Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 4, 2014

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THIS WEEK:

Knowledge of Weight; Trafficking

Scott v. State, S13G1042 (3/28/14)

The Supreme Court granted a writ of certiorari to determine if the Court of Appeals erred in concluding that proof of the knowledge of the weight or quantity of cocaine was not an element of the offense of trafficking under former O.C.G.A. § 16-13-31(a)(1) (2003). The evidence showed that appellant was convicted of trafficking in cocaine and related charges after he was found with 37 individually wrapped packets of cocaine, a twist-tied package of cocaine, a "slab" of cocaine and crack cocaine packaged for resale. The GBI Crime Lab expert testified that among the substances seized was 72.65 grams of a cocaine mixture registering 72.6 percent of purity of cocaine.

Former O.C.G.A. § 16-13-31(a)(1) (2003) provided, in part, that "Any person who knowingly sells, manufactures, delivers, or brings into this state or *who is knowingly in possession of 28 grams or more* of cocaine or of any mixture with a purity of 10 percent or more….commits the felony offense of trafficking in cocaine…" (Emphasis supplied). The Court acknowledged that in *Wilson v. State*, 291 Ga. 458 (2012), it found potential merit to Wilson's argument that former O.C.G.A. § 16-13-31(c) required proof that the defendant knew the amount of the marijuana he possessed. But, the Court stated, it was unnecessary to directly address the question because the question on appeal was whether the trial court's instruction to the jury that a conviction of trafficking did not require such proof constituted "plain error." Here, however, the Court was required to face the issue squarely.

The Court held that the plain language of former O.C.G.A. § 16-13-31(a)(1) (2003) "dictates the conclusion that knowledge of the quantity of the drug was an element of the crime. It contains express scienter requirements, that is, knowledge of the nature and amount of the drug and of being in possession of it." In so holding, the Court noted that in 2013, the Legislature deleted "knowingly" throughout O.C.G.A. § 16-13-31(a) and "…such change is consistent with legislative confirmation that proof of a defendant's knowledge of each element of the trafficking statute, including weight of

the drug, was required in former versions of the statute, but that the General Assembly no longer intends that it be so." Furthermore, the Court found, this intent of the Legislature was reinforced by the enactment of O.C.G.A. § 16-13-54.1 (2013) which specifically provides that knowledge of the weight or quantity of a controlled substance is not to be an essential element of the offense. Accordingly, the Court reversed the opinion of the Court of Appeals and remanded the case back to it for a determination of whether the evidence at trial was sufficient to prove beyond a reasonable doubt that appellant knew the cocaine he possessed weighed 28 grams or more.

Mental Competency; Ineffective Assistance of Counsel

Humphrey v. Walker, S13A1472, S13X1473 (3/28/14)

The Warden appealed after a court granted Walker's petition for writ of habeas corpus. The record showed that Walker was convicted of murder and sentenced to death in 2002. His direct appeal was affirmed. *Walker v. State*, 282 Ga. 774 (2007). In 2009, he filed a petition for habeas corpus alleging that his defense counsel was ineffective for failing to have his mental competency to stand trial evaluated. The habeas court agreed and the Warden appealed. The Court agreed with the habeas court and affirmed the grant of the petition.

In a very long, fact specific opinion, the Court stated that an accused is incompetent to stand trial if he is without the ability to understand the nature and object of the proceedings going on against him, to comprehend his own condition in reference to such proceedings, and to render his attorneys such assistance as a proper defense to the indictment preferred against him demanded. A claim that an accused is not competent, however, must be asserted in the court of conviction and on direct appeal, and if such a claim is not so asserted, it ordinarily is barred by procedural default and cannot, therefore, be later asserted in habeas proceedings. But, a claim that is subject to procedural default may nevertheless be considered in habeas corpus proceedings if the petitioner can satisfy the cause and prejudice test. The habeas court acknowledged that Walker never asserted in the court of conviction that he was incompetent to stand trial, but it found adequate cause and prejudice to overcome the procedural default because trial and direct appeal counsel rendered ineffective assistance.

The Court noted that the trial court made extensive findings of fact which must be credited by the Court if there is evidentiary support for them. Based on this, the Court found that the habeas court did not err when it determined that Walker was denied the effective assistance of counsel with respect to an investigation and evaluation of his competence. Counsel actually believed that Walker required a professional mental health evaluation, and they had good reasons for so believing. A reasonable lawyer in these circumstances would have pursued a professional mental health evaluation, as counsel in this case made some effort to do. Specifically, defense counsel procured funds and made arrangements for Dr. Donald Meck, a psychologist, to examine Walker. But Walker refused to submit to any examination, insisting that there was nothing wrong with him. At that point, counsel gave up any effort to have Walker professionally evaluated.

But, the Court found, a reasonable lawyer would not have abandoned the pursuit so quickly, just because Walker was opposed to the development of evidence of his mental health. After all, although an accused ordinarily is the "master of his own defense," a client that appears incompetent presents no ordinary case.

Moreover, counsel was not deterred from investigating the mental health of their client just because Walker did not wish for them to do so. Instead, the record showed, it was his specific refusal to submit to an examination that deterred them. When Walker refused to submit to an examination, counsel appeared to have assumed that the absence of an examination meant that a useful evaluation would be impossible. But, the Court stated, counsel were not themselves mental health professionals, and it was not reasonable for them to assume as much. Had they consulted with Dr. Meck, as a reasonable lawyer would have done, they would have learned that he could evaluate Walker by alternative means.

In light of such a consultation, a reasonable lawyer would have given Dr. Meck the materials and information that counsel had, and a reasonable lawyer would have gone to greater lengths to secure additional evidence by which Dr. Meck might evaluate Walker. Sufficient materials and information from which Dr. Meck could have formed an opinion about Walker's competence were readily available to counsel at and before his trial, and a reasonable lawyer would have supplied those available materials and information. And from such materials and information, Dr. Meck would have drawn the conclusion that Walker was not competent to stand trial, an opinion to which he could have testified at a competency trial. At such a trial, the question for the jury would have been whether Walker was capable of understanding the nature and object of the proceedings, whether he comprehended his own condition in reference to such proceedings, and whether he was capable of rendering his counsel assistance in providing a proper defense. Walker would have borne the burden at such a trial to show his incompetence by a preponderance of the evidence. If Dr. Meck had so testified at a competence trial, the Court stated, a reasonable probability existed that Walker would have been found incompetent to stand trial, especially in the absence of any expert testimony contradicting that of Dr. Meck. Accordingly, the Court found, Walker carried his heavy burden to show that he was denied the effective assistance of counsel with respect to competence, and by carrying that burden, he showed sufficient cause and prejudice to overcome the procedural default of his claim that he was tried while he was incompetent.

Having determined cause and prejudice, the Court addressed the merits of Walker's petition. The Court noted that Dr. Meck testified in the habeas proceedings that Walker likely was incompetent at the time of his trial. And, the Court noted, this testimony was not disputed by any expert testimony offered by the Warden. The Warden did note that, at trial, the trial court offered its own opinion that Walker seemed to adequately understand the proceedings and the Court noted, the opinion was worth something because the experienced trial judge had an extended opportunity to observe Walker in the pretrial proceedings and at trial. But, the Court stated, it could not say that the habeas court had to give it more weight than the opinion of Dr. Meck. The habeas court was in the best position to assess the credibility of Dr. Meck, and it found him quite credible. Given the standard of review,

the habeas court did not erred when it found that Walker was incompetent at the time of his trial. For this reason, the Court concluded, it must affirm the grant of the writ and vacate Walker's convictions and sentences. Finally, the Court added, the State may, of course, retry Walker, but only if he is competent at the time of retrial.

Similar Transactions; Motions to Suppress

Hernandez v. State, S13G1554 (3/28/14)

Appellant was convicted of trafficking in cocaine. The record showed that during trial, the State offered similar transaction evidence concerning a stop of appellant's car in North Carolina. Appellant argued that the trial court should have suppressed the evidence of the similar transaction because the State failed to prove the lawfulness of the North Carolina traffic stop. The Court of Appeals disagreed. *Betancourt v. State*, 322 Ga.App. 201 (2013). It found that the exclusionary rule is intended principally to deter unlawful searches and seizures, and the rule applies only when its remedial objectives are thought most efficaciously served. The Court of Appeals reasoned that the suppression of evidence seized by out-of-state law enforcement officers would yield no appreciable deterrence, and as a result, it held that the exclusionary rule did not apply in this case to require the suppression of the similar transaction evidence, even assuming that such evidence was seized unlawfully. The Supreme Court granted appellant's petition for writ of certiorari and affirmed the decision of the Court of Appeals, but on other grounds.

The Court stated that our statutory law provides a procedure by which an accused may move to suppress evidence that was obtained unlawfully. A motion to suppress must "be in writing and state facts showing that the search and seizure were unlawful." O.C.G.A. § 17-5-30(b). In the absence of such a motion, the State has no burden to prove the lawfulness of the manner in which evidence was obtained, and the accused fails to preserve any error with respect to the suppression of the evidence. Here, the Court found, the State gave notice to appellant seven months before trial that it intended to offer evidence of the North Carolina traffic stop as a similar transaction. Although appellant objected to the admission of that evidence on several grounds, he never argued before trial that the evidence had been unlawfully obtained, and he never filed a written motion to suppress. Instead, he waited until a hearing on the admissibility of the similar transaction evidence held out of the presence of the jury, but midway through the trial to say anything about the lawfulness of the North Carolina traffic stop. And even then, he pointed to no facts suggesting that the stop was unlawful. To the contrary, he merely argued that the State had failed to prove the lawfulness of the stop. But, the Court held, the State had no burden to prove the lawfulness of the stop until its lawfulness was put in issue by a motion that complied with the statutory requirements, and it was undisputed that appellant filed no such motion. Accordingly, the trial court correctly ruled that the State was not required to prove that the evidence was obtained lawfully. Appellant therefore failed to preserve any error with respect to the suppression of the similar transaction evidence. According, "[u]pon that ground, we affirm the judgment of the Court of Appeals."

Admissions Against Interest

Bostic v. State, S13A1344 (3/28/14)

Appellant was convicted of one count of malice murder, seven counts of aggravated assault and other related crimes. The record showed that while awaiting trial, appellant was incarcerated. The State introduced the testimony of a fellow inmate to the effect that appellant had said to another prisoner that appellant would "win his case," because "his people [would] put the guy that ID'd him at the scene of the crime . . . to sleep," which would mean that the State would "not be able to go to the grand jury and indict him and he will walk free." Appellant contended that this testimony should not have been admitted because it was hearsay, irrelevant to the crimes charged, improperly placed his character in issue, and, even if otherwise admissible, should have been excluded because it was unfairly prejudicial to him to an extent that the probative value of the evidence was outweighed.

The Court stated that admissions of a party opponent are admissible as exceptions to the hearsay rule. Here, the Court found, the testimony was, at the very least, relevant to show appellant's consciousness of his guilt, and any statement or conduct of a person, indicating a consciousness of guilt, where such person is, at the time or thereafter, charged with or suspected of crime, is admissible against him upon his trial for committing it. This was true even if it incidentally placed appellant's character into evidence. Furthermore, to the extent that appellant argued in the trial court that the probative value of the evidence was outweighed by unfair prejudice to him, the trial court did not abuse its discretion in admitting the evidence. Evidence of appellant's consciousness of guilt was certainly relevant at his trial. Any question as to the truth of the witness' testimony was, as the trial court noted, for the jury's resolution, and there was no danger that the jury would use the evidence to convict appellant on grounds other than proof of the offenses charged.

Character Evidence; Explaining Conduct of Witness

Reed v. State, S13A1583 (3/28/14)

Appellant was convicted of malice murder and other related offenses. The evidence showed that appellant shot the victim in the presence of his girlfriend who then helped him cover up the evidence of the crime and dispose of the body. Appellant contended that the trial court erred in allowing his girlfriend to testify regarding appellant's threats to harm her and her family if she failed to cooperate with him after the murder, as well as physical and sexual abuse appellant inflicted upon her both before and after the murder. The record showed that appellant moved in limine to exclude such testimony, arguing that it was not relevant to the issues in the case and that it improperly placed his character in issue. The trial court held the testimony admissible to explain his girlfriend's state of mind and conduct in the aftermath of the murder.

The Court found no abuse of discretion in this ruling. Appellant's girlfriend was clearly the State's star witness, and the defense's strategy was primarily to attack her credibility by questioning why she had failed to report the crimes for so long and suggesting that she came forward only when she needed leverage with the police regarding another matter. The State thus properly sought to adduce the girlfriend's testimony regarding appellant's abuse and threats to rebut this line of attack

by showing that the girlfriend's conduct was driven by fear. Evidence that is material in explaining the conduct of a witness does not become inadmissible simply because defendant's character is incidentally put in issue. The defense made an issue of appellant's girlfriend's conduct in failing to come forward, and the evidence of appellant's threats and abuse was therefore relevant to explaining that conduct.

Cross-examination; Prosecutorial Misconduct

Hartsfield v. State, S13A1608 (3/28/14)

Appellant was convicted of felony murder, armed robbery, and aggravated assault. He argued that the trial court erred by not granting his motion for a mistrial after the State presented improper character evidence against a key defense witness. Specifically, the mother of one of the State's star witnesses testified on behalf of appellant that when her daughter, who allegedly had direct knowledge of appellant's offenses, returned home several days after the incident, her daughter never mentioned that appellant had anything to do with the crimes.

On cross-examination, the State elicited testimony from the mother conceding that she and her daughter were not close and that her daughter had run away from home several times. The prosecutor then asked the mother whether part of the reason that she did not have a great relationship with her daughter was because she had been absent from her daughter's life, to which the mother eventually responded, "Yes, I was gone for seven years." The prosecutor responded, "Yep. And where were you for that seven years?" The mother replied that she had been in prison. Defense counsel objected to the testimony as being irrelevant, but the trial court interrupted his objection, dismissed the jury, and stated that the testimony was improper character evidence because the State could not elicit information from a witness that she had been in prison unless the State intended to impeach the witness with a certified copy of her conviction. The prosecutor asserted that while he was aware that the mother had a criminal record, he expected her to testify that she had been in North Carolina, and that he had only intended to establish that she had been an absentee parent. At this point, defense counsel moved for a mistrial and a curative instruction if the court denied the motion. The trial court denied the motion for a mistrial, but gave a curative instruction when the jury returned, directing the jury to "totally disregard" the last question from the State and the mother's response as irrelevant and improper character evidence and to "not consider [the improper evidence] at all in your decision in this case." The court then admonished the prosecutor and concluded by asking whether any of the jurors had questions about the instruction or could not follow it, to which no one responded. At this point, the State proceeded with its cross-examination.

The Court noted that because appellant failed to renew his motion for mistrial following the trial court's admonishment and curative instruction, he waived the issue on appeal. But, the Court found, even if he had preserved this issue and assuming the testimony about her prior conviction was inadmissible, the trial court did not err in denying the motion for mistrial. The decision to grant a mistrial is within the discretion of the trial court and will not be disturbed on appeal unless there is a showing that a mistrial is essential to the preservation of the right to a fair trial. Here, the trial court's immediate curative instruction, striking from the record the prosecutor's question and the mother's response, and admonishment of the prosecutor in front of the jury, preserved appellant's right to a fair trial. Accordingly, the trial court did not abuse its discretion when it denied the motion for a mistrial.

Civil Cases; Right to Transcript

Beringer v. Emory, A13A2077 (3/14/14)

Appellant appealed from an order holding her in civil contempt and denying her motion to obtain a copy of her contempt-hearing transcript. She contended that she was entitled to the transcript and that without it, she could not prove that the trial court erred in the hearing.

The Court stated that in civil cases, a court reporter and official transcript are not generally required, although a transcript may be needed to obtain full appellate review and after notes from a proceeding have been transcribed, the court reporter must certify the transcript and file the original and one copy with the clerk of the trial court. Then, upon filing, the transcript becomes a public record that is equally available to all parties. Nevertheless, a party who elects at the start of a proceeding to solely bear the takedown costs for preparing a transcript may keep another party from obtaining the transcript if, at the start of those proceedings, the other party expressly refuses to participate in the takedown costs.

To foreclose a losing party's access to a proceeding transcript for failure to participate in takedown, the party seeking forfeiture must not only make the express refusal known to the judge before trial, but must also invoke a ruling of the trial judge at the commencement of the proceedings. Emory, as the party seeking a forfeiture of appellant's right to a transcript, had the burden of demonstrating that those requirements had indeed been met.

Here, the Court found, an express refusal was made by appellant in response to an inquiry by the court reporter in open court prior to commencement of the proceedings. However, the trial court did not make a ruling at the beginning of the trial that appellant had expressly refused to share payment for the takedown. Therefore, the Court held, appellant was entitled to a transcript of the hearing.

Voir Dire; Jurors

Haynes v. State, A13A1788 (3/19/14)

Appellant was convicted of rape, attempted child molestation, and enticing a child for indecent purposes. He contended that the trial court erred in failing to excuse a juror for cause. The record showed that during voir dire, the juror testified that when she was six years old, she was sexually assaulted. She testified that she had already formed an opinion about guilt or innocence, she was not impartial, and that "you would have to convince me of innocence." The prosecutor then asked her whether she could do what the law required and put the burden of proof on the State if the trial court instructed her that the State had that burden, that the defense was not required to prove anything or to put up any evidence, and that the defendant was not required to testify. She replied, "I would, of course I would have to I guess as you keep saying compartmentalize and try and be impartial. I wouldn't want to, but I

could." She indicated that she thought she could be fair and impartial. In response to defense questioning, the juror reiterated that she could "compartmentalize," but she did not want to and she did not believe that she was the right juror for the case. The judge stated that because the juror said could "do it" even if she did not want to, she was capable of sitting on the jury.

Here, the Court found, the trial court reasoned that the juror's comment did not establish a bias or a fixed belief in the guilt or innocence of the accused, but rather reflected a common opinion of jurors in this type of case involving a difficult and unpleasant subject. A potential juror's doubts as to his or her own impartiality or reservations about his or her ability to set aside personal experiences do not require the court to strike the juror, as the judge is uniquely positioned to observe the juror's demeanor and thereby to evaluate his or her capacity to render an impartial verdict. Rather, a juror who expresses a willingness to "try" to be objective and whose bias arises from feelings about the particular crime as opposed to feelings about the accused may be eligible for service.

Thus, the Court held, despite the juror's initial reaction to the charges in the case, she never indicated any bias against appellant personally. Moreover, she indicated that she could put aside her prior life experiences and try to be fair and impartial. Accordingly, the trial court did not abuse its discretion in failing to strike the juror for cause.

Search & Seizure

State v. Snead, A13A1817 (3/19/14)

Snead was charged with VGCSA and possession of a weapon during the commission of a felony. The trial court granted Snead's motion to suppress and the State appealed. The evidence showed that two officers, responding to a call of a suspicious vehicle, observed a truck parked near other vehicles at a multi-family residence near the side of the road. Snead was lying across the seat of the truck when the officers approached, and he leaned over to close the open driver's side door after being awoken by the officer's headlights. The office who approached from the driver's side noticed Snead appeared to be impaired, was jittery and visibly shaking during the encounter, seemed confused, and had thick and slurred speech. He also noticed an empty gun holster and asked Snead if there was a weapon in the vehicle. Snead said no, but the other officer was able to see pistol in the truck from his passenger side vantage point. He called out the officer code word to alert the other officer of the weapon's existence. At that point, Snead grabbed the weapon by the handle with his finger in the trigger guard, and both officers drew their service weapons and commanded Snead to drop the weapon. As Snead was moved to the back of the vehicle, but not placed in handcuffs, the other officer opened the passenger side door, secured the weapon and conducted a search in which he found the controlled substance. The trial court granted Snead's motion to suppress, finding that the officer was not authorized to open the passenger door of the vehicle to secure the weapon and finding that the drug paraphernalia was not in plain view from outside the vehicle.

The Court reversed. The Court stated that an officer is authorized to perform a warrantless search of the passenger compartment of an automobile when 1) an arrestee is within reaching distance of a vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest; 2) the officer has a reasonable suspicion that the occupant, whether an arrestee or not, is dangerous and might access the vehicle to gain immediate control of weapons; or 3) there is probable cause to believe that the vehicle contains evidence of criminal activity. The Court noted that in *Michigan v. Long*, the U. S. Supreme Court held that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons. The issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Citing *Long*, the Court held that the trial court erred by finding that the officer was not authorized to open the passenger door of the vehicle in order to secure the weapon simply because Snead had been removed from the interior of the vehicle. Snead was not handcuffed while the officer was opening the passenger-side door to retrieve the weapon, and that act of doing so was "simultaneous" to the other officer's removal of Snead from the truck. But even accepting the trial court's finding that Snead's removal to the rear of the vehicle had occurred by the time the officer opened the door and secured the weapon, the officer was authorized to secure the weapon for both officers' safety because Snead was not handcuffed at that point.

Thus, the Court found, the entry into the vehicle was authorized to secure the known weapon and conduct a Terry-style protective sweep for others, and the officer's potentially ulterior motive of searching for contraband does not play a part in the Fourth Amendment analysis. The testimony of both officers that Snead had to be told to drop the weapon while both officers had their service weapons drawn and pointed at him, regardless of whether he had to be told once or twice, removed this from the line of cases in which officers did not have the appropriate reasonable belief to support entering the vehicle to secure a weapon and complete a search of the passenger compartment on the basis of officer security. When the officer discovered contraband other than weapons, he was not required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances.

Sentencing

Collins v. State, A13A1691 (3/13/14)

Appellant was convicted of armed robbery, possession of a firearm during the commission of a crime and possession of an article with an altered identification mark. He contended that the sentencing judge did not exercise any discretion in sentencing him to 20 years for the armed robbery, pointing to the judge's comments that "[i]n this circuit you ain't going to get 10 years if you get out with a loaded gun and stick it in somebody's face and take their money" and that "[t]he only question is life or 20 years no parole."

The Court stated that a trial court's use of a mechanical sentencing formula amounts to a refusal to exercise its discretion. But, the Court must consider the judge's remarks as a whole. Here, the transcript of the sentencing hearing showed that prior to the remarks in question, the judge gave a lengthy summary

of the evidence and noted the minimum possible sentence of ten years. Considered as a whole, the Court stated it did not believe the trial court's remarks indicated either a misunderstanding of the law or a general policy of not exercising discretion. Rather, the trial court judge clearly knew the possible sentencing range and, based on the manner in which the armed robbery was committed, determined that neither the minimum nor maximum sentence was appropriate, and that instead a 20-year sentence was authorized. Accordingly, the Court held, the trial court did not employ a mechanical formula in imposing the sentence in this case.

Motions to Suppress

McKinney v. State, A13A2385 (3/18/14)

Appellant was convicted of possession of marijuana with intent to distribute. He contended that the trial court erred by conducting the motion to suppress during the trial because it deprived him of his Fourth Amendment right to testify at the motion to suppress in order to protect his Fifth Amendment right to remain silent at trial. The record showed that appellant filed his motion to suppress two business days before trial. Immediately before trial, counsel advised the court that appellant had filed a motion to suppress, and the court indicated that it would hear the motion during the course of the trial. Trial counsel responded, "Okay, I'll do it at that stage." Trial counsel did not advise the court at that time that appellant wished to testify at the suppression hearing, nor did counsel do so before the trial court ruled on the motion to suppress.

The Court stated that the trial court has broad discretion in regulating and controlling the business of the court, and the appellate court should never interfere with its exercise unless it is made to appear that wrong or oppression results from its abuse, or the court in some manner takes away rights the parties have under the law. Here, appellant testified at the hearing on his motion for new trial that he did not observe the drug dog sit down during the free-air search, in contrast to the officers' testimonies that the dog sat down and alerted on the car. After hearing appellant's testimony, the trial court denied the motion for new trial, noting that he considered and rejected trial counsel's argument at the suppression hearing that the dog never alerted. The court recognized that although conducting a motion to suppress during trial "is not the best protocol," the court was not willing to permit a defendant to delay trial to conduct a hearing on an untimely suppression motion. The Court held that given the timing of the motion, the trial court's consideration of the argument that the dog failed to alert, and appellant's failure to advise the court that he wished to testify before the court ruled on the motion to suppress, the trial court did not abuse its discretion in conducting the suppression hearing during the trial.

DUI; Refusal to Take Breath Test

State v. Mitchell, A13A1829 (3/20/14)

The State appealed from the grant of a motion for new trial, finding that the prosecutor made improper arguments to the jury. The record showed that during the State's closing argument, the prosecutor, in responding to Mitchell's defense that he was sleeping in his car, not driving it, stated: "The officer conducted a field sobriety test. He tried to do the one-leg stand. He couldn't. . . . That is not all. He had a chance to prove his innocence. No, I was sleeping. I was sleeping, officer. Okay. Well, you had a chance. Come downtown. Take this test. If it comes out less than the legal limit, go ahead. Free to go. Okay. No, I will not take the opportunity to prove my innocence." After Mitchell objected during a sidebar conference, the trial court instructed the prosecutor to repeat and clarify the court's instruction that the State always had the burden of proof. In response, the prosecutor made the following comments: "Let me clarify to the jurors what I meant when I said he had a chance to prove his innocence. As you know and the court has already told you, today the burden is on us, the state, to prove beyond a reasonable doubt that he is guilty. But I'm clarifying on that day he had a chance to tell the officer no, what you think is wrong. I am not under the influence of alcohol to the extent I am less safe. My slurring, stumbling speech and driving off is not because I had too much to drink. He did not take the opportunity to relay that to the officer when he could have."

Relying on *Pinch v. State*, 265 Ga.App. 1, 5(4) (2003), the Court found that the closing argument was impermissibly burden shifting. Here, the State told the jury that Mitchell could have proven his innocence by taking a breath test, but chose not to do so. The trial court denied Mitchell's objection and did not give curative instructions. Consequently, the trial court correctly concluded that it had erred at trial, and it properly granted Mitchell's motion for new trial.

Search & Seizure

Bryant v. State, A13A2320 (3/20/14)

Appellant was convicted of trafficking in cocaine and obstructing an officer. He contended that the trial court erred in denying his motion to suppress. The evidence showed that an officer stopped the Buick in which appellant was a passenger because the car's drive-out tag did not display all the required information. The officer noticed three cell phones in the car, even though there were only two occupants, appellant and the driver. The driver handed the officer all the documents the officer requested: his driver's license, proof of insurance, and a bill of sale. The officer then returned to his patrol car to run the information on the computer and to verify the paperwork. Eventually, the officer returned and stated that he was going to issue a warning instead of a citation. But, instead of being relieved, the driver only appeared more nervous. The officer began talking to the driver as he was writing the warning and the responses made him suspicious. The officer also asked a few questions of appellant and his responses were inconsistent with that of the driver. The driver consented to the officer's request to search the vehicle and a backup officer arrived on the scene. Suddenly, appellant ran into the woods and was chased by the backup officer. Eventually he was subdued and the officers recovered a duct-taped bag of cocaine in appellant's pants.

The Court stated that the Fourth Amendment is not violated when, during the course of a valid traffic stop, an officer requests of the driver consent to conduct a search. If a driver is questioned and gives consent while he is being lawfully detained during a traffic stop, there is no Fourth Amendment violation.

However, a seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably

required to complete that mission. Appellant argued that the police illegally detained him after the traffic stop had ended. But, the Court found, the evidence showed that the purpose of the traffic stop had not ended when the driver granted consent to search the car.

Nevertheless, appellant argued, the traffic stop ended when the officer explained to the driver that he had "decided to issue him a written warning, it [would] not cost him any money and it [would not] go on his record and after [he had] complete[d] it, that he'[d] basically be on his way." But the Court noted, the video recording from the officer's dashboard camera established that at the point he asked for consent to search, the officer had not finished writing out the citation. Consequently, the trial court did not err in denying the motion to suppress.

Guilty But Mentally Ill; Motions in Arrest of Judgment

Poole v. State, A13A1745 (3/14/14)

Appellant pled guilty but mentally ill to three counts of terroristic threats and two counts of stalking pursuant to *North Carolina v. Alford*. He argued that he was entitled to withdraw his plea to the terroristic threats and stalking charges because the trial court failed to follow the procedures set forth in O.C.G.A. § 17-7-131(b)(2) for acceptance of a plea of guilty but mentally ill. The Court noted that O.C.G.A. § 17-7-131(b)(2) provides in relevant part: "A plea of guilty but mentally ill at the time of the crime . . . shall not be accepted until the defendant has undergone examination by a licensed psychologist or psychiatrist and the court has examined the psychological or psychiatric reports, held a hearing on the issue of the defendant's mental condition, and is satisfied that there is a factual basis that the defendant was mentally ill at the time of the offense[.]"

The State conceded that the procedural requirements imposed by O.C.G.A. § 17-7-131(b)(2) were not followed at the plea hearing. However, the Court found, even if the State failed to demonstrate that the trial court complied with O.C.G.A. § 17-7-131(b)(2), appellant was not automatically entitled to withdraw his plea of guilty but mentally ill. In reaching this conclusion, the Court looked to the analogous context where a trial court fails to comply with the procedural requirements for pleas imposed by the provisions of Uniform Superior Court Rule ("USCR") 33. In that context, it is well settled that even if the record does not adequately demonstrate compliance with the provisions of USCR 33, a defendant is entitled to withdraw his plea "only to correct a manifest injustice." Citing *Smith v. State*, 287 Ga. 391 (2010), the Court concluded that the reasons for requiring a showing of manifest injustice apply to motions to withdraw a guilty plea based on a violation of O.C.G.A. § 17-7-131(b)(2).

To prove manifest injustice, appellant must show some real harm or prejudice resulting from the violation of O.C.G.A. § 17-7-131(b)(2). Here, however, appellant failed to make such a showing. At the hearing on his motion to withdraw his plea, appellant presented no evidence whatsoever that he had been harmed or prejudiced by the entry of his plea of guilty but mentally ill. Moreover, the "guilty but mentally ill" plea is for the benefit of the defendant, because (1) it provides for mental health treatment during the sentence, and (2) it recognizes a reduced level of culpability. Therefore, if the sentencing court fails to strictly comply with O.C.G.A. § 17-7-131(b)(2), such failure inures to the defendant's benefit and is harmless error. Consequently, the Court held, withdrawal of appellant's plea of guilty but mentally ill was not necessary to correct a manifest injustice, and therefore the trial court's denial of his motion to withdraw his plea was affirmed.

Appellant also contended that the trial court erred in denying his motion in arrest of judgment with respect to the terroristic threats charges because the indictment 1) failed to allege with sufficient particularity the "crime of violence" threatened against the victims and 2) failed to allege any corroboration for the alleged threats. The Court disagreed. A motion in arrest of judgment must be based upon a defect that the accused might otherwise have challenged by a timely general demurrer. A general demurrer challenges the validity of an indictment by asserting that the substance of the indictment is legally insufficient to charge any crime, and it should be granted only when an indictment is absolutely void in that it fails to charge the accused with any act made a crime by the law.

Here, the Court found, the indictment was not fatally defective for failing to specify the "crime of violence" threatened against the victims. Each of the three terroristic threats counts recited all of the elements of the crime and couched the allegations in the language of the terroristic threats statute, O.C.G.A. § 16-11-37(a). The general rule is that an indictment which charges a defendant with the commission of a crime in the language of a valid statute is sufficient to withstand a general demurrer charging that the indictment is insufficient to charge the defendant with any offense under the laws of this State. Furthermore, appellant could not have admitted the allegations of the indictment without admitting that he was guilty of the crime of terroristic threats. Therefore, the indictment was not fatally defective and that appellant could not succeed on his motion in arrest of judgment.

The Court also rejected appellant's contention that the indictment was required to set out the evidence that would be used by the State to corroborate the testimony of the victims about the terroristic threats. The essential elements of the crime of terroristic threats are a threat to commit a crime of violence with the purpose of terrorizing another. O.C.G.A. § 16-11-37(a) Corroboration is not an element of the offense, but rather an additional evidentiary rule imposed on the State by statute. And, it is not necessary for the State to spell out in the indictment the evidence on which it relies for a conviction. Accordingly, the trial court did not err in denying appellant's motion in arrest of judgment on this ground either.

Discovery; Rule of Sequestration

Mitchell v. State, A13A1786 (3/17/14)

Appellant was convicted of armed robbery. He argued that the trial court erred in excluding the testimony of two newly-discovered defense witnesses. The Court agreed and reversed his conviction.

The record showed that the victim and sole eyewitness, Haywood, was the first witness to testify at trial. On direct examination, Haywood recounted his version of the events and specifically testified that he had neither seen nor met appellant prior to the robbery. During a brief recess, appellant's trial counsel was approached by two individuals who had been sitting in the courtroom observing

the trial. They informed counsel that they recognized Haywood when he came into the courtroom, that Haywood was known by a different name in the community, and that Haywood had known appellant for several years. Thus, the existence of these witnesses and the relevance of the information they possessed did not become apparent until Haywood appeared on the witness stand and testified. At the trial court's request, appellant's counsel made a proffer of what the witnesses would testify to, and it was readily apparent from this proffer that the credibility of the victim could be called into question. However, the trial court ultimately denied appellant's request to permit the witnesses to testify because 1) their names were not provided to the State prior to trial and 2) these witnesses had remained in the courtroom during Haywood's testimony in violation of the rule of sequestration.

However, the Court found, in ruling on the State's objection to the witnesses based on the alleged discovery violation, the trial court erred by failing to require the State to make the requisite showing of prejudice and bad faith as required by O.C.G.A. § 17-16-6. Notably, in its order denying appellant's motion for new trial, the trial court specifically found, in relation to one of appellant's ineffective assistance claims, that trial counsel "was not deficient for not placing [the] two witnesses on the defense witness list because he did not know about the witnesses until the trial was underway." Thus, the Court found, as the record clearly showed, there was no bad faith on the part of appellant in failing to disclose the newly-discovered witnesses. Therefore, the trial court erred in excluding the witnesses based on a violation of reciprocal discovery.

The Court further found that the trial court also erred regarding the rule of sequestration. The trial court found that appellant had invoked the rule of sequestration "and then chose not to follow it," and that "he should not be rewarded for circumventing the meaning of the rule of sequestration[.]" But, the Court found, at the time the rule was invoked, the two individuals at issue were not potential witnesses. They became witnesses only after Haywood appeared on the witness stand and testified, and they promptly informed defense counsel of this fact. And, the trial court found that appellant's counsel did not know about the witnesses until after the trial was underway. Under these circumstances, the Court failed to see how trial counsel could have "chosen" to disregard the rule of sequestration.

Moreover, the Court stated, even if it were to assume that the rule of sequestration had been violated, exclusion of the witnesses was not the proper remedy. When the rule of sequestration is violated, the violation goes to the credibility rather than the admissibility of the witness' testimony. A party's remedy for a violation of the rule is to request the trial court to charge the jury that the violation should be considered in determining the weight and credit to be given the testimony of the witness. Accordingly, to the extent that the trial court's decision was based on a violation of the rule of sequestration, it was error to exclude the witnesses from testifying.

Thus, the Court concluded, when this issue arose at trial, the trial court requested appellant's counsel to make a proffer of what the witnesses would testify to, and it was readily apparent from this proffer that the witnesses' testimony could have been used to impeach Haywood. As the State's case against appellant hinged on the credibility of Haywood as the sole eyewitness to the armed robbery, the exclusion of the witness' testimony was not harmless. Accordingly, appellant's conviction was reversed.

Codefendant Testimony; Continuing Witness Rule

Windhom v. State, A13A2090 (3/13/14)

Appellant was convicted of armed robbery. He contended that the trial court erred in allowing a codefendant to testify because the codefendant was not competent. The record showed that in support of his argument, appellant introduced at trial a July 15, 2010 report by a psychologist who performed a court-ordered competency evaluation of the codefendant and concluded that he was not competent to stand trial. But almost two years later, on May 4, 2012, the codefendant entered a guilty plea to robbery by intimidation, at which time the trial court made a finding that he was, in fact, competent to knowingly, intelligently, and voluntarily waive his constitutional rights. Appellant's trial took place September 17-19, 2012. In denying appellant's motion in limine, the trial court noted that no court had ever found the codefendant to be incompetent; the only evidence of his incompetency was the psychologist's opinion. The Court concluded that appellant failed to show that the trial court abused its discretion in denying his motion in limine, given that the codefendant was found to be competent two years after the psychologist's evaluation and only months before the instant trial occurred.

Appellant also contended that the trial court erred by allowing the video recording to go out with the jury. The record showed that the security video recording taken from the store after the robbery was showed to the jury, narrated to by the codefendant, and then allowed to go out with the jury. Appellant contended that the video recording was a continuing witness. But, the Court found, unlike a videotaped interview or a transcript of testimony, the video recording, which was admitted without objection, was independent and original evidence, in and of itself, and did not depend on the credibility of the maker for its value. It was a true depiction of the event. Therefore, it was not subject to the continuing witness rule.

Ineffective Assistance of Counsel; Willful Blindness

Hutchins v. State, A13A1924 (3/14/14)

Appellant was convicted of violating O.C.G.A. § 16-13-30.5(a)(2), pertaining to the use or conveyance of certain substances used in the manufacture of controlled substances, and O.C.G.A. § 16-5-73(b)(1), pertaining to the presence of children during the manufacture of methamphetamine. Appellant contended that she received ineffective assistance of counsel. The Court agreed and reversed her convictions.

The evidence showed that appellant and her three year old child lived with her parents and that her parents were involved in the manufacturing and selling of methamphetamine. The Court, after describing the evidence at length, found that the evidence was insufficient to convict appellant of violating O.C.G.A. § 16-13-30.5(a)(2), but sufficient to convict her of the violation of O.C.G.A. § 16-5-73(b)(1).

Nevertheless, the record also showed that during trial, the lead investigator testified at length during the State's case in chief concerning appellant's alleged involvement

in a suspected illegal "pill ring." Counsel interposed no objection to this testimony, and the record did not indicate that the State had been allowed to inquire into appellant's participation in the pill ring as a similar transaction. The investigator further testified, without objection, as to his opinion of appellant' truthfulness: "I can tell deception right away. I've had hundreds of hours of interviews, interrogation schools. [Appellant] was being deceptive. She knew what was there. She knew where the chemicals were. She showed me where the stuff was. She knew what was going on in that house." The investigator also testified that he believed that appellant was aware of drug sales being made from the her parents' home, and he gave that opinion after reiterating that he had heard that appellant was part of a pill ring.

Additionally, the Court noted, the prosecutor also thoroughly cross-examined appellant on her involvement in what the State characterized as a "massive narcotics pill ring." During cross-examination, the prosecutor stated that a confidential informant had implicated appellant in the pill ring, asserted that appellant had bought pills at the behest of a specific person, and argued that appellant knew that some of these pills were being distributed to her mother. When the prosecutor asked appellant whether she knew that members of the pill ring were involved in criminal activity, defense counsel finally objected. Given that evidence concerning the pill ring had already been admitted, however, the court allowed the question but instructed the prosecutor not to state whether appellant' alleged involvement in the pill ring expressly constituted criminal activity.

The Court first found that the statements that appellant participated in a conspiracy to fraudulently obtain prescription narcotics and to resell them in a street-level drug operation was objectionable as it was improper character evidence. At the hearing on appellant's motion for new trial, appellant's trial counsel offered no strategic basis for admitting the evidence; rather she testified that she did not think the evidence was harmful. Thus, the Court held, as there was no strategic reason for failing to object to this bad character evidence, counsel's performance was deficient and the trial court erred in holding otherwise.

The Court next found that the record showed the State was clearly using the evidence concerning appellant's involvement in the alleged pill ring to cast her in the role of a drug dealer with an intimate knowledge of the drug trade gleaned from personal experience. Such evidence also demonstrated, as the prosecutor argued, that appellant had a propensity to commit the type of crime for which she was charged, buying pills for someone else. Thus, the evidence severely undermined appellant's credibility with respect to key issues at trial: whether she knew that the pseudoephedrine pills and other chemicals in the house were being used by her mother to manufacture methamphetamine and, given that knowledge, whether she intentionally permitted her child to be present where methamphetamine was being manufactured. Given that the evidence in this case was circumstantial and that the jury's finding of guilt turned on what appellant reasonably should have deduced from the evidence recovered from the home, the Court concluded that there was a reasonable probability that the outcome would have been different had it not been for trial counsel's deficient performance in failing to exclude this bad character evidence.

Although the case was reversed, the Court nevertheless addressed appellant's contention that the trial court erred in giving a charge on willful blindness. The Court stated that a charge on willful blindness or deliberate ignorance is appropriate when the facts support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution. A court should not instruct a jury on deliberate ignorance when the evidence points to actual knowledge or no knowledge on the defendant's part. Further, the deliberate ignorance instruction, when appropriate, provides another way to satisfy the knowledge element of a criminal offense, not the intent element. Consequently, the Court found, a charge on deliberate ignorance that equates knowledge with intent, or which tends to confuse those concepts, is erroneous. The Court noted that although the record contained some evidence which would support a deliberate ignorance or willful blindness charge, giving the instant charge was error under the circumstances because it contained language which could have misled the jury into equating knowledge with intent.

Ineffective Assistance of Counsel; Pretrial Identification

Bonner v. State, S14A0034 (3/28/14)

Appellant was convicted of murder and other charges. The evidence showed that appellant and two others shot and killed Adams and pistol-whipped Perkins. Appellant argued that his trial lawyer was ineffective because the lawyer failed to object to Perkins's identification of him as the man who shot Adams. Specifically, he contended that the pretrial identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Also, his trial lawyer should have objected when Perkins identified him during the trial because the in-court identification was tainted by the improper pretrial identification. The Court disagreed.

The Court noted that the pretrial identification occurred after the State notified Perkins that a bond hearing for appellant would be held at the county law enforcement center. Perkins waited outside the courtroom of the facility and was told to enter by a bailiff. He stood with members of Adams's family, "[a]nd they asked me did I recognize anybody." Perkins looked at the 30 to 40 men sitting in the courtroom, including men of the same race, age, and build as appellant, all of whom were dressed alike in inmate garb. Unbeknownst to Perkins, appellant was standing in the front of the courtroom at the time, and Perkins told Adams's family members that he did not recognize anyone sitting in the "benches." The bailiff came up to the group that included Perkins and told them to step out of the courtroom, and as they walked into the hallway, Perkins turned and saw appellant walk out behind them. Perkins testified that he then recognized appellant "as the person that . . . I saw under the streetlight and that . . . walked around . . . and shot [Adams]."

Citing *Sweet v. State*, 278 Ga. 320, 322 (1) (2004), the Court stated that the suggestiveness of an identification procedure used by police applies only to state action. Here, the State action involved in the pretrial identification was limited to compliance with the victim notification statute and allowing a bailiff to instruct Perkins and Adams's family members about when to enter and exit the

courtroom. In any event, appellant was never identified to Perkins, nor did anyone suggest to Perkins which of the many men in and around the courtroom was appellant. As a result, the pretrial identification in this case was no more suggestive than the identification in *Sweet*, in which a witness identified the defendant outside the courtroom just prior to a preliminary hearing. And any issues about Perkins's ability to accurately identify appellant, especially given that he previously had failed to provide an identification during a photographic lineup, were credibility issues to be determined by the jury. Thus, the Court concluded, given that appellant failed to show that any objection to the pretrial identification or the subsequent in-court identification by Perkins would have been successful, he failed to carry his burden to establish ineffective assistance.

Opinion Testimony; Police Officers

Lewis v. State, A13A2423 (3/12/14)

Appellant was convicted of aggravated assault. The victim testified that appellant attacked her by throwing her on a bed and stabbing her. Appellant testified that she attacked him and that he used a letter-opener to get her off him (the victim allegedly weighed 200 lbs. and appellant only 140). During her testimony, the victim stated that appellant appeared "geeked up" and "high" to her. The prosecutor then recalled the initial responding officer who, despite not seeing appellant after the incident or after appellant was taken into custody, to testify, over objection, his opinion as to what it means to be "geeked up."

Appellant contended that the trial court erred in allowing this testimony. The Court agreed and reversed his conviction. The Court stated that an officer may testify regarding his training to recognize the manifestations of drug or alcohol intoxication, but such testimony is generally allowed only when the officer has had ample opportunity to observe the demeanor of a party. In such cases, the officer's opinion is based upon matters personally observed by the officer. Also distinguishable are cases involving the expert testimony of officers regarding their analysis of physical evidence.

But the officer's testimony here, even if the proper foundation had been laid for the testimony, was not relevant to the particular circumstances before the jury. While the victim testified that appellant "looked high," the officer did not observe appellant at any time and had no contact with him in the course of his investigation. The officer's testimony regarding his experience with "geeked up" individuals, that those individuals were combative (or not combative if they were bipolar and had taken medication), had to be subdued, and were apologetic in the future, was improper and did not have a tendency to establish any fact in issue. It did not support the victim's claim that appellant was "high," and it was not relevant to rebut appellant's testimony that he did not consume alcohol with his ibuprofen medication as the State argued. The trial court therefore erred in allowing this testimony because it did not have a tendency to establish a fact in issue, and the probative value of the testimony was outweighed by the potential for prejudice.

Moreover, the Court found, given that the case turned solely on the credibility of appellant and that of the victim, it was highly probable that admission of the officer's testimony contributed to the verdict. Although it was undisputed that appellant stabbed the victim, there was also evidence that he did so in self-defense. While the evidence was sufficient to sustain appellant's conviction, the Court found the evidence was not overwhelming.

Impeachment; Prior Convictions

Waye v. State, A13A1777 (3/13/14)

Appellant was convicted of aggravated assault in 2008. He contended that the trial court erred in allowing the prosecutor to impeach his testimony with two prior convictions. The record showed that before the State began its cross-examination of appellant, the trial court conducted a hearing outside the jury's presence and determined that the State would be allowed to introduce evidence of two out of three prior felony convictions for impeachment purposes. In ruling on the admissibility of the evidence, the trial court said, "This is a difficult issue. We don't have a lot of guidance on it… I really think the '77 conviction is just too far remote, too stale. I am going to allow impeachment by the '87 aggravated assault conviction and the '91 possession of cocaine as meeting the standard of the statute." Appellant admitted during cross-examination that he had been previously convicted of possessing cocaine and of aggravated assault, and the State did not question him further regarding the circumstances those convictions.

Appellant argued that the trial court erred in admitting evidence of the two prior convictions "without making findings on record explaining its ruling that the probative value of [the] prior convictions substantially outweighed [their] prejudicial effect." The Court stated that former O.C.G.A. § 24-9-84.1(a)(2) provided that evidence of a defendant's felony conviction that was less than ten years old was admissible if the probative value of the evidence substantially outweighed its prejudicial effect to the defendant. Further, evidence of a defendant's conviction older than ten years was only admissible if the court determined "in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweigh[ed] its prejudicial effect." Former O.C.G.A. § 24-9-84.1(b). Citing *Clay v. State*, 290 Ga. 822, 835(3)(B) (2012), the Court stated that trial courts have been given "little guidance regarding what constitutes an abuse of discretion in admitting such convictions under O.C.G.A. § 24-9-84.1." But, five factors outline the basic concerns relevant to the required balancing: 1) the nature, i.e., impeachment value of the crime; 2) the time of the conviction and the defendant's subsequent history; 3) the similarity between the past crime and the charged crime, so that admitting the prior conviction does not create an unacceptable risk that the jury will consider it as evidence that the defendant committed the crime for which he is on trial; 4) the importance of the defendant's testimony; and 5) the centrality of the credibility issue.

In considering under O.C.G.A. § 24-9-84.1(a)(2) the admissibility of prior convictions less than ten years old, a trial court must make an on-the-record finding that the probative value of admitting the conviction substantially outweighs its prejudicial effect, but was not required to list the specific factors it considered in making its decision. But, the trial court is required to make a different determination regarding a prior felony conviction that is older than

ten years. Evidence of such a conviction is not admissible "unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. [Former] O.C.G.A. § 24-9-84.1(b)" A trial court must make an on-the-record finding of the specific facts and circumstances upon which it relies in determining that the probative value of a prior conviction that is more than ten years old substantially outweighs its prejudicial effect before admitting evidence of the conviction for impeachment purposes under O.C.G.A. § 24-9-84.1(b).

Accordingly, the Court remanded the case to the trial court to make an on-the-record finding of whether the probative value of admitting the 1991 conviction substantially outweighed its prejudicial effect, and to enter express findings on the record as to whether, in the interest of justice, the probative value of appellant's 1987 conviction substantially outweighed its prejudicial effect, based on the *Clay* factors and any other facts and circumstances the trial court may deem relevant.

Victim's Sexual History; Statements

Futch v. State, A13A2421 (3/20/14)

Appellant was convicted of multiple counts of child molestation. He contended that the trial court erred regarding evidence of the victim's sexual history. The record showed that prior to trial, the State sought to exclude any testimony regarding certain statements made by the victim to a school counselor regarding the victim's self-stimulation during class. The defense proffered that there would be testimony to show that a school counselor had previously questioned the victim about the cause of her behavior and that the victim had told the counselor that on one occasion that another child had accidentally touched her at daycare. The trial court granted the State's motion in limine, but the trial court expressly stated that it could reconsider its ruling depending on the evidence presented at trial.

The Court stated that absent a showing of relevance, evidence of a child's past sexual history, including acts committed by persons other than the accused, is inadmissible. Moreover, evidence of a prior molestation or previous sexual activity on the part of the victim is not relevant in a child molestation case to show either the victim's reputation for nonchastity or her preoccupation with sex. However, where the State introduces medical testimony indicating that the child has been sexually abused or evidence of child abuse accommodation syndrome and connects the child's behavior to that syndrome, evidence that the victim may have been molested by someone other than the accused may be admissible to establish other possible causes for the behavioral and medical symptoms exhibited by the child.

The Court noted that during the State's presentation of its case-in-chief, the State elicited testimony from the outcry witness, the victim's teacher, that the victim exhibited several behavioral and physical symptoms of sexual abuse while at school which included, inter alia, that the victim was sexually stimulating herself during class. The teacher testified that the victim's self-stimulation continued for several months, that she had talked to the victim about it, and that the victim did not know why she was doing it other than it sometimes "felt good." After several months of this behavior, the victim finally approached the teacher, told her that she knew what she was doing was wrong, and that she wanted to stop. She then disclosed that appellant had been sexually abusing her. The Court found that as this testimony appeared to connect the victim's behavior to the sexual abuse committed by appellant, the testimony proffered by the defense regarding the victim's prior explanation for her self-stimulation during class, i.e., that she had been inappropriately touched by another child at daycare, would have been admissible to establish another possible cause for the victim's behavior.

But, the Court stated, pretermitting whether the trial court erred in initially granting the State's motion in limine, the record showed that the State ultimately introduced evidence that the victim had been touched by another child at daycare. The trial court then reversed its prior ruling and decided to allow appellant to question the witnesses about the daycare incident.

Nevertheless, appellant contended, by this point, his defense was compromised because he was unable to cross-examine the State's earlier witnesses regarding the daycare incident. However, the Court found, the record showed that appellant had ample opportunity to present his theory of defense. Thus, after the trial court reversed its decision, the State recalled the victim's teacher to the witness stand. She testified that the victim, during her outcry, did not mention the daycare incident. Appellant chose not to cross-examine this witness to determine whether she had any other knowledge of the daycare incident or whether the victim had previously disclosed that the daycare incident was the cause of her behavior in class. The State then called the victim to testify, and appellant was able to cross-examine the victim regarding the daycare incident. The victim testified that she had told her teachers and a counselor that "a little boy accidentally touched me," and she further testified that the boy was about her age and that it happened only once while they were playing. Appellant did not question the victim any further regarding this issue. Lastly, appellant testified at trial, and he was questioned by both the defense and the State about his knowledge of the daycare incident. After the presentation of the above testimony, appellant did not ask to recall any of the earlier witnesses or seek to call any additional witnesses to explore the daycare incident any further. Therefore, the Court concluded, as appellant had ample opportunity to explore the daycare incident as a possible cause of the behavior exhibited by the victim but declined to do so, any resulting harm suffered by appellant "f[ell] squarely on his shoulders." A defendant cannot complain of error induced by his own conduct.

Appellant also contended that his statements to the police were not freely and voluntarily made. The audio recording of the interview was played for the jury at trial. During his testimony, the investigator acknowledged that he had used trickery during the interview when he told appellant that the police had conducted a forensic interview/polygraph test of the victim and that the results revealed with certainty that she was telling the truth about being sexually abused by appellant, that the victim's brother had witnessed an incident where appellant had sexually abused the victim, and that there was an audio recording of the victim's father confronting appellant about the sexual abuse. The investigator further testified that

his representations to appellant were untrue and that he had used such trickery in an attempt to elicit a truthful response from appellant. Ultimately, when confronted with the possibility that something could have happened between appellant and the victim while appellant was intoxicated, appellant stated that "anything is possible."

The Court stated that the use of trickery and deceit to obtain a confession does not render it inadmissible, so long as the means employed are not calculated to procure an untrue statement. Applying this principle, the Court found that the investigator's misrepresentations as to the existence of inculpatory evidence against appellant did not affect the admissibility of appellant's statement.

Furthermore, the Court found, the fact that the investigator told appellant repeatedly during the interview that he was there to help appellant did not constitute a hope of benefit which would render appellant's statement involuntary. The investigator testified that he was merely offering to help appellant get the guilt off of his chest. Under O.C.G.A. § 24-3-50, a confession is only admissible if it was made voluntarily, "without being induced by another by the slightest hope of benefit[.]" But the Court stated, this Code section does not encompass every conceivable benefit that the police may offer a suspect in an effort to induce him to confess. Rather, the phrase "slightest hope of benefit" as used in this Code section has consistently been interpreted to mean promises related to reduced criminal punishment, a shorter sentence, lesser charges, or no charges at all. Having reviewed the audio recording of the interview, and after considering the context of the investigator's numerous statements to appellant that he "was there to help him," the Court concluded that appellant could not have reasonably understood such statements to have meant that he would receive lesser punishment or that he would never be charged or arrested for his crimes. Thus, the investigator did not induce appellant's statement with a "hope of benefit" within the meaning of O.C.G.A. § 24-3-50.