly fell within the ambit of former O.C.G.A. § 24-3-5.

Character Evidence

Washington v. State, S13A1620 (2/24/14)

Appellant was convicted of murder and the unlawful possession of a firearm during the commission of a felony. The evidence showed that appellant had extramarital affairs with two co-workers, one of whom was the victim. Shortly after appellant's wife delivered his child, appellant found out that he had impregnated the victim co-worker. When the victim announced the pregnancy to friends and family, she was found dead the next day. Appellant's whereabouts on the day of the murder were tied to the victim's last moments and evidence showed that appellant was in possession of brand ammunition and the weapon used in the commission of the murder.

Appellant contended that that the trial court erred when it admitted evidence of appellant's bad character, specifically, his extramarital relationship with the second co-worker. The Court noted that under former O.C.G.A. § 24-2-2, "[t]he general character of the parties and especially their conduct in other transactions are irrelevant matter unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct." (O.C.G.A. § 24-2-2 was superseded by O.C.G.A. § 24-4-404). However, if the evidence of other acts is relevant for some other purpose than to show a probability that the defendant committed the crime because he is a man of criminal character; the evidence is admissible. Consequently, the State would be authorized to present evidence of a defendant's possible motive for committing a crime, and such evidence would not become inadmissible merely because it may incidentally place the defendant's character in issue.

At trial, the State sought to show that appellant had motive to conceal his extramarital affair with the victim not only from his wife, but also from the second co-worker. The evidence showed that the second co-worker did not know about his relationship

with the victim and although appellant insisted that his affair with the second co-worker had ended by the time the victim was killed, the jury could have inferred that he wanted it to continue. Because the nature of appellant's relationship with the second co-worker was relevant to the issue of motive, the Court held that it was properly admitted into evidence.

Severance; Antagonistic Defenses

Barge v. State, S13A1687 (2/24/14)

Appellant was convicted of murder. The evidence showed that the victim was shot during the commission of a robbery perpetrated by appellant and his two co-defendants. Of the three co-defendants, one took a plea deal and testified against the other two at their joint trial. Pursuant to the plea deal, the co-defendant testified that he, appellant, and the other accomplice were the three gunmen who robbed the victims and caused the death of one of the victims. Further, he testified that he and appellant were armed and appellant had shot his weapon.

Appellant contended the trial court erred when it denied his motions to sever. First, appellant asserted that he and his co-defendant had antagonistic defenses, such that each would blame the other for the crime and therefore, severance was necessary. Additionally, appellant contended that his co-defendant's status as a convicted felon and the additional charges indicted against the co-defendant confused the jury and likely imputed the co-defendant's felony status to appellant. The Court stated that in a capital case in which the death penalty is not sought, a trial court's decision not to sever the trial of co-defendants is reviewed for abuse of discretion, and the movant must make a clear showing that the joint trial was prejudicial and resulted in a denial of due process. Moreover, the existence of antagonistic defenses alone is insufficient to require the severance of a joint trial. Here, appellant and the co-defendant were indicted on almost identical charges, except the co-defendant had the two additional charges of felony murder and the predicate felony possession of a firearm by a convicted felon. Further, the Court revisited the jury instructions given by the trial court and noted that the charge was clear and proper. Thus, the Court rejected appellant's

assertion that the jury was likely confused by the additional charges against appellant's co-defendant.

Nevertheless, appellant also argued that severance was proper because the co-defendant entered into evidence a video which showed appellant identifying himself by the nickname of "Little Yo." The record showed that during the State's case-in-chief, two witnesses identified appellant by this nickname. Appellant took the stand in his own defense and denied that he was known by this nickname. However, during his co-defendant's presentation of evidence, the co-defendant introduced a videotape in which appellant appeared to reference himself by the nickname "Little Yo." Appellant argued that because this videotape was not part of pre-trial discovery from the State, had the trial been separated, the State could not have introduced the video. The Court disagreed. Prior to the introduction of the videotape and appellant's testimony, two witnesses had already identified appellant as being the person known as "Little Yo." The fact that appellant's testimony denying he was known as "Little Yo" was effectively impeached by the codefendant's introduction of the videotape was not tantamount to the denial of due process. Moreover, the Court stated, even evidence which violates constitutional standards of due process may be admitted for impeachment purposes. Accordingly, the trial court did not abuse its discretion when it denied appellant's motions to sever.

DUI; Implied Consent

Plemmons v. State, A13A2452 (2/18/14)

Appellant was convicted of DUI (less safe) and driving on the wrong side of the road. The evidence showed that appellant injured himself when his vehicle left the road and drove over a fire hydrant. The first responding officer testified that appellant smelled of alcohol, slurred his speech, and "staggered" after the accident. The officer asked whether appellant had consumed alcohol and he responded that he had a "few beers." However, because the officer felt that appellant needed to go to the hospital to treat his injuries, appellant was not asked to perform field sobriety tests. After speaking to the charge nurse, the officer entered appellant's hospital room and wrote him citations for DUI and failure to maintain

lane; the citations directed appellant to appear in court. The officer then advised appellant that he was “under custodial arrest,” which the officer later testified meant that appellant “was not processed, which means he was not arrested,” explaining that “[t]hat’s generally what we do when somebody’s going to the hospital. You don’t arrest them on the scene because the County doesn’t want to pay for their bill. So they’re not processed. If they’re going to the hospital, . . . when he goes to court that’s when he’s processed on all his paperwork.” The officer gave appellant the citations and then read him the implied consent rights. Appellant refused any testing, and the deputy left him at the hospital for treatment.

Appellant argued that the trial court erred by denying his motion in limine to exclude evidence that he refused state-administered chemical testing. The trial court judge found that the officer was not required to arrest appellant prior to the implied consent notice because appellant had sustained serious injuries as defined in O.C.G.A. § 40-5-55. After his conviction, a different judge, who presided over appellant’s motion for new trial, concluded that the implied consent notice given by the officer was proper not due to appellant’s sustained injuries in the car accident, but because, under the totality of the circumstances, appellant was arrested prior to the request for a chemical test.

The Court noted that O.C.G.A. § 40-5-55(a) provides as follows: “[A]ny person who operates a motor vehicle upon the highways or elsewhere throughout this state shall be deemed to have given consent, subject to Code Section 40-6-392, to a chemical test or tests of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug, *if arrested for any offense* arising out of acts alleged to have been committed in violation of Code Section 40-6-391.” (Emphasis supplied.) Moreover, an arrest is accomplished whenever the liberty of another to come and go as he pleases is restrained, no matter how slight such restraint may be. The defendant may voluntarily submit to being considered under arrest without any actual touching or show of force. Thus, the adequacy of the implied consent notice depends upon whether the individual was formally arrested or restrained to a degree associated with a

formal arrest, and not whether the police had probable cause to arrest. In other words, the Court stated, it is the reasonable belief of an ordinary person under the circumstances, and not the subjective belief or intent of the officer, that determines whether an arrest has been effected.

Here, the Court found, the officer wrote appellant a citation for DUI less safe, told appellant he was under custodial arrest, gave him the citation, and then read him implied consent, which he refused. Given the evidence, particularly the officer’s statement to appellant that he was “under custodial arrest,” the Court found no error in the trial court’s determination that a reasonable person in appellant’s position would not think that he was free to leave at the time the officer read the implied consent warnings, and therefore, the reading of the notice was done at the “time of the arrest” as required by O.C.G.A. §§ 40-5-55, 40-5-67.1(a), and 40-6-392(a)(4).

Jury Charges; Merger

Moore v. State, A13A1937 (2/18/14)

Appellant was indicted for malice murder, but convicted of voluntary manslaughter. He was also convicted of other offenses, including three counts of concealing a death. Appellant contended that the trial court erred in refusing to give his requested charge on misdemeanor involuntary manslaughter. Because appellant did not preserve his objection to the jury charge at trial, the Court reviewed the charge for plain error. To support his assertion, appellant contended that the requested charge was justified by his statement to police that the victim, his girlfriend, attacked him, and that he accidentally strangled her in an attempt to restrain her and therefore, the jury could have found that he committed a lawful act in a criminally negligent manner. The Court, however, rejected appellant’s argument under the authority of *Demery v. State*, 287 Ga. 805, 809 (2010), which held that one who seeks to justify homicide as having been committed in self-defense is not entitled to an additional instruction on involuntary manslaughter resulting from the commission of a lawful act in an unlawful manner.

Appellant also contended that the trial court erred in refusing to merge his three convictions for concealing a death. The Court agreed, citing *Nazario v. State*, 293 Ga. 480

(2013) in which the Georgia Supreme Court reasoned that, since O.C.G.A. § 16-10-31 refers to “the death” and “a discovery,” “the gravamen of the offense is conduct that hinders ‘a discovery’ that a person has been unlawfully killed by concealing that death.” *Nazario* concluded that multiple acts employed in concealing a single death merge as a matter of fact into one conviction. The Court found appellant’s actions similar to that found in *Nazario*. Thus, the Court vacated two of the three convictions and sentences for concealing the death of another.

Rule of Lenity

McMullen v. State, A13A2298 (2/18/14)

Appellant was convicted of felony obstruction of a law enforcement officer (Count 1) and simple battery on a law enforcement officer (Count 2). The trial court merged Count 2 into Count 1 and sentenced appellant to three years. Appellant argued that the trial court erred by failing to sentence her on the lesser misdemeanor offense (Count 2) instead of the felony offense (Count 1) based on the rule of lenity.

The Court stated that the rule of lenity applies whenever there are multiple punishments for the same offense, and provides that the ambiguity is resolved in favor of the defendant, who will then receive the lesser punishment. The rule does not apply, however, when the statutory provisions are unambiguous. And here, the Court found, there was no ambiguity in the two code sections at issue. Felony Obstruction of a law enforcement officer, O.C.G.A. § 16-10-24(b), provides in relevant part, “[w]hoever knowingly and willfully resists, obstructs, or opposes any law enforcement officer . . . in the lawful discharge of his official duties by offering or doing violence to the person of such officer . . . is guilty of a felony. . . .” Simple battery on a law enforcement officer, O.C.G.A. § 16-5-23(e), provides that “[a]ny person who commits the offense of simple battery against a police officer . . . engaged in carrying out official duties shall, upon conviction thereof, be punished for a misdemeanor of a high and aggravated nature.”

The Court concluded that the two statutes do not define the same offense. To prove misdemeanor battery on a law enforcement officer, O.C.G.A. § 16-5-23(e) requires a

showing that the defendant either made physical contact of an insulting or provoking manner or intentionally caused physical harm to an officer while the officer was engaged in carrying out official duties; it does not require proof that the defendant's actions obstructed the officer in the discharge of his official duties. Conversely, O.C.G.A. § 16-10-24(b) does not require proof of physical contact or harm, but does require evidence of a threat to do physical violence to the officer with "the specific intent to hinder law enforcement." Thus, the two defined crimes did not address the same criminal conduct, there was no ambiguity created by different punishments being set forth for the same crime, and the rule of lenity did not apply. Additionally, the Court noted, the trial court properly avoided the injustice of double sentencing when it factually merged appellant's misdemeanor battery conviction into the felony obstruction conviction.

Similar Transactions; Cross Examination

Miller v. State, A13A2500 (2/18/14)

Appellant was convicted of rape. The evidence showed that the victim was stranded by the side of the highway after her car had broken down. Appellant pulled over to the side of the road and offered the victim a ride. After assuring her that he had a family and children, the victim got in his vehicle. Once appellant began driving, his demeanor changed and he drove the victim to a secluded part of the woods where she was assaulted and raped. At trial, the State presented evidence of two similar transactions committed by appellant.

Appellant contended that the State failed to prove that the two prior transactions actually occurred or that he was the perpetrator. The Court stated that to be admissible as a similar transaction, the State must show that it is seeking to introduce the evidence for a permissible purpose; there is sufficient evidence that the accused committed the independent offense or act; and there is a sufficient connection or similarity between the independent offense or act and the crime charged so that proof of the former tends to prove the latter. Moreover, the evidence must be relevant to an issue in the case and its probative value outweighs its prejudicial

effect. Absolute proof is not required that a defendant committed the offense in a similar transaction. Rather, the State need only prove that the defendant committed the prior offense by a preponderance of the evidence. The credibility of a similar transaction victim is a question for the trier of fact, and any inconsistencies in the victim's testimony go to the weight of the evidence, not its admissibility. Furthermore, a similar transaction victim's prior inconsistent statement to the police is admissible as substantive evidence and can provide the basis for the admission of the prior offense even if the victim subsequently denies that the offense occurred.

With respect to the first similar transaction, the victim of that incident testified that a man offered her a ride from a gas station after she had a flat tire, that she got into his pickup truck, that his demeanor then changed, and that he took her to a secluded location where he forced her to remove her clothing. However the victim further testified that she had been assaulted, but not sexually assaulted, and she denied telling police investigators that she had been raped. According to the victim, she had "bad nerves," suffered from "short-term memory loss," and was unsure of when exactly the incident had occurred. The victim further testified that she was "scared" appellant might not be the man who had attacked her because he was "a lot younger" when the assault occurred and did not look "the same anymore." However, the police investigators testified that the victim in her initial interview told them that she had in fact been raped and she positively identified appellant as her assailant. One of the investigators also testified that appellant's appearance had changed since the incident. The Court found, based on the combined testimony of the victim and the police investigators, that the trial court committed no error in finding that the State sufficiently established that the victim of the first similar transaction had been raped by appellant.

With respect to the second similar transaction, the victim of that incident testified that a man had offered her a ride home from a restaurant but then drove her to a secluded location where he assaulted and raped her, and she positively identified appellant in a photographic lineup and at trial. The Court found that the victim's testimony, standing alone, established by a preponderance of the

evidence that appellant raped her. Thus, the trial court committed no error in finding that the State sufficiently established that the victim of the second similar transaction was raped by appellant.

Appellant also contended that the trial court erred in limiting his examination of a witness called by the defense to impeach the victim of the second similar transaction. At trial, the victim of the second similar transaction testified that earlier on the day she was raped by appellant, she was involved in a physical altercation with another woman. She testified that the fight lasted only "a few seconds" and that the injuries she sustained that day were the result of the rape, not of her fight with the other woman. The trial court permitted appellant to call the other woman involved in the fight as a witness to describe the fight and any injuries sustained by the parties during the fight. However, the trial court ruled that appellant could not question the woman about the reason for the fight or what was specifically said during the fight because it would venture beyond disproving the victim's testimony and would constitute impermissible character evidence.

The Court stated that a victim's character is rarely relevant for any purpose in a criminal trial, and generally, a victim may not be impeached with instances of specific misconduct or prior bad acts. Appellant was entitled to have the woman describe the fight itself and any resulting injuries to impeach the second similar transaction victim's testimony. However, because the scope of impeachment was limited to the facts of the second transaction, the Court held that the trial court acted within its discretion in limiting appellant's examination of the woman involved in the fight to prevent a general attack on the character of the second similar transaction victim.

Character Evidence

Aldridge v. State, A13A2154 (2/19/14)

Appellant was convicted of robbery, aggravated assault, battery, and criminal trespass. The evidence showed that the victim was in a business relationship with a mattress factory in which the victim would receive used mattresses for resale. The victim kept the second hand mattresses in tractor trailers at the rear of the mattress factory's premises

until they were full and ready to transport. The day before the crimes occurred, the victim was attending to his mattresses behind the mattress factory when appellant drove up in a maroon-colored pickup truck and inquired about the mattresses. The victim told appellant not to bother the mattresses because they were private property, and he advised appellant to leave the premises. In response, appellant threatened the victim by saying “you don’t want to mess with me,” and added words to the effect that he had served time in prison. Appellant then left the premises. The next day, appellant returned to the mattress factory and committed the offenses against the victim.

Appellant contended that the victim’s testimony concerning appellant’s statement to the effect that “you do not want to mess with me, I have served time” was irrelevant, lacked probative value, and impermissibly placed his character in issue. The Court disagreed. Evidence that is relevant and material to an issue in a case is not rendered inadmissible merely because it incidentally placed the defendant’s character in issue. The Court found that the statement was relevant to show appellant’s intent, state of mind, and course of conduct for the subsequent robbery. Therefore, the trial court did not err in admitting the statement, even though it may have incidentally placed appellant’s character in issue.

Sentencing

Allen v. State A13A1969 (2/18/14)

Appellant was found guilty of felony shoplifting. He contended that the trial court erred in failing to exercise its discretion in sentencing him pursuant to O.C.G.A. § 17-10-7(a) and (c). The record showed that appellant had four prior drug felonies. Appellant argued that the trial court believed that it was without discretion under the statute and that it was required to sentence him to the maximum of ten years.

O.C.G.A. § 17-10-7(a) provides that “any person who, after having been convicted of a felony offense in this state or having been convicted under the laws of any other state or of the United States of a crime which if committed within this state would be a felony and sentenced to confinement in a penal institution, commits a felony punishable by confinement in a penal institution *shall be*

sentenced to undergo the longest period of time prescribed for the punishment of the subsequent offense of which he or she stands convicted, provided that, unless otherwise provided by law, the trial judge may, in his or her discretion, probate or suspend the maximum sentence prescribed for the offense..” (Emphasis supplied.) Further, O.C.G.A. § 17-10-7(c) provides that “any person who, after having been convicted . . . for three felonies . . ., commits a felony within this state shall, upon conviction for such fourth offense or for subsequent offenses, *serve the maximum time provided in the sentence of the judge* based upon such conviction and shall not be eligible for parole until the maximum sentence has been served.” (Emphasis supplied.)

The Court found appellant’s argument unavailing and explained that subsection (a) prescribes the sentence that the trial court must impose for a felony conviction that follows a prior felony conviction: the longest period of time provided for the punishment, i.e., the maximum sentence for the crime. Subsection (c) does not prescribe the sentence that must be imposed, but rather dictates that a person convicted of a fourth felony or more must serve the maximum time provided in the trial court’s sentence and is not eligible for parole. Read together, the trial court had no discretion with regard to the term of the sentence and was required to sentence appellant to ten years, the maximum sentence for shoplifting.