*Prosecuting Attorneys' Council of Georgia*

# CaseLaw UPDATE

WEEK ENDING APRIL 5, 2013

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## THIS WEEK:



### *Sufficiency of Evidence; Jury Charges*

*Lee v. State, A12A2420 (3/20/13)*

Appellant was convicted of aggravated assault, theft by receiving, attempt to elude and other offenses. The evidence showed that while driving a stolen minivan, appellant led police on a high speech chase in which he caused an accident with an innocent party. Both driver and passenger testified that appellant struck their vehicle when he attempted to drive around them. A video of the entire police chase was introduced into evidence and played for the jury.

Appellant argued that the evidence did not support his conviction for aggravated assault of the innocent driver because the State proved only that his contact with the innocent party's car was accidental, and therefore failed to prove that he intended to injure the innocent driver. The Court disagreed. The State is not required to prove that a defendant acted with intent to injure the victim. Rather, proof that a defendant placed the victim "in reasonable apprehension of injury" is all that is needed. Here, the testimony of the innocent driver established that appellant's use of the minivan to strike the victim's car and force it off the road placed the victim in reasonable apprehension of receiving a serious bodily injury. Thus, the Court held the evidence sufficient.

Appellant also argued that the State failed to prove that he knew or should have known that the minivan was stolen. Generally, theft by receiving is usually proved in whole or in part by circumstantial evidence. The evidence at trial showed that appellant was found in possession of the minivan only 12 hours after it was stolen. Additionally, he fled when police attempted to stop him in the minivan, led them on a high speed chase, and eventually abandoned the vehicle. The State also introduced similar transaction evidence showing that on at least one prior occasion appellant had fled from police while in possession of a stolen vehicle, with his flight resulting in him abandoning the car. Taken together, the evidence was sufficient to support an inference

that appellant was aware that the minivan was stolen.

Lastly, appellant contended that the trial court erred in refusing to give his requested jury charge on accident under O.C.G.A. § 16-2-2. To be entitled to a jury charge on accident, the defendant must present some evidence from which the jury could find that the defendant acted without criminal intent and was not engaged in a criminal scheme, and that his actions did not show an utter disregard for the safety of others who might reasonably be expected to be injured thereby. Here, the Court found, appellant's argument failed because the evidence at trial showed that he was engaged in a criminal scheme to elude the police. Consequently, the trail court did not err in refusing to give the jury charge.

## Sentencing; Right to Counsel

*Parham v. State, A12A1875 (3/22/13)*

Appellant was convicted for felony shoplifting. He contended the trial court erred by considering in aggravation of punishment a prior guilty plea that was entered without benefit of counsel. The record showed that after appellant was found guilty, the prosecutor advised the court that the State had three additional certified copies of convictions. After reviewing the convictions, appellant's counsel objected to the trial court's consideration of one of the pleas because the plea was entered without counsel. The prosecutor then asked whether the trial court was "inclined to consider the plea that was taken without the benefit of counsel?" The trial court responded that it would. The trial court then, after considering the prior convictions, sentenced appellant to ten years with the last five years to be served on probation.

The State argued that when the record does not show that the trial court relied upon the uncounseled pleas in determining the length of a sentence and the sentence is within the legal range, appellate courts cannot assume that the trial court relied upon the uncounseled pleas because trial courts are presumed to consider only relevant, legal evidence. The Court noted, however, that the record in fact showed that the trial court considered the plea taken without counsel because the trial court specifically said it would. Thus, the Court held, the trial court erred by considering the uncounseled guilty plea and therefore, appellant's sentence was vacated and remanded to the trial court for re-sentencing.

## Sufficiency of Evidence; Sentencing

*Graham v. State, A12A2237 (3/22/13)*

Appellant was convicted of four counts of voluntary manslaughter as lesser offenses of felony murder, two counts of cruelty to children, aggravated assault, aggravated battery, and making false statements to the police. The evidence showed that appellant's three-month-old baby died while in her care. The evidence, briefly stated, established that police and emergency medical technicians found appellant's three-month-old baby dead shortly after appellant called 911 at 9:44 p.m. The baby at first looked like she had died of natural causes. Appellant gave police conflicting accounts of the events preceding the baby's death, first telling police that she lived alone with the baby and her other daughter at their apartment, that she had picked up the baby from the baby's father earlier that evening at a gas station, that she had no contact information for the father, and that she had put the baby to sleep in her playpen when she came home. However, appellant actually lived with the baby's father, whom she initially misidentified to the police and there had been evidence of a "heated conversation" that occurred prior to the father leaving the home. The father had put the baby to bed around 5:30 p.m. and left the apartment around 7:00 p.m. that evening, leaving appellant alone with the baby up until the 911 telephone call.

Appellant contended that the evidence did not support her voluntary manslaughter conviction. A person commits voluntary manslaughter by causing the death of another human being under circumstances which would otherwise be murder and if she acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. Here, the Court found, there was no evidence of sudden provocation by the baby to support a voluntary manslaughter conviction.

Nevertheless, the State argued, the provocation necessary to sustain the conviction derived from the concept of "transferred intent." Specifically, that appellant's anger at the father was transferred to the baby and "manifested itself in grabbing and shaking the baby too hard[,] causing the injuries that resulted in the baby's death." The Court, however, disagreed. Even if the "heated argument" established provocation, there was no evidence to support the inference that appellant was so angry at the father that appellant acted out of an irresistible passion and killed the baby or that she committed murder that was mitigated by provocation. Thus, the jury was simply left to speculate on this issue and therefore, appellant's voluntary manslaughter convictions must be reversed.

Next, appellant contended that the evidence was insufficient to sustain her convictions of cruelty to children, aggravated assault, and aggravated battery, arguing that the circumstantial evidence did not rule out the reasonable hypothesis that the baby's injuries were caused by the father. To warrant a conviction on circumstantial evidence, the proved facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused. Such evidence is weighed by the jury, and unless the verdict of guilt is unsupportable as a matter of law, the Court will not disturb that finding. Thus, the issue in circumstantial evidence is not whether someone else might have committed the crimes in question, it is whether the circumstantial evidence presented was sufficient to authorize the jury to conclude that the only reasonable hypothesis was that appellant was guilty.

The State presented evidence that appellant lied about living with the father, about the father's name, and about where the baby had been that day. She knocked on a neighbor's door but did not wait for her to answer, then when the neighbor came over with a phone she did not call 911 right away, but called someone else first. Appellant did not seem surprised when the detective told her that the autopsy had uncovered extensive internal injuries to the baby, and said in a phone call from jail that she had not expected anyone to be locked up until after the autopsy. The baby had been in her care for more than two hours when she died, and in the medical examiner's opinion, the baby would have died "within minutes or hours" after she suffered the brain injury. Therefore, the Court sustained appellant's convictions based on the circumstantial evidence presented to the jury.

## Substantive Double Jeopardy

*Southwell v. State, A12A1700 (3/26/13)*

Appellant pled guilty to robbery by intimidation and felony theft by taking. He contended that his prosecution for the two crimes violated the Double Jeopardy Clauses of the U.S. and Georgia Constitutions and that the two crimes should have been merged for sentencing purposes. The Court noted that since Georgia's statutory bar to successive prosecutions and multiple convictions for the same conduct, O.C.G.A. § 16-1-7, is more expansive than the constitutional proscription of double jeopardy, its inquiry would be viewed through the more "expansive test."

The record showed that the warrant for appellant's arrest recounted that he had threatened the victim, a store employee, with a knife and that he had taken money from the store's cash register as well as the victim's car keys. The indictment charged that appellant (1) obtained money from the "immediate presence" of the victim by threatening to stab her in the neck, thus committing robbery by intimidation; and (2) stole her car, thus committing felony theft by taking. By pleading guilty, appellant admitted the facts set forth in the indictment.

To make a determination as to whether the same act or transaction violates two different statutory provisions, the Court utilized the "required evidence test" as to whether each provision requires proof of a fact which the other does not. Here, appellant's indictment charged that he obtained money from the "immediate presence" of the victim by threatening to stab her in the neck, thus committing robbery by intimidation; and stole her car, thus committing felony theft by taking. A person commits the offense of armed robbery when, with intent to commit theft, he or she takes property of another from the person or the immediate presence of another by use of an offensive weapon, or any replica, article, or device having the appearance of such weapon. Because the offense is accomplished by creating an apprehension of danger on the part of the victim, the crime of robbery by intimidation is a lesser included offense of armed robbery. However, a person commits the offense of theft by taking when he unlawfully takes or unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated. Here, the facts of appellant's guilty plea demonstrated that he obtained money by intimidation, whereas he obtained a different object, the car, without the use of intimidation. Therefore, the Court held, appellant committed two different crimes, each of which required proof of a fact which the other did not.

## Restitution; Sentencing

*Watts v. State, A12A2170 (03/21/13)*

Appellant was convicted of simple assault and battery as lesser included offenses of aggravated assault and aggravated battery, respectively. The evidence showed that a fight broke out between appellant and the victim in which appellant used a razor to "slash" several areas of the victim's face. During the sentencing hearing, the State requested at the end of its argument regarding sentencing: "If Your Honor is considering in any way any kind of probation, I would ask that the crime victim's compensation be reimbursed. There's restitution due to medical bills for [the victim] in the amount of $7,584.35." The trial court then gave appellant an opportunity to speak before announcing its sentence, which included "token restitution to the victim *or* replacement costs for victim compensation of $1,000." (Emphasis supplied.) Its written sentence stated "restitution of $7,584.35; Victim: token rest. of $1,000.00 Crime Victim Compensation Program." No evidence was introduced during the sentencing hearing to support the amount of the victim's medical bills or to show the amount of any payments made to the victim by the Crime Victims Compensation Board.

Appellant challenged the order of restitution. The Court stated that a restitution order must be made on sufficient evidence and by a preponderance of the evidence. The record must also show that the trial court considered the factors outlined in O.C.G.A. § 17-14-10(a) before requiring restitution as a condition of probation. Here, the State failed to present evidence in support of its request for restitution and the trial court also failed to consider the factors outlined under O.C.G.A. § 17-14-10(a). Thus, the Court vacated the trial court's restitution award and remanded the issue back to trial court to set an amount of restitution based upon competent evidence and upon O.C.G.A. § 17-14-10(a) factors.

Next, appellant contended that the trial court erred in its sentence by specifying that her credit for time served would not begin until December 5, 2008, the date her probation for another offense expired. The record showed that at the time of appellant's arrest on May 2, 2008, she was seven months short of completing a five-year probation period under a first offender sentence. After her arrest, she was initially denied bond by the magistrate judge. In a hearing held on July 16, 2008, the superior court judge orally granted bond to appellant, allowing her counsel to prepare the order. A written order memorializing the oral finding, however, was not prepared and filed by appellant's attorney until December 5, 2008, the same day that she completed her probation period. In her motion for new trial hearing, a Sheriff's Office employee testified that appellant was confined in the jail from May 2, 2008, the date of her arrest, until December 13, 2008, when she bonded out.

The Court noted that O.C.G.A. § 17-10-12 provides that the amount of credit for time spent in confinement while awaiting trial is to be computed by the convict's pre-sentence custodian, and the Department of Corrections has the duty to award the credit for time served based upon that calculation. Furthermore, a trial judge has no authority to interfere with the administrative duties of the correctional custodians and the Department of Corrections to determine and award credit for time served. Therefore, the Court vacated this portion of appellant's sentence and remanded with direction to the trial court to strike the portion of its order specifying "credit for time served … after December 5, 2008."

## Lesser Included Offenses; Sex Offender Registration

*Loya v. State, A12A2194 (3/22/13)*

Appellant was tried by jury and found guilty of felony public indecency for urinating in public and public intoxication. The evidence showed that an officer saw appellant walk along a road and then urinate on a large boulder at the same time that a woman was driving in the opposite direction. The officer saw that the woman appeared to be shocked, and he testified that he could see appellant's genitals when he was urinating. Appellant was also intoxicated at the time. The State also

introduced two similar transactions. In the first, appellant was arrested and plead guilty to exposing himself in a courtroom to a female probation officer. In the second, appellant was convicted of exposing himself outside a public library.

Appellant contended that the trial court erred in refusing to charge the jury on public drunkenness as a lesser included offence of public indecency. He alleged that the jury could have concluded from the evidence that appellant was guilty of public drunkenness and that public urination could have been considered an "indecent condition or act" under O.C.G.A. § 16-11-41. The Court disagreed. One offense is not included in another if each offense requires proof of a fact that the other does not. The crime of public drunkenness requires proof that appellant was intoxicated, which the crime of public indecency does not. And the crime of public indecency requires proof of exposure of sexual organs, which the crime of public drunkenness does not. Accordingly, the Court held that the offense of public drunkenness is not included in the crime of public indecency pursuant to O.C.G.A. § 16-6-1(1).

Appellant also contended that O.C.G.A. § 16-1-6(2) regarding lesser included offenses should have been applied. The statute provides that a crime is included in another if it differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission. Appellant argued because public drunkenness may be shown by an "indecent condition or act," that element of the crime only differs in degree from the element of public indecency that requires showing "lewd exposure of the sexual organs." The Court found no merit in the argument because of the fact that public drunkenness also requires a showing of intoxication and therefore differs from public indecency in a way not covered by O.C.G.A. § 16-1-6(2).

Appellant then challenged the trial court's special condition of probation to register as a sex offender. He contended that the trial court erred by requiring him to register because public indecency is not a crime for which conviction requires registration as a sexual offender under O.C.G.A. § 42-1-12(e), registration was cruel and unusual punishment, and requiring him to register constitutes an "indeterminate sentence" in that under the registration statute he must comply with the registration requirements for his entire life. The Court noted that a trial court has broad discretion to impose appropriate conditions of probation and appellate courts will approve any reasonable condition imposed by the trial court in the absence of express authority to the contrary. There is also no authority prohibiting a trial court from ordering sex offender registration as a special condition of probation for those who commit crimes that come within the registration statute. Furthermore, the registration statute itself contains no language expressly prohibiting a superior court from imposing sex offender registration as a probation condition.

Here, the Court held that because of appellant's prior convictions, the trial court was authorized to conclude that he was a recidivist who engages in acts harmful to the public. The condition was tailored to the crime and was reasonable under the circumstances. The requirement that appellant register was considered a regulatory action and not punitive, and thus, his argument of cruel and unusual punishment under the Eighth Amendment was without merit. Finally, the Court rejected appellant's argument that he would be required to register as a sex offender for the rest of his life. While the sex offender statute requires lifetime registration, O.C.G.A. § 42-8-34(c) requires that the probationary condition shall not exceed the maximum sentence of confinement which could be imposed on a defendant. Appellant's sex offender registration as part of his probation was thus limited to the maximum sentence allowed by law as punishment for that crime, and therefore, the Court held, the trial court did not improperly give him an "indeterminate sentence" by requiring him to register as a sexual offender.

## Confrontation Right; Hatley

*Maurer v. State, A12A1672 (03/21/13)*

Appellant was convicted of child molestation. The evidence showed that appellant was watching a movie in the garage while lying on a blow-up mattress with the victim, appellant's 10-year-old step-daughter, and her younger brother. After the younger brother had fallen asleep, appellant engaged in a sexual act with the victim. The next day, the victim told her older brother what happened the night before. The following week, the brother disclosed to his mother what the victim had told him. The family said nothing about the incident until two years later, when the mother told a close friend what appellant had done to the victim. The friend reported the incident to police.

The victim took the stand and was reluctant to discuss what had happened. When asked why she could not tell the truth, the victim stated, "Because we had forgave [sic] him a long time ago and I don't want anything to happen to him." And when asked "what did you forgive him for?" she replied, "I don't want to say." The victim confirmed, however, that appellant was her stepfather, that he lived with her and her family in July 2007, that during that month, she was watching a movie with appellant and her younger brother in the garage, and that her younger brother fell asleep. She acknowledged that she spoke with a forensic interviewer, stated that what she told the interviewer was the truth, and admitted that she had told her older brother "about something that happened."

Appellant argued that his Sixth Amendment right to confrontation was violated because the trial court failed to compel the victim to testify. The Court disagreed. Although the victim refused to answer questions concerning what occurred on that night, she did state, however, that what she told the forensic interviewer was the truth, and that she had also told her brother about the incident. Under former O.C.G.A. § 24-3-16, hearsay statements by underage victims of sexual abuse are admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify in the proceedings and the trial court finds that the circumstances of the statement provide sufficient indicia of reliability. The Court noted that the trial court had broad discretion in determining the admissibility of child hearsay evidence and it would reverse the conviction only if abuse of discretion was shown.

Moreover, in *Hatley v. State*, 290 Ga. 480, 483(I) (2012) the Georgia Supreme Court held that to comport with the Confrontation Clause, the child whose statements are at issue must actually testify at trial. However, former O.C.G.A. § 24-3-16 did not require the child to corroborate the hearsay testimony. Furthermore, the right of confrontation may be waived by the failure to object. Here, appellant made no objection that his right to confrontation

was violated by the victim's failure to answer questions concerning the incident. Moreover, the Court found no authority requiring that the victim be compelled to testify about the incident. Indeed, the Court stated, one of the reasons for allowing a child victim's hearsay statement to come into evidence was to "spare children who are subjected to abuse from further unnecessary trauma in the courtroom."

## Discovery; Jury Charges

*Falay v. State, A12A1921 (3/26/13)*

Appellant was convicted of one count of aggravated assault for the shooting of the victim. Appellant contended that the trial court erred when it failed to grant his motion to exclude the testimony of a witness based on an alleged discovery violation. Specifically, he contended that the trial court should have granted his objection to the witness testifying because the State did not comply with the trial court's instruction to provide him with a copy of the witness' plea transcript in an unrelated robbery. The record reflected that defense counsel notified the trial court that he had just become aware that the witness had pled guilty to an unrelated charge, but had not yet been sentenced. The trial court reviewed its plea book and retrieved the witness' file, which included a transcript of his plea hearing. The trial court then provided defense counsel with the transcript and recessed while counsel reviewed it. When court reconvened, defense counsel moved to exclude the testimony because of the State's alleged discovery violation. Appellant maintained that the plea transcript revealed that the trial court had directed the State to provide him with a copy of the transcript when it became available, and that the State did not do so. The trial court stated, however, that it had not intended the State provide appellant a copy of the transcript, only to "make defense counsel aware of the situation"

The Court noted that exclusion of testimony was only applicable if appellant showed that the State's discovery violation was prejudicial and made in bad faith. Here, the Court found that appellant did not seek the remedy of the statute because he failed to show prejudice and bad faith on behalf of the State. Furthermore, the Court noted that appellant did not seek a recess or continuance or remedy provided under O.C.G.A. § 17-16-6. Therefore, the trial court did not abuse its discretion.

Next, appellant contended that the trial court erred when it refused to give his charge on abandonment. The record revealed that during deliberations, the jury asked: "When you know a crime is going to be committed, does walking away and not reporting it make you a party to the crime? Does not reporting it when you witness it make you a party to the crime?" Although he had not requested the charge before deliberation, appellant requested that the trial court give the instruction of abandonment when the jury raised the issue. The State objected to any new charges, and the trial court determined that the question was one of fact, and "for applying the law to facts," and thus "cannot be answered by the court." The trial court then noted that abandonment would not be warranted under the facts of the case, or appropriate since the evidence was closed and the jury had been charged. It then responded to the jury that it could not answer the question and directed it to "apply the jury instructions to the evidence presented during the trial in reaching your decision."

The Court found no error because jury instructions were within the discretion of the trial court. Furthermore, abandonment, a "voluntary and complete renunciation of his criminal purpose," O.C.G.A. § 16-4-5(a), is available only where the defendant first admits engaging in the underlying crime. Here, appellant made no such admission. Thus, the trial court did not err in refusing to give a charge on abandonment.

## Sentencing; Probation Revocation

*Allison v. State, A12A1990 (3/22/13)*

Appellant contended that the trial court erred in sentencing him on more than one felony offense under O.C.G.A § 42-8-34.1(d) when the trial court issued an order revoking his probation. In 2003, appellant was sentenced to thirty years, six to serve in jail and the balance on probation. In 2012, appellant was charged with violating his probation by committing five new offenses over approximately eight months, including 3 felony counts of theft by taking. Appellant entered an *Alford* plea to the charges and the trial court revoked 15 years of appellant's probation. Appellant objected, arguing that under O.C.G.A § 42-8-34.1(d) the trial court was limited to revoking the lesser of the balance of his probation or the maximum penalty for a single felony offense. Therefore, he argued that the maximum revocation amount would only be 10 years on the one felony theft by taking offense. The trial court then clarified its order, stating that it was revoking ten years as to the first violation for theft by taking and five years consecutive on the remaining counts.

O.C.G.A. § 42-8-34.1(d) provides: "If the violation of probation or suspension alleged and proven by a preponderance of the evidence or the defendant's admission is the commission of a felony offense, the court may revoke no more than the lesser of the balance of probation or the maximum time of the sentence authorized to be imposed for the felony offense constituting the violation of the probation." The Court stated that while O.C.G.A § 42-8-34.1(d) refers to only a single felony offense, statutory construction under O.C.G.A. § 1-3-1(d)(6) provides, "[t]he singular or plural number each includes the other, unless the other is expressly excluded." Additionally, the Court did not believe it was the intent of the legislature to prevent the trial court from revoking cumulative portions of a lengthy term of probation consistent with multiple offenses committed by a probationer. Therefore, the Court concluded that the trial court did not err in using multiple offenses when determining the amount of appellant's probation to be revoked.

## Brady; Judicial Conduct

*Ellicott v. State, A12A2036 (3/25/13)*

Appellant was convicted of several charges that stemmed from a yearlong pattern of spousal abuse. First, appellant contended that the trial court erred when it failed to create a record of its in camera review of potential *Brady* material that derived from the victim's therapy sessions. He argued that the case should have been remanded to the trial court with direction to conduct a post-trial in camera inspection of the records. The Court noted that the burden fell on appellant to show that he was denied material exculpatory information such that he was denied a fair trial. Here, the record showed that appellant conceded that an in camera review had taken place of the records

of allegedly exculpatory evidence and he had received a "snippet or two" of the confidential therapist records. The Court stated that appellant did not object to the manner in which the review was conducted. Rather, he criticized the trial court for a failure to preserve the record. Furthermore, he failed to show any potential exculpatory or material evidence from the in camera review. Therefore, the Court held that there was no basis for appellant to challenge the trial court's discretionary ruling.

Next, appellant contended that the trial court's comments during the sentencing phase of his trial violated Canon 3(E)(1) of the Georgia Code of Judicial Conduct, and deprived appellant of his right to a fair trial. Canon 3(E)(1) states that judges shall disqualify themselves in any proceeding where their impartiality might reasonably be questioned. A trial judge's failure to sua sponte recuse himself will warrant reversal only where the conduct or remark of the judge constitutes an egregious violation of a specific ethical standard, and it must support the inescapable conclusion that a reasonable person would consider the judge to harbor a bias that affects his ability to be impartial. Moreover, to merit recusal, any alleged bias must be of such a nature and intensity to prevent the defendant from obtaining a trial uninfluenced by the court's prejudgment. The Court held that since appellant failed to point to any conduct or remark by the trial court during the trial that would meet this standard, his argument was without merit.

Nevertheless, appellant argued that the trial court's comments during his sentencing provided clear evidence of the trial judge's substantial bias against him. The record showed that during his sentence hearing, the judge commented on the evidence and appellant's demeanor during trial. The trial court compared his conviction to the "death of a monster," and commented that, given his family's history, appellant should have committed suicide. The trial court also stated that he was imposing a sentence that would insure that appellant would spend his life confined to a small cell where he would spend "every day thinking" about the freedom that he once had. The Court stated that when sentencing, a trial court may consider any evidence that was properly admitted during the guilt-innocence phase of the trial, and may also consider the conduct and attitude of the defendant during trial. A trial court should not, however, take into account when sentencing any considerations that are not clearly shown by the evidence of record. But, the Court concluded, pretermitting whether the trial court's comments took into account any considerations that were not clearly shown by the evidence of record, the comments did not result in any prejudice to appellant because his sentences were well within applicable statutory limits.

## Photographic Lineups; Search & Seizure

*Jones v. State, A12A2082 (3/22/13)*

Appellant was convicted of armed robbery, burglary, and impersonating a police officer. First, he asserted that the trial court erred in denying his motions to suppress the eyewitness identifications resulting from alleged impermissibly suggestive photographic lineups. To set aside a conviction, the record must show that the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. An identification procedure is impermissibly suggestive when it leads the witness to an all but inevitable identification of the defendant as the perpetrator, or is the equivalent of the authorities telling the witness, "this is our suspect." Further, the taint which renders an identification procedure impermissibly suggestive must come from the method used in the identification procedure.

Although the first victim was shown two separate photographic lineups, the Court noted that the first victim was not given two opportunities to identify appellant because his picture was not included in the first lineup. Rather, the first photographic lineup contained a picture of appellant's brother. The first victim was able to identify the brother as "someone who may have possibly been the second man involved in the robbery," but not the exact man who robbed him. Then, the second photographic lineup contained a picture of appellant, and the first victim identified the man (appellant) who robbed his store. Further, the record showed that police mistakenly showed a single picture of appellant's brother to the second victim that was not part of a photographic line up. There was no evidence that the police showed a picture of appellant by itself. Rather, the record reflected that the only photograph police showed to the second victim of appellant was the one contained in the photographic lineup. Thus, there was nothing inherently suggestive or otherwise improper about any photographic lineups.

Appellant also contended that the items seized from a 3rd party's apartment went beyond the scope of the search. The record showed that the police executed a search warrant at the home of a girlfriend of appellant's brother (and co-defendant). The Court found that appellant lacked standing to challenge the search. Although appellant rightly stated that "overnight guests" are protected under the Fourth Amendment, appellant failed to show that he was anything more than a casual visitor "merely present with the consent of the householder." There was no evidence of "clothing, toiletries, or other personal effects" that belonged to appellant within the residence. Additionally, the Court held that appellant had no standing to challenge the items seized from a gym bag inside the apartment because he failed to demonstrate that he had any possessory interest in the bag. Thus, the trial court did not err in denying appellant's motion to suppress.

## Co-Conspirator Statements; Hearsay

*Aguilera v. State, A12A2218 (3/22/13)*

Appellant was convicted of trafficking cocaine. The record showed that in 2008 and 2009, a joint task force was conducting an investigation into a large drug trafficking operation in which the target of the investigation was a high ranking member of the organization known by the name "Soco." The task force tapped into Soco's cell phone to obtain information pertaining to a large shipment and purchase of drugs. The parties negotiated a purchase price for two kilograms of cocaine for which payment by the buyer would occur at a later time. The information led the task force to a drug swap in which appellant, as a "runner" for the buyer would pick up the cocaine. At the meeting place, appellant and Soco switched cars and Soco took appellant's car to his "stash house" and placed the cocaine inside the vehicle. Soco then returned the meeting place and the two switched vehicles again. Once the transaction was completed, appellant was followed and arrested. Two days after appellant's arrest, the task force concluded

its investigation by arresting approximately 45 individuals associated with this particular drug trafficking operation, including the high ranking supplier. At the time of his arrest, Soco had in his possession the cell phone from which the intercepted calls were made and received. Stored in the contacts of his cell phone was appellant's phone number.

Appellant argued that the trial court erred when it admitted the transcripts of phone calls between the supplier and buyer and between the supplier and appellant's co-defendant, because such evidence constituted hearsay. O.C.G.A. § 24-3-5 provides that "[a]fter the fact of conspiracy is proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." (*See* new O.C.G.A. § 24-8-801(d)(2)(E) which provides, in relevant part, that the following evidence shall not be excluded under the hearsay rule: "[a] statement by a coconspirator of a party during the course and in furtherance of the conspiracy . . . .") Here, the Court held that the trial court properly instructed the jury that it must determine whether a conspiracy existed; that if the existence of a conspiracy was proved beyond a reasonable doubt by evidence other than the declarations of the co-conspirators, the jury could consider the statements made by any co-conspirator; and that if the jury found that either of the defendants were not a part of the conspiracy, then they were to disregard any co-conspirator statements made out of the presence of that defendant. Generally, a buy-sell agreement will support a conspiracy when the evidence shows that the supplier "fronts" drugs to a buyer. Thus, the arrangement allows the seller to retain a sufficient interest in the subsequent sale to establish that he acted in concert with the recipient to distribute the contraband.

Here, the Court found, the evidence showed that Soco had "fronted" the drugs to appellant's contact buyer, because he had provided the drugs to him on the promise of future payment. Furthermore, following the arrest of appellant, the task force intercepted conversations between the contact buyer and Soco in which the men discussed who should bear the financial loss resulting from the seizure of the cocaine. The evidence also supported the inference that appellant was part of this conspiracy, i.e., that he was acting in concert with supplier and contact buyer to facilitate the sale, purchase, possession, and transportation of a large quantity of cocaine. Thus, these statements did not constitute hearsay and the trial court did not err in admitting them.

## Ineffective Assistance of Counsel; Relevancy of Evidence

*Granger v. State, A12A2466 (03/20/13)*

Appellant indicted on six charges: rape, aggravated child molestation, incest, sodomy, statutory rape, and child molestation. The trial court directed a verdict on the incest charge, and the jury acquitted him on the rape, aggravated child molestation and sodomy charges. He was convicted of only statutory rape and child molestation.

Appellant contended that his trial counsel was ineffective for failing to object to improper bolstering of the victim through a nurse's testimony and for failing to move for a mistrial. The Court noted that the credibility of a witness, including a victim witness, was a matter for the jury's determination under proper instruction from the trial court. In no circumstance may a witness' credibility be bolstered by the opinion of another as to whether the witness is telling the truth. Here, the nurse's testimony explained the victim's demeanor upon arriving at the hospital; she testified that she "could tell that [the victim] was not kidding with us." The Court found that pretermitting whether the testimony was improper bolstering, the Court held that the nurse's testimony was hardly beneficial to the State or harmful to appellant because he was acquitted by the jury of rape, aggravated child molestation, and sodomy. The jury accepted appellant's contention that he had not forced sexual intercourse with the victim, he had not performed oral sex upon her, he had not physically injured her, and thus, they concluded that the victim was not credible as to the allegations supporting the charges. Although appellant was convicted of both statutory rape and child molestation, independent evidence other than the victim's testimony provided support for those charges, namely appellant's own testimony and the physical evidence provided at trial. Thus, the trial court's finding that defense counsel was not ineffective was not clearly erroneous.

Appellant also contended that the trial court erroneously admitted a video of a phone conversation while he was in the police interview room. While in the room, appellant invoked his right to counsel, and thus stopped police questioning. He was recorded in the interview room some time later having a phone conversation on his cell phone with an unidentified person, wherein appellant said, "for like five minutes ni**er . . . and then I stopped." The Court noted that the statement was arguably a reference by appellant to having had sex with the victim, particularly when considered that he was in the police station for an interview based upon allegations of that very fact. Thus, the statement was highly relevant and probative. The Court held that although the term he used in referring to his listener was distasteful, it was not directed at the victim. Therefore, there was no prejudicial error.

## Evidence; Effective Assistance of Counsel

*Brown v State, A12A2308 (03/20/13)*

Appellant was convicted under the Georgia Racketeer Influence and Corrupt Organizations (RICO) Act. The evidence showed that as manager, appellant on many occasions falsified overtime hours for full and part time employees. When a discrepancy in overtime payments was discovered by an employee, appellant would then attempt to arrange an agreement where he would authorize the overtime pay in exchange for a portion of the overtime earnings. Appellant unsuccessfully offered a female employee unworked overtime pay if she "showed him her legs." The female employee then complained to management. The complaint led to an investigation by the company into the false overtime reports. Appellant was then terminated and subsequently charged with the RICO violation.

Appellant contended that the trial court erred by overruling his objection to testimony by management that he was terminated as a result of the company's investigation. He alleged the testimony was irrelevant and invaded the province of the jury. The Court stated that any evidence is relevant which logically tends to prove or disprove any material fact which is at issue in the case, and every act or circumstance serving to elucidate or throw light upon a material issue or issues is relevant.

Additionally, Georgia law favors the admission of any relevant evidence no matter how slight its probative value, even evidence of questionable or doubtful relevancy or competency should be admitted and its weight left to the jurors. Here, the Court held the investigation testimony relevant because it provided the circumstances supporting the factual allegations in the indictment. Therefore, the Court found no error.

Next, appellant argued that testimony regarding the investigation went toward the ultimate issue and "invaded the province of the jury." The Court found that the witness did not give her opinion as to whether appellant was guilty of the allegations as alleged in the indictment; rather, she testified that he was terminated from his employment with the company based on their investigation of him. Additionally, appellant's trial counsel withdrew any objection as to the findings of the investigation, instead focusing his objections on any testimony that the criminal allegations pending against him were true. Trial counsel did renew his objection to the witnesses' statement that appellant had been terminated by the company, but as noted by the trial court, that fact had already been presented by other witnesses (and later by appellant himself) without objection, so it was cumulative. Under the circumstances, there was no error in admitting the challenged evidence.

## Sufficiency of Evidence; Merger

*Nosratifard v. State, A12A2243 (3/20/2013)*

Appellant was convicted on five counts of aggravated stalking based on five text messages he sent to the victim and her family in violation of a Temporary Protective Order (TPO). Following a lengthy record of stalking incidents, the victim obtained a TPO for the month of January 2009. After the TPO was issued, appellant continued to harass and follow the victim. In February 2009, a hearing was held on her request to extend the TPO, but after appellant agreed to leave the victim alone, the judge denied her request. After the denial, the victim was further harassed to the point where she felt the need to purchase a dog and a firearm for her safety. On March 3, appellant aggressively followed the victim in her vehicle and lead to appellant's arrest for aggressive driving. Appellant posted bond for his release on March 9, 2009, and one of the special conditions of his bond order provided: *The Defendant shall stay away, absolutely, directly or indirectly, by person, telephone, e-mail, messenger or any other means of communication from KAREN MAXIE hereinafter referred to as "victim."…Violations connected with contacting/following the victim may subject the Defendant to a separate prosecution for the felony offense of Aggravated Stalking.*

When appellant was in jail for the aggressive driving charge, the text messages sent to the victim ceased. However, when appellant was released on bond, calls and texts from unknown numbers were received by the victim. Later at trial, many of the "unknown" texts sent to the victim and her family were identified from specific linguistic traits attributable to appellant. On April 2, 2009, the victim notified police that she was receiving harassing phone calls. Upon arrival to the victim's home, several attempted communications were made by appellant. At 8:32 p. m., she received the text at issue in Count IV, which stated, "I know you will show all off (sic) this text to the police but don't because more trouble for you." Because this text referred to the police within minutes after the officer entered the victim's house, he became concerned that appellant was keeping the house under surveillance. Subsequent investigation by the police found that the phone numbers were not traceable to appellant because they were sent by prepaid phones. However, one call was sent from a payphone located near appellant's place of business. Appellant was then arrested by police and the harassing texts and phone calls finally ceased.

Appellant contended that the evidence was insufficient to support his convictions because the State produced only circumstantial evidence to prove that he sent the texts and failed to exclude every other reasonable hypothesis except that of his guilt. Appellant alleged that he presented sufficient evidence to show that someone else could have been harassing the victim. To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused. However, the proved facts need exclude only *reasonable* hypotheses—not bare possibilities that the crime could have been committed by someone else. Furthermore, the question of reasonable hypothesis is to be determined and weighed by the jury and the verdict will only be reversed if the guilty verdict is insupportable as a matter of law. To violate O.C.G.A § 16-5-91, the State had to show that the protective order prohibited appellant from engaging in certain conduct with respect to the victim; that appellant placed the victim under surveillance, or contacted her without her consent; that such an act violated the protective order; and that such an act was done for the purpose of harassing and intimidating the victim.

Here, the Court noted that the March 9, 2009 order prohibited appellant from communicating with the victim by telephone or any other means. Thus, the text messages would fall within the order. Although the State was not able to connect appellant directly to any of the numbers used to send these texts, the victim and her children testified that the texts contained phrases often used by appellant, references to information known by appellant, and "broken English" similar to that employed by appellant. Moreover, the text messages stopped when he was in jail on the driving charge, resumed when he bonded out and stopped completely when he was arrested on the charges in this case.

Additionally, the State was also required to prove that appellant sent the texts for the purpose of harassing and intimidating appellant. The definition of "harassing and intimidating" in this context was found under O.C.G.A. § 16-5-90(a)(1), and involves a knowing and willful course of conduct directed at the victim which causes emotional distress by placing her in reasonable fear for her safety by establishing a pattern of harassing and intimidating behavior, and which serves no legitimate purpose. Here, the evidence at trial supported a finding of a long and clear pattern of knowing and willful, harassing and intimidating behavior by appellant directed at the victim for no legitimate purpose. The text messages themselves, sent on three separate days, establish such a pattern. The Court noted that evidence combined with appellant's other threatening behavior and the victim's testimony that she was so scared she felt compelled to undertake security measures was more than sufficient to establish the last element of the crime of aggravated stalking as to each count of the indictment. Therefore, it was proper for the jury to infer the circumstantial evidence to support appellant's conviction.

Appellant then argued that the trial court should have merged Counts I with Count II for sentencing because they "are part and parcel of the same criminal act." He made the same contention as to Count III, involving a text sent April 2, 2009 at 7:08 p. m., and Count IV, involving a text sent the same day at 8:32 p. m., because he asserted that they were sent as part of an ongoing conversation that began at 6:43 p. m. that day. The Court disagreed. Even assuming that the texts sent on the same day were part of a continuous course of conduct, merger would not necessarily be required under the facts of this case. Rather, the Court stated, whether a course of conduct can result in multiple violations of the same statute requires a determination of the 'unit of prosecution,' or the precise act or conduct that is being criminalized under the statute. Aggravated stalking, O.C.G.A. § 16-5-91(a), provides in plain language that the prohibited conduct is following, placing under surveillance, or contacting another person without consent in violation of one of the enumerated orders or conditions for the purposes of harassing or intimidating that person. Thus, under the facts of this case, the unauthorized act of contacting of the victim in violation of the condition of the bond order forms the proper "unit of prosecution" under O.C.G.A. § 16-5-91(a).

Moreover, the Court noted, appellant failed to point to anything in the record that suggested that Counts I and II were part of an ongoing conversation with the victim or her family. Therefore, both texts were considered "two separate contacts" that supported different "units of prosecution" and the trial court did not err by not merging the two.

Next, although the evidence demonstrated that the text messages referenced in Counts III and IV were two of fifteen texts sent to the victim on April 2, the Court found that they were separate contacts in violation of the aggravated stalking statute. The record showed that appellant initiated contact on April 2 to both the victim and her daughter, who were sitting beside each other when they received the text. That text read simply, "What's up?" and the daughter decided to respond on her phone to try to get appellant to incriminate himself. The victim testified, however, that she did not respond to any of the texts because she was too afraid. As the exchange of texts progressed, appellant was apparently on notice that the person responding was not the victim because at 6:52 p. m., he directed the other person to "ask your mamy[;] she knows," although some of the other texts in the conversation appeared to be directed to the victim. The evidence also indicated that appellant sent the text message at issue in Count III at 7:08 p. m. to both the victim and her daughter. The evidence also showed that appellant separately sent the text message at issue in Count IV, which referenced the police while the officer was in her home. Thus, the Court held, each text constituted a separate violation of appellant's bond order and each supported a separate charge of aggravated stalking.

## Demurrer; Jury Instructions

*Lauderback v. State, A12A2348 (3/21/13)*

Appellant was convicted of reckless driving. First, he contended that the trial court erred by denying his oral demurrer to the indictment, which was asserted after the jury was selected but before trial began. The accusation charged appellant "with the offense of RECKLESS DRIVING ([O.C.G.A. §] 40-6-390), for that the said accused, did in HENRY COUNTY, Georgia, on or about September 05, 2011, unlawfully drive a vehicle in reckless disregard for the safety of persons or property,…" At trial, he asserted that the failure to charge the particular manner in which the crime was committed rendered the accusation fatally deficient and did not allow him sufficient information to form a defense. The trial court denied the motion as untimely.

The Court noted that if a defendant decides to challenge the validity, specificity or form of an indictment, he or she must file a general and/or special demurrer seeking to quash the indictment. A general demurrer challenges the *validity* of an indictment by asserting that the *substance* of the indictment is legally insufficient to charge any crime. A special demurrer, on the other hand "merely objects to the *form* of an indictment and seeks more information or greater specificity about the offense charged." Pursuant to O.C.G.A. § 17-7-110, special demurrers must be filed within ten days after the date of arraignment, unless the time for filing is extended by the trial court. Additionally, indictments that do not allege a specific date on which the crime was committed are not perfect in form and are subject to a timely *special* demurrer. Here, appellant's challenge to the accusation was in the nature of a special demurrer and thus, was untimely.

Appellant also contended that the trial court's instruction on reckless driving and "reckless disregard" failed to sufficiently distinguish between civil and criminal liability and therefore allowed him to be convicted on a "lower level" of criminal intent. The record showed that during its initial charge, the trial court explained to the jury that the crime of reckless driving requires a showing of criminal negligence, but that specific intent is not required. The court then defined criminal negligence for the jury "as reckless or wanton conduct that shows an indifference to the injurious result of the negligent acts, an indifference to the safety of others, and a lack of consideration for their welfare." Following this charge, the court also instructed the jury that "[a]ny person who drives any vehicle in a reckless disregard for the safety of persons or property is guilty of the offense of reckless driving."

Once jury deliberations began, the jury requested a definition of "reckless disregard." The trial court indicated that it was inclined to give a recharge based on language in *Walden v. State*, 273 Ga.App. 707, 711 (2005), and asked counsel if they had another suggestion or better idea. Appellant's counsel indicated he did not know if he could provide a better definition, and after reviewing the language proposed by the trial court, stated for the record that he would let the trial court handle it as the court saw fit. After the jury received the clarification, defense counsel stated, "[j]ust for the record, I want to reserve all my objections and the objection to that as being different than what reckless disregard is."

The Court stated that according to O.C.G.A. § 17-8-58(a), any party who objects to any portion of the charge to the jury or the failure to charge the jury shall inform the trial court of the specific objection and the grounds for such objection before the jury retires to deliberate. By failing to object, any error in the jury instruction must be reviewed for plain error. Under this standard, the Court did not believe that the trial court's recharge on criminal negligence, a correct statement of the law, was obviously erroneous because it was not as clear as appellant said it could have been. Moreover, reviewing both the recharge

and the initial charge together, the Court failed to see how the jury was confused to the extent that appellant was convicted on a lower level of criminal intent. Therefore, the trial court did not err.

## Judicial Comment; Baston

*Henderson v State, A12A2240 (3/20/13)*

Appellant was convicted on four counts of sexual exploitation of children in violation of O.C.G.A. § 16-12-100(b)(8). Appellant contended that the judicial statements made by the trial court violated O.C.G.A §17-8-57. The statute provides that it is error for any judge in any criminal case, during its progress or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused. Should any judge violate this Code section, the violation shall be held to be error and the decision in the case reversed. The record showed that at the conclusion of an officer's testimony, the trial court reviewed the evidence that had been admitted until that point, noting that one exhibit was "[two] DVDs located in the defendant's house in the bedroom," while another exhibit consisted of "[six] DVDs located at the defendant's house in the [living room]." Appellant contended that these statements constituted improper commentary of the evidence prohibited by O.C.G.A. § 17-8-57 because possession and knowledge are essential elements of the charged crimes. The Court, however, held that the statements were made to provide context to "clarify which exhibit was associated with which [evidence]." Furthermore, the statements by the judge were made to "ensure the orderly administration of the trial." Additionally, appellant had admitted that he possessed the DVDs. Therefore, the Court found the enumeration without merit.

Appellant also contended that the trial court erred by empaneling a juror that he lawfully struck following the State's *Batson* claim that he used peremptory strikes to exclude prospective jurors solely based on their gender. Under the three-part *Baston* test, the opponent of a peremptory challenge must make out a prima facie case of discrimination. The proponent of the strike is then required to set forth a gender-neutral, case-related, clear and reasonably specific explanation for the exercise of his strikes. At this point, the proponent of the strike need not proffer an explanation that is persuasive or even plausible—all that is required is an explanation that is facially gender-neutral. The third step of the process requires the trial court to determine whether, considering the totality of the circumstances, the opponent of the strikes has shown that the proponent was motivated by discriminatory intent in the exercise of his strikes. The opponent of the strikes may carry his burden of persuasion by showing that similarly situated opposite sex jurors were not struck or that the proponent's gender-neutral reason for a strike is so implausible or fantastic that it renders the explanation pretextual.

Here, the State challenged appellant's use of eight of his nine peremptory challenges to strike women. As a result, the trial court found that the State had made a prima facie showing of gender discrimination, and it required appellant to provide reasons for his strikes. The trial court then accepted appellant's explanations for six of the seven women. However, when explaining female seven, counsel stated "I thought I recognized [L. C.] as being a former bailiff here at the [c]ourt. And I struck her because bailiffs see everything and hear everything. But if she's not, I've just made a mistake. But that's still neutral as far as sex is concerned." The Court clarified, "although a trial judge must accept a facially [gender]-neutral explanation *for purposes of determining whether the proponent has satisfied his burden of production at stage two*, this does not mean that the judge is bound to *believe* such explanation at stage three." The Court noted that the trial court was able to observe the demeanor of defense counsel as he explained his reasons for the strikes and giving great deference to the trial court's ultimate finding and considering the totality of the circumstances, including the number of appellant's strikes against females, trial counsel's inability to articulate a gender-neutral basis for the strike against female seven, and that counsel was unsure about whether she was in fact a bailiff (and had not asked her if she was), appellant failed to establish clear error in the trial court's finding that the strike was pretextual.

## Ineffective Assistance of Counsel; Merger

*Taylor v. State, A12A1877 (3/21/13)*

Appellant was convicted of attempt and conspiracy to manufacture methamphetamine as well as possession of ephedrine and pseudoephedrine. Her co-defendant, Hagris, was also convicted, but the Court found that the trial court erred in denying his motion for new trial. Appellant argued that she was denied her right to effective assistance of counsel because her counsel, Stauffer, had an actual conflict of interest in that he had represented her while his law partner, Cox, was simultaneously representing Hargis, allegedly in violation of the Georgia Bar Rules and the Georgia Rules of Professional Conduct. As a result of this alleged conflict, she asserted, Stauffer failed to press her case as zealously as he should have.

In reviewing the record, the Court stated that "[t]he history of Hargis's and Taylor's representation is a tortuous one." Briefly stated, the two co-defendants bounced between public defenders and private counsel and in two separate periods of time, were represented by their respective trial counsel. In 2008, the court granted the State's motion to sever their respective cases for trial. However, when Hagris failed to appear for his trial in February, 2009 and then was rearrested in July, 2009, the State moved to vacate its earlier motion to sever. Both defendants agreed that appearing together would allow appellant to argue that "she wasn't involved." Thus, both cases were rejoined for trial without objection from either appellant or Hagris.

The Court stated that when a defendant raises no objection to an alleged conflict during trial, she must demonstrate on appeal both the existence of an actual conflict and its significant effect on counsel's performance. The critical question is whether the conflict significantly affected the representation, not whether it affected the outcome of the underlying proceedings. It differs from ineffective assistance of counsel claims generally, where prejudice must be shown, because ineffective assistance of counsel claims involving actual conflicts of interest require only a showing of a significant effect on the representation. Although joint representation by one attorney of two or more defendants whose defenses are antagonistic is impermissible where an actual conflict of interest adversely affects the attorney's performance, counsel from the same law firm are not automatically disqualified from representing multiple defendants charged with offenses arising from the same conduct.

Moreover, the Court stated, even assuming that appellant had shown the existence

of an actual conflict arising from Stauffer's representation of her at the same time Cox was representing Hargis, both she and Hargis explicitly waived any conflicts arising from Stauffer's and Cox's prior and simultaneous representations of each of them before proceeding to a consolidated trial. Thus, any error in allowing the joint trial to proceed was induced and cannot provide the basis for a claim that counsel was ineffective.

Nevertheless, appellant argued that her waiver was ineffective because the risks of the joint representation were never explained to her. But, the Court stated, even assuming that she is correct, she failed to show that her defense was compromised by that joint representation. Although appellant summarily asserted that her viewpoint was "antagonistic" to Hargis's, the record shows that neither Hargis's cross-examination of appellant nor his closing argument suggested that she was involved in any criminal activity; in fact, Hargis insisted in closing that neither defendant had committed any crime. Likewise, and despite appellant's critique of Stauffer's "minimal" defense efforts, including not calling Hargis to the stand, the hearing on her motion for new trial showed that Stauffer and appellant authorized Cox to "take the lead" before and at trial as part of a reasonable strategy to present Hargis as "the main character in this play" with appellant "not being as involved." Furthermore, there was no "finger pointing" between co-defendants, and both counsel pursued the same defense strategy that their respective clients were innocent. Thus, the Court concluded, appellant failed to show that any actual conflict between her own and Hargis's interests caused divided loyalties or compromised Stauffer's representation of her at the same time that Cox represented Hargis. Accordingly, the trial court did not clearly err when it denied appellant's motion for new trial on this ground.

Next, appellant argued that the trial court should have merged the attempt to manufacture methamphetamine with possession of ephedrine and pseudoephedrine because the two offenses were based on the same conduct and evidence. Under O.C.G.A. § 16-1-7(a), when the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. The accused may not, however, be convicted of more than one crime if one crime is included in the other; or the crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct. The indictment charging appellant and Hargis with attempt to manufacture methamphetamine specified that they had not only "obtained and assembled" but also "take[n] steps to alter" the ephedrine and pseudoephedrine. The charge on possession also asserted that the co-defendants had altered these substances with the intent to manufacture the drug. The State provided evidence at trial that some of the methamphetamine ingredients had been altered.

The Court stated that the jury could have found appellant guilty of both attempt to manufacture methamphetamine and possession of ephedrine and pseudoephedrine based on different conduct. Appellant assembled methamphetamine ingredients with intent to manufacture the drug, and also possessed some part of those ingredients after altering them. It was not necessary for the State to prove the surplusage in each count — the allegation of alteration in that count alleging attempted manufacture, or the allegation of intent to manufacture in the possession count — in order to obtain separate convictions for the two crimes. Thus, because the evidence supported a conclusion that different conduct by appellant resulted in the commission of both attempted manufacture of methamphetamine and possession of ephedrine and pseudoephedrine, the two crimes did not merge.