

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 22, 2013

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THIS WEEK:

- Merger; Miranda Rights
- Indictment; Motion to Vacate Conviction
- Miranda Rights; Right to Counsel
- Pre-trial Evidentiary Issues; Demonstrative Evidence
- Ineffective Assistance of Counsel; Sentencing
- Merger; Victim's Prior Conduct
- Merger; Continuing Witness Rule
- Merger; Evidence; Due Process
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- Sufficiency of the Evidence; Entrapment
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Merger; Miranda Rights

Schutt v. State, S12A2060 (3/18/13)

Appellant was convicted of malice murder and other crimes in connection with the death of her husband. The record showed that she arrived home from work and prepared her husband a late dinner that she laced with prescription sleep medicine. After her husband fell asleep in the master bedroom, appellant attacked him, beating him repeatedly with a ball-peen hammer and stabbed him 38 times in the face, chest, sides, back, abdomen, and left thigh. The victim's throat and wrists were also cut. After taking measures to cover up the incident, appellant then fabricated a story in which three men broke into the home, raped her and her husband, and then murdered the husband. Appellant gave conflicting accounts of the number of assailants to medical personnel and a special victims unit (SVU) officer who interviewed her about the alleged rape. A homicide detective spoke to her at the hospital, and she agreed to give a formal statement. She then accompanied the SVU officer and the homicide detective to the police station, where she was advised of and waived her Miranda rights. In the subsequent interview, which was videotaped, appellant eventually confessed that she killed her husband, who she claimed had been abusive, and made up the home invasion story.

Appellant contended that the aggravated assault should have merged into malice murder. The evidence, particularly the medical examiner's testimony, showed that the injuries to the victim's throat were relatively superficial and non-fatal and that it was stab wounds to his torso and thigh and blunt force trauma

to the head that killed him. However, the evidence also showed that appellant cut the victim's throat after she inflicted the fatal injuries, and it was not clear that there was any deliberate interval between the assaults. Therefore, the Court held, appellant's aggravated assault and malice murder convictions merged, and her sentence for aggravated assault was vacated.

Appellant also contended that the trial court erred in failing to suppress the statements she made to the police at the hospital and at the police station because she had not knowingly and voluntarily waived her Miranda rights. The Court stated that *Miranda's* protections arise when an individual is either formally arrested or restrained to the degree associated with formal arrest. Therefore, the question is whether a reasonable person in appellant's situation would have perceived that she was in police custody.

At the hospital, the SVU officer explained that while he found appellant's story suspicious, he did not communicate his suspicions to her and at no time implied that she was under arrest. He was not accusatory in his questioning and did not believe that he had probable cause to arrest her. The officer further testified that he did not do anything that would have led appellant to believe that she was not free to leave and she never indicated that she thought she was not free to leave. The Court held that the trial court was entitled to credit such testimony and therefore, the appellant's motion to suppress was properly denied as to the statements made at the hospital.

Finally, appellant conceded that she voluntarily accompanied the SVU officer and the homicide detective to the police station, that she was allowed to change clothes before the interview, and that, at the beginning of the interview, she was advised of her Miranda rights and agreed to waive those rights and speak with the police. However, she claimed that her mental status was "too fragile" to allow her to knowingly and voluntarily waive her rights. After viewing the videotaped interview, the Court held that there was no error and the State proved by preponderance of the evidence that appellant was properly advised of her Miranda rights.

Indictment; Motion to Vacate Conviction

Simpson v. State, S12A1569 (3/18/13)

Appellant contended the trial court erred in denying his motion in arrest of judgment. In 2002, he was convicted and sentenced on three counts each of malice murder, aggravated assault, and concealing a death. Appellant then filed a number of post-appeal motions in the trial court. In response to a "Motion to Vacate Void Conviction and Set Aside Sentence," as amended, the trial court entered an order on June 2, 2011, partially granting the motion, and finding that the aggravated assaults merged into the malice murders as a matter of fact. On June 13, 2011, appellant filed a motion in arrest of judgment, challenging his indictment as suffering from a fatal defect. The trial court denied the motion because it had to be made in the term of court at which the judgment was obtained and was untimely pursuant to O.C.G.A. § 17-9-61(b).

Appellant contended that the trial court's sentencing order of June 2, 2011 constituted a new judgment of conviction, that his June 13, 2011 motion in arrest of judgment was filed within the same term as that new judgment of conviction, and his motion in arrest of judgment was timely under O.C.G.A. § 17-9-61(b). The Court disagreed. The order entered on June 2, 2011 did not trigger a new statutory right to seek review of the indictment. Additionally, appellant's "Motion to Vacate Void Conviction and Set Aside Sentence" presented a claim that certain crimes merged as a matter of fact with certain other crimes. Therefore, it was a motion attacking the convictions themselves as void, not merely claiming that the sentences were void. Because such a motion was not authorized, the trial court's order purporting to "partially grant" the motion was a nullity. Thus, the Court held that the grant from the trial court cannot serve as a "judgment" under O.C.G.A. § 17-9-61(b).

Miranda Rights; Right to Counsel

Reaves v. State, S12A1582 (3/18/13)

Appellant was convicted for the murder of her stepdaughter. She sought to suppress the statements that she made to a Sergeant, contending that some of the statements were

made before she was advised of her Miranda rights, and the others were made after she was advised of her rights and had invoked her right to counsel. The trial court found that the interview of appellant was not a custodial interview at the outset, but it became custodial during the course of the interview, and the court denied the motion as to statements made before the interview became custodial. The trial court also found that appellant was advised of her rights around the time the interview became custodial, but she did not unequivocally invoke her right to counsel until much later. Accordingly, the trial court denied the motion as to statements made between the time Miranda warnings were given and her unequivocal invocation of her right to counsel.

First, appellant contended that she was in custody before she was given her Miranda rights. The Court stated that Miranda warnings are required only when a person is interviewed by law enforcement while in custody and a person is considered to be in custody if she has been formally arrested or if her freedom of movement has been restrained to the degree associated with a formal arrest. The Court found that the evidence supported the trial court's finding that appellant voluntarily agreed to ride with the Sergeant to the police station, that she rode in the front seat of an unmarked patrol car, that she was not handcuffed, and that she was not formally arrested. When they arrived at the police station around 11:00 a.m., the Sergeant, who then was unaware that appellant's husband had implicated her, asked appellant to write a statement about the victim's medical condition and related events. No one was in the room with her, the door to the room was left open, she could move about freely, and she had full access to a restroom and refreshments. The Sergeant later returned to the room at 12:24 p.m., talked with appellant, and reviewed her statement with her. Later, around 2:15 p.m., the Sergeant was informed by another officer that appellant might be suspected of criminal wrongdoing, and the Sergeant read the Miranda warnings to her. Therefore, the Court held, the pre-Miranda statements were properly admitted based on the "all the circumstances" as found by the trial court, because a reasonable person in appellant's position would not have perceived herself to be in custody before the Sergeant read the Miranda warnings and would have felt free to leave.

Next, appellant contended that her requests were not ambiguous and that she had properly invoked her right to counsel. To properly invoke her right to counsel during a custodial interrogation, a suspect “must articulate h[er] desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” Appellant contended that she unequivocally asked for a lawyer on three separate occasions. First, the Sergeant told appellant that he was going to inform her of her Miranda rights, and she asked: “Maybe I will need my lawyer? . . . Is that what you’re telling me?” When the Sergeant asked, “What?” appellant answered, “That I need to have me a lawyer.” She contended that this answer was an unequivocal request for counsel. The Court held that taken in context, the statement was not such a request for counsel, but rather, it was a statement clarifying and completing appellant’s earlier question about whether the Sergeant was telling her that she needed to have a lawyer.

Second, appellant asked the Sergeant “When will I have to come back with a lawyer?” The Sergeant then asked “What’s that?” and appellant then asked again “When do I have to come back with a lawyer?” The Court held that a comment that a suspect would like counsel to be present in the future is not a clear and unambiguous request for counsel. At most, her question as to when she would have to come back with a lawyer was referring to “the future assistance of an attorney, not immediate assistance.”

Third, appellant stated, “I would still feel more comfortable with a lawyer.” The Sergeant responded, “Okay. So you don’t want to talk to me right now?” and appellant answered, “not unless I can exercise my rights any time . . . during the conversation.” The Sergeant immediately reassured her that “[y]ou can do that . . . It’s your right, ma’am.” The Court held that appellant’s statement was very similar to the statement “I prefer a lawyer,” which the Court determined is only an ambiguous mention of possibly speaking with an attorney and insufficient to invoke the right to counsel. Thus, the Court held that all the statements were consistent with “hedge” words and phrases like “maybe” and “feel more comfortable,” such that a reasonable officer would have understood only that she *might* want an attorney present, not that she was clearly invoking her

right to deal with the officer only through counsel. Accordingly, all the statements were admissible against appellant.

Pre-trial Evidentiary Issues; Demonstrative Evidence

Smith v. State, S12A1978 (3/18/13)

Appellant, after a retrial, was again convicted of malice murder. The evidence showed he shot his wife through a pillow and left the firearm under the pillow. First, appellant contended that the trial court erred in refusing to conduct a full evidentiary hearing following reversal of his first conviction, regarding the admissibility of his custodial statement and the victim’s hearsay statements. The Court noted that appellant was correct in stating that a reversal by the Court sets aside the prior trial proceedings and requires the case to be heard again. But, the trial court is not required to rehear all pretrial motions as though they had never before been considered. A trial court retains broad discretion over interlocutory evidentiary rulings which may be modified at any time until entry of final judgment, and a trial court has the authority to reconsider any of its previous rulings that have not been adjudicated on appeal. Here, the Court held that such discretion does not require them to rehear pretrial motions “from scratch.” Additionally, before retrial, the trial court informed the parties that it would review the transcripts from the first hearing on appellant’s motions to exclude the contested statements and allow the parties to present any additional evidence they wished to offer in support of their respective positions. Thus, the trial court’s discretion in regard to the motions was “entirely appropriate.”

Next, appellant asserted that the trial court erred in allowing certain evidence to go out with the jury during deliberations. The record showed that the State offered into evidence the bloody pillow on which the victim’s head was resting when police arrived at the scene. A dowel rod was inserted through the pillow, as the officer explained, to demonstrate the trajectory of the bullet. While the pillow by itself was “real” evidence, the dowel rod inserted in the pillow was “demonstrative” evidence, because it had no probative value in itself but rather served as a visual aid to help clarify the officer’s testimony. The Court held that “demonstrative evidence is to be received

into evidence and go out with the jury during deliberations.” Thus, the trial court did not abuse its discretion in admitting this evidence or in allowing it to go out with the jury.

Ineffective Assistance of Counsel; Sentencing

Ward v. State, S13A0420 (3/18/13)

Appellant was convicted for malice murder, felony murder, and other crimes. He contended that his trial counsel rendered ineffective assistance by failing to ask the trial court to extend use immunity to one of his witnesses after that witness invoked his Fifth Amendment right to remain silent. The record showed that appellant wished to call a witness, contending that the witness would have implicated another individual as the shooter other than appellant. At trial, the witness lawfully invoked his right not to incriminate himself and thus could not be forced to testify. Appellant argued that his counsel was “duty-bound” to request that the trial court allow the witness to testify with immunity.

The Court disagreed. The Court stated that it has never directly held that a defendant, as opposed to the State, may properly request a trial court to extend use immunity to a defense witness. While there may be some precedent for such an action in other jurisdictions, there is none here in Georgia. Under such circumstances, the Court held, it cannot be said that trial counsel was ineffective for failing to demand that the trial court take an action for which there is no current Georgia authority.

Next, the Court noted that the trial court sentenced appellant to separate terms of life imprisonment for malice murder and felony murder. Since there was a single victim, appellant could not be convicted and sentenced for both murder counts under O.C.G.A. § 16-1-7(a)(1). Thus, the Court vacated the separate judgment of conviction and sentence for felony murder.

Merger; Victim’s Prior Conduct

Slaughter v. State, S12A1527 (3/18/13)

Appellant was convicted of malice murder, aggravated assault and other crimes in connection with the shooting death of the victim.

The evidence showed that he shot the victim once in the chest and upon his collapse, once in the leg. Appellant at first denied shooting the victim, claiming that his only role was taking the gun from a shooter (whose name he made up) and disposing of it. Appellant eventually admitted, however, that he was the shooter and claimed that he acted in self-defense.

First, the Court found error in the trial court's failure to merge the aggravated assault and malice murder charge. When multiple injuries are inflicted on a single victim in quick succession and the defendant is convicted of both aggravated assault and murder, deciding whether there was an aggravated assault independent of the fatal assault requires the court to consider "both the order and timing of the assaults." The Court has previously held that convictions and sentences for aggravated assault and malice murder (or felony murder) merged when a fatal injury preceded the infliction of a non-fatal injury and the injuries were not separated by a deliberate interval. Here, the record demonstrated that the interval between the victim's injuries was minimal, and the fatal gunshot wound to the victim's chest preceded the non-fatal gunshot wound to his leg. Accordingly, appellant's conviction for aggravated assault for shooting the victim in the leg merged with his malice murder conviction, and his sentence for that aggravated assault must be vacated.

Next, appellant contended that the trial court abused its discretion in excluding evidence of prior acts of violence by the victim against third parties. At the time appellant was tried, evidence of a victim's specific acts of violence against third parties was admissible if a defendant claimed and made a prima facie showing of justification. To make a prima facie showing of justification so as to allow evidence of violent acts by the victim against third parties, the defendant must show that the victim was the aggressor, the victim assaulted the defendant, and the defendant was honestly trying to defend himself. Appellant sought to present evidence of a violent encounter between the victim and third parties less than a year before appellant shot the victim. The trial court excluded this evidence on the grounds that appellant failed to show that the victim had assaulted appellant and that appellant was honestly trying to defend himself. The Court found that the record supported the holding. Thus, the Court held, there was no abuse of

discretion in determining that appellant failed to make a prima facie showing of justification and excluding this evidence. However, the Court noted, the appellant was tried in 2011 and not under the new rules of evidence.

Merger; Continuing Witness Rule

Bradley v. State, S12A1857 (3/20/13)

Appellant was tried and convicted of murder, aggravated assault, armed robbery, and three counts of possession of a firearm during the commission of a crime. He contended that several of the crimes for which he was convicted should have merged. He also claimed that the trial court erred when it allowed an audio recording of a conversation between appellant and a police informant to go out with the jury during its deliberations.

The evidence showed that on the afternoon of October 15, 2003, two men ran into a food mart where the victim and his son worked. One of the men wore a mask, shot and killed the victim with a revolver, and fled the scene. The second man walked behind the counter and took money from a cigar box. Two years later, a woman contacted the police department and told officers that she overheard appellant say that he had robbed the food mart. The police officers asked the woman to speak directly with appellant to get more information, and in multiple conversations with appellant, he implicated himself in the robbery with the other individual.

Appellant contended that the trial court should have merged several of his convictions. He was convicted of three counts of possession of a firearm during the commission of a crime, with one possession charge stemming from each of the other crimes of which he was convicted—murder, the aggravated assault upon the victim's son, and the armed robbery of victim's son. The Court noted that O.C.G.A. § 16-11-106(b) does not necessarily authorize one possession charge for every predicate offense. Rather, when multiple crimes are committed together during the course of one continuous crime spree, a defendant may be convicted once for possession of a firearm during the commission of a crime as to every individual victim of the crime spree, as provided under O.C.G.A. § 16-11-106(b)(1), and additionally, once for firearm possession for every crime enumerated in subsections (b)(2)

through (5). Here, the record showed that there were only two victims, and none of the crimes were the type enumerated in subsections (2) through (5). Therefore, the Court vacated the third possession count.

Next, the Court found that the trial court erred in failing to merge appellant's conviction for the aggravated assault of the victim's son with his conviction for the armed robbery of the victim's son. The Court found there is no element of aggravated assault with a deadly weapon that is not contained in armed robbery. Here, the record showed the aggravated assault, as charged in the indictment, occurred when appellant assaulted the son with the revolver. The State argued that the aggravated assault was completed when appellant fired the weapon and then ran out of the store and that only then did the armed robbery occur as a separate transaction from appellant's accomplice. But the armed robbery could not have occurred exclusively after appellant fled from the store because the undisputed evidence showed that the accomplice did not have a weapon. Instead, the armed robbery began when appellant pointed the revolver at the victim's son for the purpose of robbing the store, during which time the aggravated assault also occurred, and the armed robbery concluded immediately thereafter when the accomplice took the money out of the cigar box after appellant fled. Thus, the Court held the appellant's conviction and sentence for aggravated assault was vacated.

Lastly, appellant contended that the trial court erred when it allowed an audio recording of a conversation between him and the police informant to go out with the jury during its deliberations. Appellant claimed that this violated the continuing witness rule because it placed undue emphasis on the recording to have it played once during trial and then again during jury deliberations. However, appellant did not present any evidence that the jury, in fact, replayed the recording during its deliberations or even that it had the equipment necessary to do so. Furthermore, the prosecuting attorney testified that it was his practice to include such a recording with the other admitted evidence that went to the jury room but not to send the equipment to play the recording. Also, the trial court found, as a matter of fact, that the jury did *not* replay the recording in the jury room. Therefore, the Court found the enumeration without merit.

Merger; Evidence; Due Process

Jones v. State, S12A1759 (3/18/13)

Appellant was convicted of the felony murder of his four-year-old son and cruelty to a child in the first degree. The Court held, sua sponte, that the trial court erred in entering a judgment of conviction and imposing a separate sentence for cruelty to a child in the first degree. Because the felony murder for which appellant was convicted was premised on cruelty to a child in the first degree, the predicate offense merged into the murder as a matter of law. Therefore, the Court vacated the conviction and sentence for cruelty to a child in the first degree.

Appellant contended that he was denied a fair trial because the State failed to timely produce an audio recording of an interview of his girlfriend by a GBI agent. The record showed that this recording was produced to appellant at trial before any witnesses testified, albeit after voir dire had concluded. The Court noted that because the recording actually was produced, there was no *Brady* violation, and to prevail on his claim of error, appellant must show that an earlier production of the recording would have been beneficial to him and that the delay in production deprived him of a fair trial. Appellant argued that the quality of the recording was compromised when it was played at trial and that he could have made better use of the recording at trial if only it had been produced earlier. However, the Court found, claims about the quality of the recording were speculative, inasmuch as appellant's trial lawyer testified at the hearing on the motion for new trial that he recalled nothing about the recording, and the recording itself did not appear in the record on appeal. Moreover, appellant did not show that he was deprived of a fair trial by the late production of the recording because he did not ask for a continuance to further examine the recording. To the contrary, the court inquired at trial of an investigator assisting appellant's lawyer whether more time was needed to examine the recording, and the investigator responded in the negative. Therefore, the argument was without merit.

Judicial Comment; "Speedy Appeal"

Smith v State, S12A1671 (3/18/13)

Appellant challenged his convictions and sentences for malice murder, aggravated assault, and possession of a weapon at a public gathering. The evidence showed that appellant's friend had an argument inside a nightclub, and during the evening, a physical altercation occurred. The club closed and the patrons left through the front door and entered the parking lot; as they did so, a brawl ensued outside in which appellant grabbed his friend's weapon and shot the victim.

The record showed that during direct examination of a crime scene investigator, an agent of the GBI was asked by the State numerous questions regarding the parking area outside the club. The trial court asked the State if the line of questioning would lead to a relevant and narrow point, to which the State answered in the affirmative. The court then stated as follows: "Okay. Because my experience is that Special Agent Davis is a very thorough investigator, and I don't think that everything he found that day is relevant to the issues of this case, and I don't want to have to require him to testify about everything he learned. I'd like for you just to kind of narrow it to those things that he learned that really bear on the issues in this case." Appellant argued that the judicial comment about the "very thorough investigator" was an opinion on the veracity of the witness, and thus an expression as to what might be proved by the evidence, in violation of O.C.G.A. § 17-8-57.

The Court stated that a trial court's brief personal remark to or about a witness does not necessarily improperly comment upon the credibility of the witness. Additionally, a trial court is authorized to control the conduct of the trial and to guide counsel to ensure a fair trial and the orderly administration of justice. Here, the trial court exercised such discretion. The reference to the witness being "a very thorough investigator" was solely in the context of explaining the court's concern for the orderly and efficient presentation of testimony, and to ensure that the State would not "require him to testify about everything he learned" during the investigation. Therefore, the court's comment was "limited in scope" and did not infer anything as to appellant's guilt or innocence.

Next, appellant argued that the delay between his September 2001 trial and the April 2011 order which denied his motion for new trial violated his rights to due process. The Court has addressed the proper resolution of claims asserting due process violations based on inordinate appellate delay, and determined that the appropriate analysis is application of the four speedy trial factors set forth in *Barker v. Wingo*. The prejudice necessary to establish a due process violation based on post-conviction direct appeal delay is prejudice to the ability of the defendant to assert his arguments on appeal and, should it be established that the appeal was prejudiced, whether the delay prejudiced the defendant's defenses in the event of retrial or resentencing. Appellate delay is prejudicial when there is a reasonable probability that, but for the delay, the result of the appeal would have been different. Here, appellant argued that counsel had to "reconstruct the case." However, the Court noted, appellate counsel will always have to familiarize him or herself with the case when he or she is not the same attorney who represented the defendant at trial. Moreover, the only particularized assertion of prejudice that appellant made against his counsel was without any supporting evidence. Therefore, the Court found there was no due process violation.

Sufficiency of the Evidence; Entrapment

Cosmo v. State A12A2469 (3/14/2013)

Appellant was convicted of violating the "Computer or Electronic Pornography and Child Exploitation Prevention Act," O.C.G.A. § 16-12-100.2(d)(1), attempt to commit a felony (pandering), and three counts of criminal solicitation. The evidence showed that following an online solicitation from an undercover agent, appellant and agent corresponded via email, text, and phone conversation in which the agent, posing as an adult named "Amber," would provide sexual services along with underage minors. Appellant was at first open to the suggestion of sexual contact with children. However, he later confirmed that he was only interested in sexual services from "Amber." While on his way to meet the adult, appellant again confirmed that he did not want services from underage minors, and confirmed that the meeting would only involve the adult. Upon

arrival to the hotel, appellant was then arrested and taken into custody.

Appellant first contended there was insufficient evidence to support his conviction under O.C.G.A. § 16-12-100.2(d)(1) because the State failed to prove that he interacted with a child or a person he believed to be a child. Georgia courts apply strict construction to a criminal statute and when subject to two constructions, one which would render an act criminal, the other which would not, the statute must be construed strictly against the State and in favor of the accused. Here, the Court held that the evidence was insufficient to support the conviction under the statute. The phrase “seduce, solicit, lure, or entice a child or another person believed by such person to be a child to commit any illegal act” was not construed to encompass appellant’s communication with only an adult or a person known to be an adult.

Next, appellant contended that he was entitled to a new trial on his remaining convictions because the trial court erred by denying his request for a charge on his defense of entrapment. The Court stated that generally, in order to raise the defense of entrapment, the defendant must first admit the commission of the crime and then show that he did so because of the unlawful solicitation or inducement of a law enforcement officer. However, there is a recognized exception to the general rule: “When the State’s case shows evidence of entrapment and the defendant offers no evidence of entrapment inconsistent with his defense that he did not commit the crime, the defendant is not required to admit the commission of the crime in order to be entitled to a charge on entrapment.” Entrapment consists of three distinct elements: 1) the idea for the commission of the crime must originate with the state agent; 2) the crime must be induced by the agent’s undue persuasion, incitement, or deceit; and 3) the defendant must not be predisposed to commit the crime.

Here, the appellant presented evidence of entrapment that arguably was not inconsistent with his denial of the commission of the crime. The evidence presented by the State showed that the idea for the commission of the crime originated with a state agent. It also showed that appellant may have been induced by the agent’s repeated statements that if the “over the line” services she offered were not what appellant was looking for, she hoped that he

could find the companionship he was looking for elsewhere. Also, the State also presented evidence that appellant may not have been predisposed to commit the crime as he informed the fictitious adult “Amber” by email “[p]lease understand i have not done anything like this . . . I am just a man with an overactive sex drive,” and by two separate text messages attempting to confirm “just you and me though right?” Therefore, the Court held that the trial court committed reversible error by denying him an entrapment defense and appellant was entitled to a new trial on several counts.

DUI; Miranda

Appling v State, A12A2137 (3/14/13)

Appellant was convicted of driving under the influence of drugs such that it was less safe to do so, for driving under the influence of alcohol such that it was less safe to do so, and for driving under the influence of two or more substances such that it was less safe to do so. Appellant contended that the trial court erred in denying his motion to suppress. The evidence showed that an officer pulled over appellant for swerving in his traffic lane. An officer then asked appellant if he had been drinking and he responded that he had “a couple.” Because the officer was a shift supervisor and had a trainee with him and did not handle lengthy traffic stops, he requested the assistance of another officer who arrived 30 minutes later to assist the stop and perform sobriety tests. The second officer then decided he needed backup to perform the tests, and requested another officer who then arrived 15 minutes later and parked in front of appellant’s truck alongside the road. The third officer administered an alco-sensor test, which was positive for alcohol. He then placed appellant under arrest and read him the implied consent warning for subjects over 21. The appellant then voluntarily accompanied the officer to the hospital to administer a blood test.

Appellant contended that during the stop he was in custody and the officers had failed to provide him with Miranda warnings. The test for determining whether a detainee is in custody for Miranda purposes is whether a reasonable person in the detainee’s position would have thought the detention would not be temporary. The subjective views of the detainee and the officer are not dispositive to

the determination. As a general rule, although a motorist is deprived of his freedom of action during a traffic stop, such detention is insufficient to trigger the rights set forth in *Miranda*. Here, the Court found, appellant failed to show that he was in custody. The evidence showed that none of the officers told him that he appeared to be intoxicated or that they intended to arrest him prior to the third officer’s formal arrest. Appellant was not handcuffed or directed where to stand or sit while waiting on the last officer to arrive. Although there were a total of four officers on the scene, this fact alone did not constitute an arrest as a matter of law. Thus, appellant was not under arrest prior to the officer’s administration of field sobriety tests and therefore, the trial court did not err by denying his motion to suppress.

Competency; Jury Charges

Brinkley v. State, A12A2322 (3/11/13)

Appellant was found guilty by a jury of kidnapping with bodily injury (by rape) against a female victim; rape of the female victim; kidnapping against a male victim; and armed robbery against the male victim. He contended that the trial court erred by failing to sua sponte assess whether he was competent, and that this failure violated his constitutional right to due process. The Court stated that a trial court is to conduct, sua sponte, a competency hearing when there is information which becomes known to it, prior to or at the time of the trial, sufficient to raise a bona fide doubt regarding the defendant’s competence. The salient question is whether the trial court received information which, objectively considered, should reasonably have raised a doubt about the defendant’s competency and alerted the trial court to the possibility that the defendant could neither understand the proceedings, appreciate their significance, nor rationally aid his attorney in his defense. The focus is on whether the defendant shows irrational behavior, his demeanor at trial, and any prior medical opinion regarding his ability to stand trial.

Appellant claimed that a written statement he gave to police prior to trial and a remark he made to the court at the sentencing hearing raised bona fide doubts regarding his competency. He argued that the written statement showed a “severe literacy impairment”

and raised doubts about his education level and intelligence, and his request at the sentencing hearing for 10 to 15 years on probation showed that he did not understand the nature of the proceedings. The Court found that the statements raised no reasonable doubt as to appellant's competency. The record showed no irrational behavior at trial and no prior medical opinion regarding competency that would have caused the trial court to have reasonable doubts about appellant's competency to stand trial. Additionally, appellant's age at trial alone was not enough to trigger a competency hearing before the court.

Next, appellant claimed that when the trial court instructed the jury on the charge of kidnapping with bodily injury, the court gave an erroneous charge which misled the jury to believe that proof of consensual sex with the victim was sufficient to establish the necessary element of bodily injury. He argued that the instruction erroneously referred only to carnal knowledge of the female victim during the kidnapping without adding that, to constitute bodily injury by rape as alleged in the indictment, the carnal knowledge must also have been by force and against the victim's will. Thus, the trial court's instruction incorrectly failed to inform the jury that carnal knowledge of the victim must be with force and against the victim's will to constitute bodily injury by rape as alleged in the indictment.

Here, the Court noted, the record showed that the trial court correctly instructed the jury that the State alleged rape as the bodily injury that occurred during the kidnapping, and "that a person commits the offense of rape when he has carnal knowledge of a female forcibly and against her will." After the incorrect instruction, the trial court correctly repeated all the elements of rape in its instructions on the separate rape charge. Moreover, on the separate rape charge, the trial court instructed the jury that the defendant contended that the victim freely consented to sexual intercourse with him; that the State had the burden to show lack of consent; and that consent on the part of the alleged victim is fatal to a conviction for rape. The Court held that the guilty verdict on the rape charge demonstrated that the jury considered and rejected appellant's consent defense. Thus, taken as a whole, the Court found that the incorrect portion of the instructions was harmless and did not mislead or confuse the jury as to the proof necessary to

find appellant guilty on the charge of kidnapping with bodily injury.

Mutual Combat; Jury Charges

Hutto v. State, A12A1995 (3/11/13)

Appellant was indicted on one count each of murder, aggravated assault, and felony murder. Following a jury trial, he was convicted of the lesser offense of voluntary manslaughter. He contended that the trial court erred by charging the jury on mutual combat absent a request because such a charge is warranted only when there is evidence that both combatants are armed with deadly weapons. However, the Court noted, the Supreme Court of Georgia has recognized a conflict in the case law as to whether there must be evidence that the combatants are armed with deadly weapons in order to authorize a charge on mutual combat. Some cases hold that "there must be evidence that mutual combatants have deadly weapons in order for the jury to be charged on the law of mutual combat," while others hold that "mutual combat generally involves deadly weapons" and that "[a] mutual combat charge is proper when there is evidence of a mutual intention or agreement to fight." Here, the Court noted, the original instruction made no mention about the use of deadly weapons and informed the jury that mutual combat is "a combat between two persons as the result of a sudden quarrel, or such circumstances as indicate a purpose, willingness, and intent on the part of both to engage mutually in a fight." The evidence showed that appellant had a knife and that the victim was unarmed, thus the mutual combat charge could have only benefitted the appellant. Witnesses also testified that when appellant invited the victim to come outside and fight, the victim accepted, and the two came towards each other to mutually engage in the fight. Therefore, the Court held, there was sufficient evidence of a willingness or intention on the part of appellant and the victim to mutually engage in the fight, such that the charge on mutual combat was warranted.

Guilty Plea; Sentencing

Williams v. State, A12A2160 (3/11/13)

Appellant pled guilty to three counts of an indictment that charged him with various

crimes related to the sale, possession, and possession with intent to distribute controlled substances. With the assistance of counsel, appellant entered a guilty plea to Counts 7, 9, and 10 of the indictment. Count 7 charged him with possession of Oxycontin with intent to distribute; Count 9 charged him with the sale of Lorcet; and Count 10 charged him with the sale of Lortab. The trial court sentenced him on each count to 30 years, with 20 years to serve and the remainder on probation. All sentences were to run concurrently.

Appellant argued that the trial court erred in denying his motion to withdraw his guilty plea, contending that the plea was not freely, voluntarily, and knowingly entered. A defendant has an absolute right to withdraw his guilty plea prior to the pronouncement of a sentence, but after sentencing, a guilty plea may be withdrawn only to correct a manifest injustice. Generally, a manifest injustice may result where the plea was entered involuntarily or without an understanding of the charges. When a defendant challenges his guilty plea, the State bears the burden of showing that the defendant freely and voluntarily entered the plea with an understanding of the nature of the charges against him and an understanding of the consequences of the plea.

Here, the Court held that the State had met its burden by a showing of the plea hearing transcripts in which appellant voiced his understanding of the nature of the charges against him and with the trial court's recitation of the mandatory maximum and minimum sentences on those charges. Appellant testified that he was not under any intoxicants and he understood his waiver of rights. Additionally, he had spoken to his attorney about the charges and possible defenses. Although there was some confusion as to whether appellant plead guilty to Count 6 or 7, when asked by the trial court if he had unlawfully possessed Oxycontin with the intent to distribute, as charged in Count 7, he responded, "Yes, sir." Lastly, the trial court informed appellant that he could change his mind, "back out" of the guilty plea, and go to trial, but that once he had been sentenced, he could not back out. Because the evidence supported the trial court's ruling, the Court found no error.

Next, appellant contended that his sentences as to Counts 9 and 10 were illegal because they exceeded the maximum allowable for the charges against him. Specifically, he

argued that although the indictment charged him with selling Schedule III controlled substances, which carry a sentencing range of one to ten years, he was sentenced to thirty years on each count. The State countered that the indictment contains a “typographical error” as to the schedule number. Furthermore, the State argued that Lorcet and Lortab are Schedule II substances because they contain hydrocodone.

However, the Court noted that various forms of hydrocodone appear on both Schedule II and Schedule III. Moreover, it was unclear which schedule, which code section, and which sentencing range would apply to the substances appellant pled guilty to selling. Because of this uncertainty, the Court remanded the case to the trial court for a hearing to determine which schedule the controlled substances at issue belong, and to impose a lawful and appropriate sentence.

Statutory Rape; Lesser Included Offenses

Nelson v. State, A12A1714 (3/12/13)

Following a jury trial, appellant contended the trial court erred by instructing the jury that child molestation was a lesser included offense of statutory rape. The evidence showed that appellant was charged with one count of statutory rape and one count of indecent exposure. At trial, however, because of the lack of direct evidence of penetration, the State requested a charge on child molestation as an included offense of statutory rape. The jury then acquitted the appellant of statutory rape and indecent exposure, and convicted him of child molestation.

Appellant contended that because no person can be convicted of any offense not charged in the indictment, he was wrongly convicted of a lesser included offense because his indictment for statutory rape did not include all of the essential elements of child molestation. The Court agreed. First, the Court held that the facts in the indictment were not sufficient to establish the crime of child molestation because they did not “raise the intent to arouse or satisfy the sexual desires of either the child or the accused,” which is an essential element of child molestation. Second, under the “required evidence test,” the Court examined whether each offense requires proof of a fact which the

other does not. Because statutory rape and child molestation require proof of facts which the other does not, child molestation is not a lesser included offense of statutory rape. Thus, the Court reversed appellant’s conviction of child molestation.

Stalking

Seibert v. State, A12A2491 (3/08/13)

Appellant was convicted of aggravated stalking. The evidence showed that in 1999, the victim, appellant’s ex-wife, obtained a permanent restraining order against appellant. In 2007, the court sentenced appellant for certain crimes, and as part of his sentence, the trial court again ordered that he was not to have contact with his ex-wife and their children. In 2010, appellant filed a pro se, civil action against the ex-wife. She took the complaint to the District Attorney’s office. An assistant district attorney filed a motion to intervene in the civil action, not as the ex-wife’s attorney, but as a representative of the State. Later, appellant sent the district attorney several documents, which included a letter from the appellant to the ex-wife in care of the district attorney. The State then indicted and convicted appellant for committing two counts of aggravated stalking by contacting his ex-wife “by mailing a letter to a third party with a specific request to deliver said letter” in violation of the permanent restraining order and a probation condition in the 2007 sentence.

Appellant contended that the evidence did not support the conviction. Although the aggravated stalking statute does not define the terms “contact” or “place or places,” the simple stalking statute does under O.C.G.A. § 16-5-90(a)(1). Under the statute, the term “contact” means “any communication including without being limited to communication . . . by mail. . . .” It defines the terms “place or places” to “include any public or private property occupied by the victim other than the residence of the defendant.” The statute also provided that “the place or places that contact . . . is deemed to occur shall be the place or places where such communication is received.” The State maintained that contact through a third party can be a violation of the aggravated stalking statute. However, the Court noted, the State only cited cases in which actual contact was made, either directly by a defendant

or indirectly by a defendant through a third party. The Court held that the State failed to prove that there was actual contact with the ex-wife, through a third party or otherwise. Additionally, the State failed to prove that appellant’s communication was made at a “public or private property occupied by the victim” under O.C.G.A. § 16-5-90(a)(1). Here, the contact occurred at the district attorney’s office, where the district attorney received the letter, a location which was not “occupied” by the ex-wife when the communication was received. Thus, the Court held, there was no evidence that appellant contacted his ex-wife as the plain terms of the statutes require and his conviction was reversed.

Forfeiture

Glenn v. State, A12A2524 (3/08/13)

Appellant was subject to a Temporary Protective Order in which his safe and its contents were seized by police on verified information that the safe contained two firearms. Upon seizure, appellant arrived at the sheriff’s office to surrender his firearms in the safe by turning over the safe key to the police. When officers opened the safe they found \$44,700.00, firearms, and 16.4 grams of marijuana. Appellant claimed that the money in the safe was proceeds from an unrelated plaintiff’s judgment. The State filed a verified in rem Complaint for Forfeiture pursuant to O.C.G.A. § 16-13-49 to which appellant filed a Verified Answer and Counterclaim. The State then filed a Motion to Strike appellant’s Answer and Counterclaim for failing to satisfy the pleading requirements set forth in O.C.G.A. § 16-13-49(o)(3). The trial court granted the motion without a hearing.

Appellant contended that the trial court erred by finding the State’s Complaint for Forfeiture established a prima facie case for forfeiture. Under O.C.G.A. § 16-13-49(e)(2) “[a] property interest shall not be subject to forfeiture under this Code section for a violation involving . . . four ounces or less of marijuana unless said property was used to facilitate a transaction in or a purchase of or sale of a controlled substance or marijuana.” However, the Court noted that the State need not show an actual sale or purchase, but rather, a “nexus” in which an actual sale does occur. Additionally, “[t]he fact that money . . . was found in prox-

imity to contraband or to an instrumentality of conduct giving rise to forfeiture authorizes the trier of fact to infer that the money . . . was the proceeds of conduct giving rise to forfeiture or was used or intended to be used to facilitate such conduct.” Here, the Court held that the State properly set out a prima facie case for forfeiture. The presence of such a large amount of currency in close proximity with firearms, ammunition, and 16.3 grams of marijuana packaged in three small bags, a manner commonly used for distribution, set out a prima facie case that the marijuana was used to facilitate a transaction in, or purchase of, or sale of marijuana.

Next, appellant contended that he had satisfied the requirements of O.C.G.A. §16-13-49(o)(3). The Court agreed. While the pleading requirements in a forfeiture action are strict, they are not meant to be impossible. The Court noted that because the property seized was currency, it was highly fungible and hard to trace to a source or transaction. Furthermore, appellant provided the identity of the transferor of and the circumstances of his acquisition of the currency. While appellant “could have provided more details as to the [circumstances],” his failure to do so, did not render his claim “insufficient” as a matter of law.

Search & Seizure

Durden v. State, A12A2556 (3/8/13)

Appellant was indicted for VGCSA. He contended that the trial court erred in denying his motion to suppress. The evidence showed that an officer was on patrol one morning in an area known for drug activity. As the officer drove by in his patrol car, an unidentified woman, described by the officer as a “concerned citizen,” flagged the officer down and stated that she had just seen a man standing on the corner selling drugs. She told the officer that the man was African-American and was wearing a blue hoodie jacket, black pants, and a blue hat, and she described exactly where he had been standing. The officer then drove to the corner where he observed appellant. When the officer got out of his patrol car, appellant started to walk away. The officer ordered him to stop and appellant complied. According to the officer, appellant appeared nervous and “was fidgeting around with his hands in his

pocket[s].” When the officer instructed him to remove his hands from his pockets, he did so. The officer then asked appellant if he was selling drugs and he responded, “I don’t sell no drugs, . . ., but go ahead, I don’t have anything.” The officer searched his pockets and found 3.3 grams of crack cocaine and approximately \$600 in cash. The trial court denied the motion to suppress, finding that the stop was a second-tier one, but justified in light of the information given the officer by the concerned citizen.

The Court found as an initial matter that the trial court properly held that appellant was subject to a second tier stop because there was evidence that the officer called out to him as he was walking away from him. Thus, the show of force would lead a reasonable person to believe that he was not free to disregard the officer’s command and go about his business. Appellant, however, contended that that the officer did not have reasonable suspicion of criminal activity to justify a second-tier investigatory stop and that the unidentified woman was an “anonymous tipster” rather than a “concerned citizen.” The Court disagreed. To meet the reasonable suspicion standard, the police must show, under the totality of the circumstances, specific and articulable facts which, taken together with rational inferences from those facts, provide a particularized and objective basis for suspecting the particular person stopped of criminal activity. A mere hunch is not sufficient for an investigatory stop and information acquired from an informant that exhibits a sufficient indicia of reliability can also be the basis for reasonable suspicion. If the citizen is deemed a “concerned citizen”, the information provided to the police is presumed reliable. If the informant is an “anonymous tipster,” the information provided to the police must be “detailed enough to provide some basis for predicting the future behavior of the suspect,” and the details must be corroborated by the police for the tipster’s reliability to be established. Here, the Court found that the unidentified woman who flagged down the officer fell into the category of a concerned citizen. The evidence showed that the tip came from a source who said she witnessed the activity, she reported it directly to an officer in a face to face conversation, and provided a detailed description of appellant. Under such circumstances, the Court held that trial court was authorized to deem the woman a

concerned citizen whose reliability could be presumed.

Appellant also contended that the trial erred in finding that he voluntarily consented to having the officer search him. Specifically, appellant maintained that his statement to the officer to “go ahead” was too ambiguous to authorize a search of his person. The State has the burden of proving the validity of a consensual search and must show the consent is given “voluntarily.” Consent which is the product of coercion or deceit on the part of the police is invalid. Here, the Court found, the evidence showed that appellant’s statement telling the officer to “go ahead, I don’t have anything,” when viewed in context, could reasonably be construed as authorizing a search of his person. Furthermore, the trial court was authorized to find that appellant’s consent was freely and voluntarily given. Moreover, there was no evidence in the record of coercion, duress, or deceit. Therefore, the Court found no error.

Identification; Restitution

Parker v. State, A12A1732 (3/13/13)

Appellant convicted of burglary, aggravated battery, aggravated assault, robbery by intimidation, and robbery by force. The evidence showed that the victim was robbed inside her home after giving appellant some food. During the robbery, the victim had at least 30 minutes to observe appellant. She testified that he was wearing a cap and had the sides of his head shaved. She also described a distinctive jacket that appellant was wearing. The victim identified appellant in court as the perpetrator. The State introduced a jacket that appellant admitted was his, and the victim identified it as the jacket he was wearing on the day of the crimes. The victim’s neighbor identified appellant as the person to whom he saw the victim talking to that morning.

Appellant challenged the sufficiency of the evidence of identification and contended the State failed to exclude a reasonable theory of innocence. However, the Court found, the record showed that the issue of identification was fully presented to the jury including the possibility of misidentification. In addition to the evidence set forth above, the jury was given evidence that the victim’s neighbor initially identified another suspect but eventually identified appellant as the suspect and that

the investigation failed to produce any useful fingerprint evidence. Appellant was also allowed to present the testimony of a police officer that initially investigated a different suspect who appeared to match the victim's description. The jury was also able to compare the victim's description of the perpetrator with both appellant and a picture of the other suspect. Therefore, the Court held that sufficient evidence was presented to the jury to allow a guilty verdict as a matter of law.

Next, appellant challenged the trial court's restitution order. Immediately after announcing the sentence and without input from the prosecutor or appellant, the trial court announced that appellant was to pay back \$10,000 worth of jewelry that the victim testified was robbed from her. The Court stated that under the current law of restitution, appellant was not required to take any affirmative action to trigger a hearing on restitution. Given that restitution was ordered as a part of appellant's probation, both OCGA §§ 42-8-35 (a) (7) and 17-14-7 (b) are applicable here. OCGA §§ 42-8-35 (a) (7) provides that the restitution amount must be adjudicated if the amount of damage or loss caused by the probationer "is in dispute": "Unless otherwise provided by law, no reparation or restitution to any aggrieved person for the damage or loss caused by the probationer's offense shall be made if the amount is in dispute unless the same has been adjudicated[.]" The Court noted that it has interpreted this clause to mean that, as a prerequisite to a restitution adjudication, the defendant must dispute the amount of restitution ordered by the trial court. OCGA § 17-14-7 (b), which was enacted in 2005, however, provides that "[i]f the parties have not agreed on the amount of restitution prior to sentencing," the ordering authority must hold a hearing on the matter. Under the plain language of this Code section, the trigger for a hearing is the absence of a showing that the parties have agreed on the amount of restitution, and the determination is to be made "prior to sentencing," not after restitution is ordered by the trial court. The Court found that there is, therefore, a conflict between the two statutes regarding the trigger for a hearing on restitution.

Although appellate courts should attempt to construe newer statutes in connection and in harmony with the existing law, where an actual conflict exists, the most recent legis-

lative expression prevails. Accordingly, the Court found, in the absence of a showing that the parties have "agreed on the amount of restitution prior to sentencing," a hearing to determine restitution was required. The Court also noted that its previous decisions that require the defendant to dispute the amount of restitution — either before or after the court orders restitution — to trigger a hearing on restitution have been superseded by a change in the law and are therefore distinguishable. See, e.g., *Woods v. State*, 205 Ga. App. 500, 501 (1992); *Patrick v. State*, 184 Ga. App. 260, 261 (1987); *Williams v. State*, 180 Ga. App. 854, 855-856 (1986); *Johnston v. State*, 165 Ga. App. 792, 793 (2) (1983); *Cobb v. State*, 162 Ga. App. 314, 316 (4) (1982); and *Johnson v. State*, 156 Ga. App. 511 (1980).

Here, there was no indication that the parties agreed on the amount of restitution prior to sentencing. The court simply announced the restitution order during sentencing without a hearing or any discussion whatsoever, and without any input from the defendant. Therefore, the Court vacated the order of restitution and remanded for a hearing in accordance with O.C.G.A. § 17-14-1 et seq.

DUI; Search & Seizure

Johnson v. State A12A1785 (3/11/2013)

Appellant, who was charged with DUI, argued that the trial court erred in denying his motion to suppress. The evidence showed that at a roadblock, officers noticed appellant had a strong odor of alcohol about him. An officer asked him to perform field sobriety tests, and he agreed to be evaluated. Upon admitting to having at least two beverages, the officer placed him under arrest and read him the implied consent law, but appellant refused to submit to a state-administered chemical test. Two hours later, the officer executed a search warrant and obtained two vials of appellant's blood. Appellant's BAC was over the legal limit.

Appellant first claimed that the roadblock was unconstitutional because it was conducted by field officers with "unfettered" discretion. For a police roadblock to satisfy the Fourth Amendment, the State must show that the decision to implement the roadblock was made by supervisory personnel at the programmatic level, rather than officers in the field, for a legitimate primary purpose; all vehicles,

rather than random vehicles, are stopped; the delay to motorists is minimal; the roadblock is well identified as a police checkpoint; and the screening officer has adequate training to make an initial determination as to which motorists should be given field sobriety tests. Here, the evidence showed that the decision to implement the roadblock was properly made by a supervisor. An officer gave unrefuted testimony that he was a unit supervisor, that he had been authorized by the sheriff and department policy to establish roadblocks, that he made the decision to implement this particular roadblock, and that he was the supervisor on the scene who set up the checkpoint and ordered all the other officers where to be and what to do. Therefore, the Court held that the roadblock was legal.

Next, appellant challenged the search warrant, claiming that it did not establish probable cause. Given all the circumstances, the issuing magistrate must determine whether there is a fair probability that contraband or evidence of a crime will be found in a particular place. Here, the officer's affidavit provided that appellant had a very strong odor of alcohol about him, his eyes were bloodshot, he admitted drinking at two different bars, and he failed two field sobriety tests. Therefore, the Court held that there was a substantial basis to determine that probable cause existed and evidence of driving under the influence would be found in appellant's blood.

Severance

Howell v. State, A12A2406 (3/11/13)

Appellant was convicted of statutory rape, possession of a controlled substance, and possession of drugs not in original container. The evidence showed that on June 9, 2011, the fourteen-year-old victim was staying with a family friend while her mother was out of town. Both were drinking beer and watching a movie when twenty-one year old appellant came over to the house. After introducing appellant to the victim, the family friend spoke privately to appellant and then went to her bedroom and fell asleep. Shortly thereafter, appellant forcibly raped the victim. When the crime was reported, the victim was taken to the hospital and examined and evidence of sexual assault was found. Upon appellant's search incident to arrest, officers discovered drugs in appellant's cigarette package.

Appellant argued that the trial court erred in denying his motion to sever the counts alleging the sexual offenses from the drug offenses because the charges were not based on the same conduct or on a series of connected or related acts. The Court stated that a trial court does not abuse its discretion in denying a severance motion where evidence of one charge would be admissible in the trial of the other. Furthermore, when the circumstances of that arrest result in additional criminal charges, it is not an abuse of discretion to refuse to sever the trial of those charges from the trial of the charge for which appellant was arrested. Here, the evidence showed that, shortly after the sexual assault, the police discovered the drugs hidden inside a cigarette package in appellant's possession during a search incident to his arrest on the sexual offenses. Thus, the Court held that the drug possession charges were related because they were an immediate circumstance of appellant's arrest for the sexual offenses for which he was being tried.

Jury Charges; Identification

Brown v. State, A12A2151 (3/14/13)

Appellant was convicted of several charges, including three counts of armed robbery and four counts of possession of a firearm during the commission of a felony. Undisputed physical evidence and witness identifications by both perpetrators and victims linked the appellant to the several robberies that occurred from July through September.

Appellant contended that the trial court erred by instructing the jury that "the level of certainty shown by the witness[es] about [their] identification" of appellant was to be among the factors considered in assessing the reliability of the eyewitnesses' identification. The Court found that this instruction was error in light of the Supreme Court's decision in *Brodes v. State*, 279 Ga. 435, 442 (2005). Nevertheless, although the trial court committed error in the jury instruction, it was not fatal to appellant's conviction because there was evidence shown at trial which corroborated the witness's testimony. Here, the crimes against the first victim were corroborated by testimony from appellant's friend that he saw him driving the vehicle used in the robbery and that appellant said he had stolen the vehicle and abandoned it. The crimes against the second victim were

corroborated by testimony from appellant's codefendants that they were with him when they dropped him off at the victim's apartment, that they heard screaming and a gunshot, and that they picked up appellant when he was unsuccessful in taking the car parked next to the victim's car. The crimes against the third victim were corroborated by testimony from appellant's accomplice that he helped him take a green Chevrolet Blazer and that he used a black pistol. Also, appellant's fingerprints were found inside the Blazer, which belonged to the third victim. Finally, the crimes against the fourth victim were corroborated by the fact that appellant was found by police in the wreckage of the victim's car, which had just been stolen from him. Therefore, the Court sustained the convictions based on the ample evidence provided at trial.

Appellant also contended that the trial court erred by denying his request for a hearing outside the jury's presence to assess the suggestiveness of pre-trial identification procedures used by two victims. Under the standards provided in *Neil v. Biggers*, it is error to allow testimony concerning a pre-trial identification of the defendant if the identification procedure was impermissibly suggestive and, under the totality of the circumstances the suggestiveness gave rise to a substantial likelihood of misidentification. Here, one victim was able to pick out appellant from an array of 2,231 photos. The Court held that the identification procedure as to this victim was not impermissibly suggestive. The other victim identified the appellant one-and-a-half hours after the robbery. The line-up was a six-person photographic lineup that contained men of the same race and age with similar complexion and hair style. Again, the Court held that the procedure revealed no undue suggestiveness created by police and there was no due process violation.

Sufficiency of Evidence; Impeachment

Jordan v. State, A12A2286 (3/11/13)

Appellant was found guilty of one count of burglary, two counts of armed robbery, and two counts of aggravated assault. The evidence showed that appellant, along with two or three other men wore masks and pointed guns while inside the victim's home and robbed both occupants. A cellphone containing a piece of

paper was found in the backyard that identified appellant's girlfriend. When police contacted the girlfriend, she made several statements that implicated appellant in the robbery. But, when the police attempted to record her responses, she refused to answer their questions. During trial, she denied and disclaimed all knowledge of the crime.

Appellant contended that the evidence presented by the State was insufficient to authorize his convictions, because the only direct evidence, the girlfriend's testimony, was impeached, and because the other evidence was circumstantial and did not exclude every reasonable hypothesis other than guilt. The Court stated that while it must review the evidence in the light most favorable to the jury verdict, it must not be blinded by that verdict when a reasonable hypothesis of innocence appears from the evidence or lack thereof, and may declare such as a matter of law.

Here, the Court upheld the burglary conviction based on the girlfriend's statements to police, even though she had changed it during her testimony. She told the police that appellant was gone during the approximate hours of the robbery, returned home, threw money at her, and told her he had been part of a home invasion. She also told police that she had given appellant the cellphone, and he admitted to placing the piece of paper with the girlfriend's personal information on it in the phone. Next, the Court upheld the armed robbery and aggravated assault counts based on the girlfriend's statements; on the testimony from the victims that guns were used in commission of the crime; the physical evidence taken from the scene showing bullet holes in the home; and one of the victim's testimony that one of the intruders with a gun was a black male with a south Georgia accent - a description which only matched appellant among the home invaders.

Similar Transactions

Dixon v. State, A12A2260 (3/11/13)

Following a bench trial, appellant was found guilty of an armed robbery of a Cherokee County convenience store and aggravated assault of one of its employees. The evidence showed that on January 10, 2009, a male carrying a dark backpack with a distinctive white design on the front and wielding a long kitchen

knife entered a BP convenience store located near Interstate 75 in Cherokee County. He wore a blue jacket, a dark hood, a dark mask, dark gloves, jeans, and white tennis shoes. The perpetrator robbed the store when there were no patrons inside and utilized the dark backpack with a “white design” to collect the money from the employees.

On March 2, 2009, law enforcement officers in neighboring Cobb County responded to a call of suspicious activity by two individuals wearing dark clothing outside a Shell station located near Interstate 75. The officers approached the two individuals, one of whom they identified as the appellant. After appellant lied to police as to why they were in the vicinity, police discovered a vehicle that was positioned for “quick access” to interstate 75 that was registered to appellant. He was arrested and charged with loitering and prowling. At the time of his arrest, appellant had black gloves in his coat pocket and a black ski mask rolled up on his head. He was also wearing jeans and white tennis shoes, had a blue fleece jacket, and possessed an empty, dark backpack with a distinctive white design on the front of it.

After appellant had been arrested, Cherokee County law enforcement began an investigation of appellant as a person of interest for the Jan 10, 2009 robbery. Various clothing items and the distinctive backpack possessed by appellant at the time of his arrest matched the perpetrator’s backpack seen on the video recording in the Cherokee County robbery. Moreover, the tennis shoes worn by appellant at the time of his arrest had treads on the bottom of them consistent with the footwear impressions that had been taken from the mud near the convenience store in Cherokee County. Based on this evidence, police in Cherokee County were able to indict appellant on the robbery.

Meanwhile, Bartow County law enforcement learned of appellant’s arrest and began investigating a series of armed robberies during the same time period. Five separate robberies had occurred within close proximity to Interstate 75, all were robbed late at night or early in the morning, no customers were in the stores, the perpetrator carried a similar backpack, wore a mask, gloves, jacket, hood, jeans, and white shoes in similar fashion to the Cherokee County Jan 10, 2009 robbery. Appellant then admitted to the robberies and pled guilty to four of the robberies in Bartow County.

Appellant contended that the trial court committed reversible error by admitting similar transaction evidence of the five Bartow County robberies. In order for the State to admit similar transaction evidence, it must show by a preponderance of the evidence that it seeks to introduce the evidence for a proper purpose; that there is sufficient evidence that the accused committed the independent offense or act; and that sufficient similarity exists between the independent offense or act and the crime charged so that proof of the former tends to prove the latter. Furthermore, a much greater degree of similarity between the charged crime and the uncharged crime is required when the evidence of the other crime is introduced to prove identity than when it is introduced to prove a state of mind and the pattern and characteristics of the crimes must be unusual and distinctive as to be like a signature.

First, the Court held that the trial court acted within its discretion in admitting evidence of the armed robberies of the four Bartow County convenience stores. There was evidence that the four armed robberies, like the Cherokee County robbery, occurred late at night or early in the morning when no customers were in the stores; involved stores that were located near Interstate 75; involved a perpetrator wearing a mask, hoodie, gloves, jeans, and white shoes; and, most significantly, involved the same perpetrator also wearing a dark backpack with a distinctive white design on it that he used for collecting cash from the registers. Such evidence showed that the robberies were “sufficiently similar” to the Cherokee County robbery and the distinctive backpack used in both counties “logically connected” the transactions to one another.

Next, the Court held that although the fifth Bartow County armed robbery did not involve the distinctive backpack, there were sufficient similarities supported by the evidence in connection with the Cherokee County robbery. Premitting whether the fifth armed robbery was admissible as a similar transaction, the Court found it highly unlikely that its admission contributed to the verdict in the bench trial, in light of the four armed robberies that were properly admitted as similar transactions.

Hearsay; Prosecutors as Witnesses

Goodwin v. State, A12A1762 (3/11/2013)

Appellant was convicted of two counts of child molestation. The record showed that a Spalding County investigator testified that after she received a referral about the case from a Cobb County detective, she set up a forensic interview with the seven-year-old victim and her mother. During the interview, the child accused appellant of descriptive sexual acts with the child which provided a sufficient basis for a search warrant to locate the items used in the crimes. Throughout trial, appellant sought to introduce evidence about interviews with the victim and her mother by the Cobb County detective a few weeks before the case was transferred to Spalding County, but the trial court sustained the State’s hearsay objections because the detective was not present at trial. Appellant wanted the recorded interviews because they allegedly provided evidence that the mother had questions regarding the child’s truthfulness.

Appellant contended that the trial court erred in not allowing into evidence hearsay testimony related to the interviews, arguing that the evidence was admissible as an exception to the hearsay rule because the Cobb County detective was “unavailable.” The Court noted that appellant relied on the general necessity exception under former O.C.G.A. § 24-3-1, which has an “unavailability component,” rather than on former O.C.G.A. § 24-3-10, because under the latter statute, testimony given by an “inaccessible” witness must have been made under oath in a former proceeding on the same issue between the same parties to be admissible, and the testimony appellant sought to admit was not given under oath in a former proceeding. Additionally, the Court specified that under former O.C.G.A. § 24-3-1(b), a witness that was “inaccessible” or “unavailable” required “proof of sustained efforts by parties” to locate the witness. Because appellant failed to obtain a ruling on the witness’s inaccessibility, the Court found no error.

Next, appellant contended that the trial court erred in the hearing on his motion for new trial by sustaining the State’s objection to questioning under oath the assistant district attorney (ADA) who tried the case. Generally, courts will not call trial attorneys to the

stand unless made necessary by the facts of the case or a “compelling need.” Moreover, trial courts are generally held to have discretion on whether to allow a party to call opposing counsel as a witness, on the view that attempting to call opposing counsel to establish some fact that can be readily proved in a different manner should be discouraged. Here, the record showed that after the ADA was sworn, appellant asked her whether she had the Cobb County detective under subpoena for the trial. Counsel for the State objected and sought a proffer as to the relevance of the questions, absent an accusation of prosecutorial misconduct, because the clerk’s file would provide evidence as to whether the detective had been subpoenaed, as could the detective himself. The court sustained the objection. Defense counsel then called the detective and he testified on the matter concerning his subpoena. Thus, the Court held, the circumstances of the case did not make it necessary for the prosecuting attorney to testify on appellant’s behalf during the hearing on the motion for new trial because the evidence sought was available through other means and eventually obtained by appellant.

Search & Seizure; Miranda

Norton v. State, A12A1820 (3/13/13)

Appellant was convicted of trafficking methamphetamine, possession of methamphetamine both on his person and in his urine, and possession of a drug related object. The record showed that appellant was brought to a hospital ER in a semi-conscious state where emergency personnel discovered the contraband and called law enforcement. Based on information gathered from appellant’s girlfriend, the officers executed a search warrant for a sample of his blood and urine which yielded positive results. At trial, the State was allowed to introduce similar transaction evidence involving charges against appellant resulting from an earlier execution of a search warrant at his girlfriend’s home. During that search, police discovered a methamphetamine pipe and appellant agreed to provide officers with a urine sample, which tested positive for methamphetamine.

Appellant contended that the trial court erred in denying his pre-trial motion to exclude the similar transaction evidence based on a

defective search warrant. At the hearing on his motion, appellant introduced evidence showing that the application for the warrant specified that law enforcement was looking for, among other things, methamphetamine. The warrant itself, however, authorized a search for marijuana, rather than methamphetamine. Under O.C.G.A. § 17-5-31, “[n]o search warrant shall be quashed or evidence suppressed because of a technical irregularity not affecting the substantial rights of the accused.” Here, the Court found, the officer executing the warrant testified that the discrepancy was a typographical error and that the officers entering the building were told to look for methamphetamine. Therefore, the Court held that the single typographical error was not so “material” as to harm the validity of the warrant.

Next, appellant attempted to exclude evidence from the prior transaction concerning the statements he made to police following the search of his girlfriend’s house, arguing that the interview violated his Miranda rights. During the recorded interview, the officer read appellant the waiver of rights form, which included a recitation of each of appellant’s Miranda rights. After reading appellant each of his rights, the officer paused and asked him if he understood that right, and each time appellant responded affirmatively. When the officer asked appellant to sign the waiver form, appellant stated, “the part [of the form] that bothers me is it says ‘I am now willing to talk’ . . . that don’t [sic] disavow everything else I said [does it]?” Appellant contended that this question showed that he had previously spoken with an officer and had indicated that he did not want to speak with police. By questioning him a second time, therefore, police violated his Miranda rights and the trial court erred in admitting the evidence obtained during that interview.

The Court disagreed. The Court held that the record contained no evidence that appellant ever asserted his right to remain silent, either equivocally or otherwise. The evidence showed that the arresting officer indicated that she neither interviewed nor attempt to interview the appellant. Additionally, the lead agent who interviewed the appellant testified that he did not attempt to speak with appellant before the recorded interview. Moreover, the Court noted, appellant did not testify at either the pre-trial hearing or the Jackson-Denno

hearing and assert that he informed any law enforcement officer present at the execution of the search warrant that he intended to remain silent. Nor did he call any other officer present at the scene to testify that he had spoken with the officer and indicated his wish not to speak with police. Thus, the Court affirmed the trial court’s ruling that appellant made a knowing and voluntary waiver of his rights.