Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 31, 2013

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THIS WEEK:

Forfeiture; Pleadings

Howard v. State of Ga., A13A0723 (5/22/13)

The trial court forfeited currency and a vehicle after striking appellants' answers as insufficient under the requirements of O.C.G.A. § 16-13-49(o). Specifically, the trial court found that neither answer was verified as required by the statute. Appellants conceded that their respective pro se answers were not properly verified, but argued that the trial court nevertheless should have allowed them an opportunity to amend their answers as contemplated under O.C.G.A. § 9-11-15.

The Court stated that the failure to comply with the strict pleading requirements of O.C.G.A. § 16-13-49 in answering an in rem forfeiture complaint is equivalent to filing no answer at all. O.C.G.A. § 16-13-49(o)(3) provides, among other things, that "an answer must be verified by the owner or interest holder under penalty of perjury." This requirement may be met by having the verification signed under oath and before a notary public. In pertinent part, O.C.G.A. § 9-11-15(a) provides that a party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pretrial order. The applicable rule is that amendments to answers in forfeiture proceedings are permitted, and they relate back to the initial answer, thus meaning that any amendment to an answer under § 16-13-49 must be considered to have been filed within the 30-day limitation of § 16-13-49(o)(3), and must be considered in determining the legal sufficiency of a property owner's answer under § 16-13-49(o)(3). If, however, the answer and the amendment are legally insufficient under § 16-13-49(o)(3), then the answer is subject to dismissal.

Here, appellants were permitted by law to amend their answers to correct the lack of verification, but they never did so, notwithstanding that the deficiency had been pointed out by the State almost two months before the hearing on the motion to dismiss. If a claimant fails to properly verify his answer in the first instance or later amend it to correct the deficiency, the trial court is entitled to strike the answer and enter a judgment of forfeiture in favor of the State. Moreover, the Court found, the fact that appellants were pro se did not relieve them from complying with the requirements of O.C.G.A. § 16-13-49, nor impose on the State or the trial court a requirement to provide them with legal advice. Accordingly, appellants did not show that the trial court abused its discretion in striking their answers.

Motions to Withdraw Guilty Pleas

Rivas v. State, A13A0766 (5/22/13)

Appellant appealed from the trial court's denial of his motion to withdraw his negotiated guilty plea to aggravated assault and cruelty to children in the third degree. He contended that the trial court erred by denying his motion because his plea counsel failed to inform him that one of the witnesses against him would not have testified to the facts necessary to convict him of the crimes, and therefore, his plea was not knowing or voluntary.

The record showed that appellant was indicted on two counts of aggravated assault, two counts of terroristic threats, one count of cruelty to children in the third degree, and one count of obstruction of an officer. The charges arose from an incident during which appellant, after arguing with his mother inside of her home, exited the house and pointed a firearm at her neighbor, who had earlier called police after hearing what she believed to be gunshots and screaming. The neighbor stated that appellant threatened to shoot her, and appellant's mother told officers that appellant had likewise threatened her inside the house, which incident took place in front of appellant's minor child.

Appellant's plea counsel entered into negotiations with the State, which agreed to file a motion for nolle prosequi on one charge of aggravated assault, the two terroristic threats charges, and the charge of obstructing an officer if appellant pleaded guilty to the remaining two charges. Based on this agreement, appellant pleaded guilty. Thereafter, appellant filed a motion to withdraw his guilty plea, which the trial court denied after two hearings at which appellant, his mother, and appellant's plea counsel testified.

The Court stated that when the validity of a guilty plea is challenged, the State bears the burden of showing affirmatively from the record that the defendant offered his plea knowingly, intelligently, and voluntarily. The State must show that the defendant was cognizant of all of the rights he was waiving and the possible consequences of his plea. After a defendant's sentence has been pronounced, his guilty plea may be withdrawn only to correct a manifest injustice. The Court noted that as an initial matter, the review of the plea hearing established that appellant was appropriately apprised of his rights prior to entering the guilty plea, appellant was satisfied with his plea counsel's advice, and appellant had discussed the case with counsel. Additionally, the trial court informed appellant of the potential range of punishment for each charge, and appellant indicated that pleading guilty was in his best interest because he believed there was a likelihood he would be convicted if he went to trial. The State provided a factual basis for the plea as summarized above. Prior to appellant actually entering his plea with the court, the prosecutor explained that appellant's mother and father had spoken to him previously and wanted the charges against appellant dropped, and the two had indicated at appellant's bond hearing that the incident had not occurred, but that the neighbor appeared at the plea hearing and testified in support of the prosecutor's factual basis.

The Court found that to the extent appellant contended that his plea was not knowing and voluntary because he was not aware that his mother would have testified that he did not commit aggravated assault against her in front of his child and that he did not point a firearm at the neighbor, his argument was without merit. The plea hearing indicated that appellant had consulted with his attorney and was advised that he was giving up his right to call witnesses in his own defense at trial. Moreover, the prosecutor explained prior to appellant's entry of his guilty plea that appellant's parents had attempted to persuade the State to drop the charges against appellant, and had stated at appellant's bond hearing that the incident did not occur. Accordingly, the trial court was authorized to reject appellant's self-serving testimony during the hearing on his motion to withdraw the plea and find that he entered the plea knowingly and voluntarily.

Jury Charges; Burden of Proof

Benjamin v. State, A13A0770 (5/22/13)

Appellant was convicted of rape and kidnapping with bodily injury. The evidence showed that at about 2:00 a.m. Saturday morning July 19, 2008, a man spoke to the 57 year-old-female-victim and then attacked her, choked her, dragged her behind a house located at 2405 Amsterdam Drive, and raped her. After the assault, the police were called, and the victim gave a detailed description of her assailant to the police that strongly corresponded to the description of appellant on his booking report. The victim also identified appellant as the assailant and correctly identified his brother's address (where she indicated he was staying in the neighborhood), which was walking distance from the site of the attack. A witness also testified that he had seen appellant and the victim that night, and saw appellant walking towards the victim. Appellant testified in his own defense and denied attacking and raping the victim. He also testified that his brother lives at 2370 Amsterdam Drive and that although he generally stayed at his brother's home on weekends, he slept at his mother's house on Friday night, July 18, 2008, and did not leave until 11:30 a.m. Saturday. He testified that he only went to his brother's house that Saturday night.

Appellant contended that the trial court erred by failing to re-instruct the jury that appellant had no obligation to present evidence after the jury asked "Why doesn't appellant's mother or any other witnesses give a statement to testify in his behalf?"

The Court found first that, under the circumstances, trial counsel did not waive an objection. The court responded to the jury without offering an opportunity for the parties to object, following which the court asked the parties if they had any objection. Although defense counsel initially responded in the negative, she immediately thereafter raised an objection in which she asked the court to re-charge "the entire burden of proof issue" because the jury appeared to believe that the defendant had a burden to present evidence. It was also clear that the trial court entertained the objection.

Further, when a jury does not ask for a recharge of one or more jury instructions but instead requests further explanation of the law or raises other questions, it is within the trial court's sound discretion to determine the need, breadth, and formation of any additional jury instructions. Here, after the jury asked why appellant's mother or other witnesses did not testify on his behalf, the trial court instructed the jury as follows: "The lawyers have rested their case. All of the witnesses who are going to testify have testified. All of the evidence that is to be presented has been presented. You will take the facts as you understand them to be and apply the law that I gave you in [the] charge and reach a verdict in this case."

The Court stated that jury instructions must be read and considered as a whole in de-

termining whether the charge contained error. Here, the trial court thoroughly charged the jury on the burden of proof and alibi. Thus, the trial court properly charged the principles of law requested by appellant in his objection. The court's decision not to repeat the charge on burden of proof in response to the jury's question about witnesses was not an abuse of discretion.

With regard to appellant's argument that a recharge on burden of proof was warranted because circumstances at trial might have led the jury to expect that appellant's mother would testify, the Court noted that it was acceptable for the State and the defense to comment on the failure of the other party to call witnesses who could have helped their case. When a criminal defendant testifies at trial about the existence of a witness with knowledge of relevant facts, and the witness does not testify, the prosecutor is entitled to comment in closing argument on the defendant's failure to produce the witness, and this does not improperly shift the burden of proof to the defendant.

Search & Seizure

Calcaterra v. State, A13A0325, (5/22/13)

Appellant was convicted of possession of cocaine with intent to traffic and possession of marijuana with intent to distribute. She argued that the trial court erred by denying her motion to suppress because her consent to search was the product of an unreasonably prolonged detention. The evidence showed that while on patrol, an officer observed a vehicle with a Virginia license plate move from the center lane of travel to the far left lane. Thereafter, the officer observed the driver, appellant, cross the far left "fog" line three times. The officer moved into the lane behind appellant, who then moved back to the center lane of travel, at which point, the officer moved behind her and activated his blue lights to effectuate a stop for failure to maintain lane. Appellant presented the officer her Illinois driver's license, and the officer asked if she owned the vehicle. Appellant stated that her brother-in-law owned the vehicle, but when the officer asked for a copy of the registration, appellant backtracked, stating that the vehicle was a rental, presenting a rental agreement originating in Ohio, which she stated was taken out by her brother-in-law. At that point, the officer asked appellant to step to the back of the vehicle so that he could further investigate whether she had been drinking or was impaired based on her manner of driving. In order to calm her down, he asked what brought her to Georgia, and while she first said she was visiting her brother-in-law, she later said she was visiting her stepbrother. The officer explained to appellant that he had stopped her because she had crossed over the fog line three times, but he was going to write her a warning instead of a ticket. At this point, the officer realized that the rental agreement showed that the vehicle had been due back in the first week of March (the stop occurred on March 27). Another cruiser with two other officers arrived on the scene while the arresting officer asked appellant's passenger for his identification. The man could not produce any, and stated conflicting accounts of his relationship with appellant and the length of their travel together. Based on all the conflicting information, and the unclear status of the vehicle, the officer suspected that the individuals might have contraband in the vehicle, and he asked both appellant and the passenger for consent to search the vehicle, which they both provided. The search uncovered 1.54 pounds of cocaine and over a pound of marijuana in the trunk.

Appellant argued that the trial court erred by denying her motion to suppress because her consent to search was the product of an unreasonably prolonged detention. The Court stated that an officer may conduct a brief investigatory stop of a vehicle if such stop is justified by specific, articulable facts sufficient to give rise to a reasonable suspicion of criminal conduct. The specific articulable suspicion must be based on the totality of the circumstances - objective observations, known patterns of certain kinds of lawbreakers, and inferences drawn and deductions made by trained law enforcement personnel. In this case, the officer witnessed appellant's vehicle cross the left-hand fog line three times. Such conduct provided the officer with probable cause to stop appellant because the conduct is a violation of O.C.G.A. § 40-6-48(1), which states that a vehicle shall be driven as nearly as practicable entirely within a single lane. Moreover, the failure to maintain lane may give rise to reasonable articulable suspicion on the part of a trained law enforcement officer that the driver is impaired.

Appellant nevertheless contended that the officer's account of her failure to maintain lane was not believable because he did not activate his dashboard camera after the first instance when she crossed the fog line; because he did not contact dispatch to investigate the status of the vehicle; and because he admitted on cross-examination that he proactively seeks out illegal activity when stopping individuals as he patrols the interstate. The Court found these arguments unpersuasive. The trial court was authorized to find that the officer observed the violations. Thus, the initial traffic stop of appellant was lawful.

Appellant also argued that the stop was unreasonably prolonged when the officer began questioning her on details unrelated to the issue of writing a citation for failure to maintain lane, and that the arrival of the other officers, and the prolonged investigation consequently resulted in invalidating the consent given for the search of the vehicle. The Court disagreed. The Fourth Amendment is not violated when, during the course of a valid traffic stop, an officer questions the driver or occupants of a vehicle and requests consent to conduct a search. The dispositive factor is not the nature or subject of the officer's questioning, but whether that questioning takes place during an otherwise lawful detention, such as, in this case, for committing a traffic violation in the officer's presence. In order to pass constitutional muster, the duration of a traffic stop cannot be unreasonably prolonged beyond the time required to fulfill the purpose of the stop. A reasonable time to conduct a traffic stop includes the time necessary to verify the driver's license, insurance, and registration, to complete any paperwork connected with the citation or a written warning, and to run a computer check for any outstanding arrest warrants for the driver or the passengers.

Here, the Court found, the initial stop of appellant was supported by the officer's observation of her traffic violation. Moreover, the officer had a reasonable articulable suspicion that appellant might have been driving while impaired because of her repeated failure to maintain lane. Thereafter, the facts surrounding the registration of the vehicle and the conflicting statements of appellant and her passenger provided support for further investigation. During the reasonable investigation into these inconsistencies, the officer asked for consent to search the car, which consent

appellant, as the driver of the vehicle, validly provided to the officer. Accordingly, the Court affirmed appellant's conviction.

Search & Seizure

Hill v. State, A13A0405 (5/21/13)

Appellant was convicted of possession of less than one ounce of marijuana, driving with a suspended license, and driving a motor vehicle with improper registration. He contended that the trial court erred in denying his motion to suppress on the ground that the officer lacked sufficient justification to conduct the traffic stop.

The evidence showed that an officer was patrolling a two-lane highway in a patrol car equipped with License-Plate Recognition ("LPR") cameras. The LPR cameras automatically read license plate tags and referenced the National Crime Information Center ("NCIC") database to determine if a vehicle was stolen or if a missing or wanted person was connected to the vehicle. As the officer drove down the highway, the LPR system alerted to a vehicle on the opposite side of the highway, and the system gave the officer a "screen shot" of the vehicle's tag and alerted him that a wanted person could be driving the vehicle. After visually confirming the tag number, the officer gave the information to his dispatcher and conducted a traffic stop. When the officer approached the vehicle, appellant rolled down the window and the officer noticed a strong odor of burnt marijuana coming from inside the vehicle. Appellant's license was suspended, and he was arrested. The officer then asked for and received appellant's consent to search the vehicle. During the search, the officer found a partially-smoked marijuana cigarette under the ashtray in the vehicle's center console.

Appellant contended that the trial court erred in denying his motion to suppress because the stop of his vehicle was not justified. The Court disagreed. Stopping and detaining a driver to check his license and registration is appropriate when an officer has a reasonable and articulable suspicion that the driver or the vehicle is subject to seizure for violation of the law. Moreover, visual surveillance of vehicles in plain view does not constitute an unreasonable search for Fourth Amendment purposes, even if the surveillance is aided by an officer's use of a license plate tag reader, because a defendant does not have a reasonable expectation of privacy in a plainly visible license plate.

Here, the officer based the stop on the information he received from the LPR system, as well as his personal observation of the vehicle's tag to confirm that the LPR alerted to the correct tag number. The information from the LPR system was similar to the information an officer retrieves when running vehicle tag information through the Georgia Crime Information Center ("GCIC"), which is sufficient for the basis of a traffic stop. Although the officer could not recall whether dispatch informed him that the vehicle's registration was suspended before or after he approached the vehicle, the officer had reasonable articulable suspicion to conduct a traffic stop based on the alert and information the officer received from the LPR system showing that a wanted person could be driving the vehicle. Since the officer had authority to initiate the stop, he was entitled to approach the vehicle and request appellant's license. When appellant informed the officer that his license was suspended, the officer had probable cause to arrest him. Moreover, appellant consented to the search of the vehicle. Accordingly, the trial court did not clearly err in denying appellant's motion to suppress.

Attempt to Commit Child Molestation; Merger

Brown v. State, A13A0408 (5/20/13)

Appellant was convicted of criminal attempt to commit child molestation, O.C.G.A. §§ 16-4-1, 16-6-4(a)(1), and computer child exploitation, O.C.G.A. § 16-12-100.2(d)(1). The evidence showed that appellant, a Tennessee resident, responded to a Craigslist ad by a sheriff's deputy purporting to be a fourteen year old female residing in Georgia and looking for male companionship. After a series of explicit emails and instant messages, the two confirmed a time and place to meet in order to engage in intercourse. When appellant arrived at the planned location in Georgia, he was arrested by law enforcement.

Appellant first argued that the State lacked jurisdiction to prosecute him because he was a Tennessee resident with no ties to Georgia before being lured to this state by law enforcement officers. The Court stated that Georgia law pertinently provides in O.C.G.A. § 17-2-1(b) that "a person shall be subject to prosecution in this state for a crime which he commits, either within or outside the State, if the crime is committed either wholly or partly within the State." Thus, the State had jurisdiction under O.C.G.A. § 17-2-1 to prosecute appellant for attempted child molestation. Appellant committed that crime at least partly within Georgia when he took a substantial step in Georgia toward committing child molestation, namely by traveling to Georgia to meet with the 14-year-old female for the purpose of engaging in sexual activities with her. The State also had jurisdiction under O.C.G.A. § 17-2-1 to prosecute appellant for computer child exploitation. The Code section establishing that crime subjects a person to prosecution in Georgia under O.C.G.A. § 17-2-1 for "any conduct made unlawful under O.C.G.A. § 16-12-100.2 which the person engages in while either within or outside of this state if, by such conduct, the person commits a violation of O.C.G.A. § 16-12-100.2" which involves another person believed by such person to be a child residing in this state. Here, the evidence showed that, *after* being told that the female in the ad lived in Georgia, appellant violated O.C.G.A. § 16-12-100.2 by utilizing computer on-line services to continue to communicate with her and to entice her to meet him to engage in sexual activities. In addition, in addressing violations of O.C.G.A. § 16-12-100.2, the Court held that a defendant utilizes computer on-line services in the county of the *recipient* of the computer messages, even when the defendant sent the messages from elsewhere. Under the reasoning of these cases, appellant utilized computer on-line services in Georgia, where the law enforcement officer posing as the underage female recipient received the messages. Accordingly, he committed the offense of computer child exploitation at least partly in Georgia, giving the state jurisdiction under O.C.G.A. § 17-2-1 to prosecute him for that offense.

Alternatively, appellant argued that, for sentencing purposes, his conviction for attempted child molestation merged into his conviction for computer child exploitation. The parties disputed whether merger was precluded by the provision of the computer child exploitation statute, which states that any violation of this Code section shall constitute a separate offense. The Court noted that similar language in the statute establishing the offense of possession of a firearm or knife

during the commission of a felony, O.C.G.A. § 16-11-106(e), evidences a "legislative intent to provide punishment for both the possession offense and the predicate felony." Furthermore, the Court found, even if merger of a computer child exploitation statute offense with an attempted child molestation offense is required in an appropriate case - O.C.G.A. § 16-12-100.2(i) notwithstanding - merger was not required in this case. To determine if one crime is included in and therefore merges with another, the Court applies the "required evidence" test, which examines whether each offense requires proof of a fact which the other does not. Here, the computer child exploitation offense required the State to prove that appellant used computer on-line services to entice a child to commit acts violating the prohibition against child molestation, O.C.G.A. § 16-12-100.2(d)(1), which the State did not need to prove for the attempted child molestation conviction, O.C.G.A. §§ 16-4-1, 16-6-4(a)(1). The attempted child molestation offense required the State to prove that appellant had the intent to commit child molestation and committed a substantial step toward the commission of that crime, O.C.G.A. §§ 16-4-1, 16-6-4(a)(1), neither of which the State had to prove for the computer child exploitation conviction, O.C.G.A. § 16-12-100.2(d)(1).

Finally, the Court held, contrary to appellant's suggestion, the required evidence test for merger applies to cases involving attempt crimes.

Guilty Pleas

Malone v. State, A13A0471 (5/20/13)

Appellant was indicted for committing the crimes of incest, aggravated child molestation, aggravated sexual battery, aggravated sodomy, and child molestation. Following a hearing, appellant entered a non-negotiated guilty plea on all counts, and he was sentenced to serve thirty years in confinement. Appellant appealed from the trial court's subsequent denial of his motion to withdraw his guilty plea. He argued that the State failed to show that he entered his plea with an understanding of the consequences because he was under the influence of medication when he entered his plea.

The Court stated that upon a challenge to the validity of a guilty plea, the State has the burden of showing affirmatively from the record that the defendant offered his plea knowingly, intelligently, and voluntarily. The State's burden may be met by (1) showing on the record that the defendant was cognizant of his rights and the waiver of those rights, or (2) using extrinsic evidence that shows affirmatively that the guilty plea was entered knowingly and voluntarily.

The evidence showed that the State initially offered appellant a negotiated plea of 20 years, to serve 12. Appellant told his attorney that he wanted to accept the plea offer, but appellant attempted to commit suicide on the day he was to appear in court to enter the plea. At the subsequent plea calendar, appellant changed his mind and declined to enter a plea, although he met with his counsel later and indicated that he had made a mistake and did want to enter a plea. Appellant's attorney then met with appellant and his family and explained to them that the trial court had stated that any subsequent plea would be non-negotiated and could not be withdrawn. The prosecutor, after confirming that if appellant entered a guilty plea it would be non-negotiated, described in detail the factual basis for the charges and recommended that appellant be sentenced to 25 years, to serve 20. Appellant's attorney confirmed that appellant wished to plead guilty, and he acknowledged that they had thrown away the State's previous plea offer, but asked the court to temper this sentencing. Appellant's attorney also represented to the trial court that appellant was currently being treated with an anti-depressant medication, but that appellant had told him that he was perfectly clear-headed that day. Appellant took the stand and, under questioning by the State, represented that his medication did not interfere with his ability to understand and think clearly. He confirmed that he understood the sentencing and charges against him and then pled guilty to the charges. The trial court accepted appellant's plea of guilty as freely and voluntarily given before sentencing him to serve 30 years in confinement.

At the hearing on appellant's motion to withdraw his guilty plea, appellant testified that he did not enter the guilty plea of his own free will. According to appellant, he was taking multiple medications, and was "not really sure" if the other medications affected his ability to think. Also according to appellant, his state of mind at the hearing was such that he "wanted to actually go to sleep and never wake up again." Appellant further maintained that he entered a guilty plea because he thought he was going to be sentenced consistently with the State's plea offer of "the 20 years to serve 12." Appellant's defense counsel testified that on the morning of the plea hearing he explained to appellant that it was up to the judge whether or not he went along with the plea. According to counsel, he did not have any concerns about appellant's medications impacting on his ability to understand what was going on in court. And counsel saw nothing at all that would make him think appellant did not know what he was doing.

The Court, after reviewing the evidence, found no error, noting that the record contained no evidence, other than appellant's own self-serving statements during the hearing on his motion to withdraw the plea, that he labored under any impairment at the time of the plea proceeding. On the other hand, appellant's testimony during the plea hearing, as well as the testimony of defense counsel during the hearing on the motion to withdraw the plea, showed that although appellant was taking an anti-depressant medication, his mental faculties were not impaired thereby and he understood that the trial court was not bound by the State's initial plea offer in determining his sentence. Thus, the State carried its burden of showing that appellant offered his plea knowingly, intelligently, and voluntarily, and the Court found that the trial court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea.

Search & Seizure

Moore v. State, A13A0096 (5/21/13)

Appellant was convicted of trafficking cocaine, possession of marijuana, and failure to maintain lane. He contended that the trial court erred in denying his motion to suppress because the officer impermissibly expanded the duration and scope of the traffic stop, and that the officer lacked a reasonable suspicion to justify the continued detention.

The evidence showed a police officer on patrol observed appellant driving his vehicle too closely behind another vehicle and failing to maintain his lane. The officer then initiated a traffic stop. After reviewing appellant's documentation, the officer told appellant that he would be issuing only warning citations. The officer observed that appellant's hands were shaking excessively, his right leg was

bouncing up and down, and he appeared to be extremely nervous. Since appellant was excessively nervous, the officer asked appellant to step out of his vehicle. Upon exiting his vehicle, appellant quickly walked to the officer's patrol vehicle and attempted to get in. The officer stopped appellant, and then began writing the first warning citation. Despite being told that he would only receive a warning, appellant's nervousness escalated. Appellant repeatedly rubbed his shirt, was overly talkative, fidgeted, and paced back and forth. The officer stated that he then called for backup due to appellant's continued nervousness, and another officer arrived in less than two minutes. While the officer was filling out the first warning citation, the officer engaged in a conversation with appellant. The officer stated that appellant hesitated when answering questions about his itinerary. Approximately six minutes into the stop, the officer called for a K-9 unit, which arrived as the officer completed the second warning citation. The drug dog conducted an open-air search around the vehicle and alerted to the presence of narcotics while the officer was in the process of calling in appellant's driver's license. The officer subsequently searched appellant's vehicle and found the marijuana and cocaine.

Appellant argued that the officer impermissibly expanded the scope and duration of the stop by questioning him about matters unrelated to the traffic violations. The Court stated that during a valid traffic stop, an officer may ask the driver questions wholly unrelated to the traffic stop or otherwise engage in "small talk" with the driver, so long as the questioning does not prolong the stop beyond the time reasonably required to complete the purpose of the traffic stop. A reasonable time to conduct a traffic stop includes the time necessary to verify the driver's license, insurance, registration, and to complete any paperwork connected with the citation or a written warning. A reasonable time also includes the time necessary to run a computer check to determine whether there are any outstanding arrest warrants for the driver or the passengers. Moreover, an officer may use a drug sniffing dog to conduct an open-air search of a vehicle's exterior during a valid traffic stop without implicating the Fourth Amendment, if the same is performed without unreasonably extending the stop. Here, there was no dispute that the initial stop was authorized. Contrary to appellant's claims, the purpose of the detention was not fulfilled when the officer indicated that he would only be giving appellant a warning citation. The officer was permitted to continue the detention while he verified appellant's license, insurance, and registration, completed any paperwork, and checked for any outstanding warrants. The officer was also authorized to engage in small talk and question appellant about his itinerary while he completed the warning citations.

Although appellant argued that the length of stop - approximately 13 minutes - was unreasonable, the record showed that appellant's own actions prevented the officer from completing the warning citations sooner. Notably, appellant exhibited increasing nervousness during the stop, and when appellant was asked to exit the vehicle, appellant immediately attempted to enter the officer's patrol car. The officer testified that he could not focus solely on writing the citations because he was concerned about appellant's extreme nervousness, and while he was engaging appellant in conversation, he was actively working on completing the warning citations. The officer also testified that the time it took him to complete the warning citations in this case was consistent with the duration of other stops where he issued multiple warning citations and the driver was exhibiting criminal indicators. The Court accepted the trial court's decision with regard to questions of fact and the officer's credibility, and held that the trial court did not clearly err in concluding that the stop was not unreasonably prolonged. Since the stop was not unreasonably prolonged, the Court did not need to consider appellant's argument that the officer lacked a reasonable suspicion to justify his detention. Therefore, the trial court's denial of appellant's motion to suppress was affirmed.

Restitution; Fair Market Valuation

Galimore v. State, A13A0791 (5/22/13)

Appellant pled guilty to burglary, and following a later hearing, the trial court ordered him to pay the victim restitution in the amount of $3,100. On appeal from the restitution award, appellant claimed that (1) the amount of restitution ordered by the trial court was not supported by the evidence; and (2) the trial court erred in failing to make findings of fact relating to each of the statutory factors that must be considered in determining the nature and amount of restitution.

The Court stated that restitution is not synonymous with civil damages. Under O.C.G.A. § 17-14-10(a)(4), the amount of damages is one of the factors to be considered by the trial court in ordering restitution. The trial court must also consider, among other things, the offender's present financial condition and future earning capacity, as well as the goal of rehabilitation to the offender. The burden of showing the offender's financial resources, and the needs of his or her dependents, is placed on the offender. However, the amount of restitution awarded cannot exceed the amount of the victim's damages, and the State has the burden of demonstrating the amount of the victim's loss. In this context, damages means "all special damages which a victim could recover against an offender in a civil action . . . based on the same act or acts for which the offender is sentenced, except punitive damages and damages for pain and suffering, mental anguish, or loss of consortium." O.C.G.A. § 17-14-2(2).

The evidence showed that appellant stole the victim's laptop computer, four Dell desktop computers, an "all in one" desktop computer, a server (collectively, the "computer-related items"), a 27 inch television, a DVD player, a game console, hand and power tools, and a jar of coins. The victim testified to the value of the stolen items individually and that the total value of the property stolen was approximately $3,500. Appellant's attorney cross-examined the victim as to how he arrived at his valuations and then argued during closing that the evidence was insufficient to establish the fair market value of the stolen property. After closing arguments, the trial court informed the victim that he was not entitled to recover the "value new" of the stolen property and then re-opened the evidence. In response to the trial court's questioning, the victim testified that if he were to sell the laptop at fair market value, he would "ask at least $750 for it," although he had earlier testified that the value of the laptop was $1,100. Consistent with the written order entered the same day, the trial court indicated that it would award restitution of $3,100.

When restitution is ordered for property that the defendant stole or destroyed, the amount of damages is based on the fair market value of the property. Appellant contended that the trial court's award was improper be-

cause the victim's testimony showed that he valued much of the stolen property based on replacement cost and not fair market value. In reviewing the trial court's ruling, the Court considered whether the evidence showed the fair market value of the items, the condition of the items, or an appropriate method of discounting the items from their replacement value to their fair market value. The Court noted that opinion evidence as to the value of an item, in order to have probative value, must be based upon a foundation that the witness has some knowledge, experience or familiarity with the value of the property or similar property and he must give reasons for the value assessed and also must have had an opportunity for forming a correct opinion.

Here, the Court found, the evidence of value as to the computer-related items was strong. The victim was an IT professional who frequently dealt in buying and selling of computer equipment, and confirmed to the trial court that he thereby was able to assess reasonable values of such equipment. He described the various computers and the server with particularity and explained that he had researched market values on eBay. Although during cross-examination the victim sometimes referred to replacement costs in explaining how he arrived at his valuations, the trial court could conclude that, other than the laptop, the victim testified to the fair market value of the computer-related equipment and not simply the cost of purchasing a new replacement. For example, the victim valued the server at $250 based on "the replacement cost on eBay," which his testimony also showed to be "a used price," thus reflecting the market value of the stolen server. The trial court made it clear to the victim that he was not entitled to ask for the "value new," after which the victim clarified that he had been speaking to "fair market . . . value on a used computer" as to the four Dell desktop computers. The trial court also indicated its intent to reduce the victim's initial valuation of his laptop to the $750 amount the victim testified he would accept if he sold it at fair market value.

The Court found that the victim's basis for testifying to the valuation of the non-computer-related items was less clear. On cross-examination defense counsel asked the victim if he was "basing everything off receipts." The victim acknowledged that he based the value of the laptop off of its receipt, but that as for "everything else," he "found the current market value based off the eBay prices." Thus, apart from his initial testimony as to the value of the laptop, and except with respect to the hand tools and the jar of coins, there was evidence from which the trial court could conclude that the victim's itemized valuation testimony constituted his opinion of the fair market value of such property, including his Wii gaming system, power tools, television, and DVD player, and that such testimony was based on his knowledge and familiarity with the market for that property as used. The witness gave the basis for his opinion which, the Court noted, would leave the weight and credibility for the trial court.

The Court did agree with appellant that the evidence was insufficient to support an award for the value of the victim's hand tools and a jar of coins. The victim acknowledged on cross-examination that his valuation of the hand tools was a "shot-in-the-dark guess" and that he did not actually know what hand tools were stolen. As the victim's testimony was shown to be speculation and without foundation, the evidence did not support an award for the fair market value of the victim's "total kit" of tools to the extent it included his hand tools, because opinion testimony without proper foundation is inadmissible as speculation.

The victim also valued a gallon jar of coins, filled approximately a third of the way full with "everything from half dollars down to pennies and dimes," at $200. The victim also testified, however, that he was "guessing" as to that amount, and that, in fact, he "[did not] know." Given these qualifications, the victim's opinion of the value of the coins in the jar was speculative and without probative value. And although a jar of coins must have some value, the trier of fact was not given any pertinent information from which to determine the number or relative distribution of the various denominations of coins therein, and so the State did not present any evidence from which the trier of fact could determine the fair market value of the coins beyond resorting to conjecture.

Notwithstanding the foregoing, even taking into consideration that the trial court failed to accept the victim's initial valuation of the laptop, the Court explained a trier of fact could conclude that the fair market value of the computer-related items was $2,250, and that the fair market value of the other property, excluding any allocation of value for the hand tools and excluding the jar of coins, was $840. This corresponded almost exactly to the $3,100 awarded by the trial court, an amount which would have been recoverable by the victim in a civil action as damages. The Court concluded, therefore, that the State met its burden of presenting sufficient evidence to support the amount of restitution.

Appellant also contended that the trial court erred by not making findings of fact relating to each of the statutory factors that must be considered in determining the nature and amount of restitution. The Court disagreed. When a trial court orders restitution it "shall" consider the factors set forth in O.C.G.A. § 17-14-10(a)(1)-(8). Here, the trial court heard evidence on damages, which were required to be proven by the State. Appellant chose not come forward with any evidence, notwithstanding that "the burden of demonstrating the financial resources of the offender or person being ordered to pay restitution and the financial needs of his or her dependents shall be on the offender or person being ordered to pay restitution." O.C.G.A. § 17-14-7(b). Appellant pointed to nothing in the transcript that would show that the trial court did not consider the appropriate factors in determining the restitution award. Further, based on an amendment to the restitution statutes in 2005, a trial court is no longer required to make written findings of fact concerning the factors to be considered in determining the restitution amount. Accordingly, Appellant failed to show error.

Forfeiture; Excessive Fines

Tipton v. State of Ga., A13A0198 (5/22/2013)

The trial court found that appellant's vehicle was subject to forfeiture to the State because it had been used to facilitate the purchase of cocaine. The evidence showed that appellant owned a 1998 Jeep Grand Cherokee Laredo that was worth between $1,600 and $2,500. There were no existing liens on the Jeep at the time in question. The Jeep was "really the only thing in the world [that appellant] own[ed], other than her clothes." On the day of seizure, appellant contacted her brother, who agreed to drive appellant around in her Jeep for the purpose of purchasing prescription drugs. Both appellant and her brother were addicted to prescription pills, and they picked

up another individual to help them facilitate the drug purchases. They drove in the Jeep to different locations around the county where the individual attempted to purchase prescription pills. Ultimately, however, the individual purchased $30 worth of cocaine in a parking lot while appellant and her brother waited in the Jeep. Patrol officers observed the cocaine purchase, and they arrested all three persons and seized the Jeep.

The State subsequently filed a civil in rem complaint seeking forfeiture of the Jeep on the grounds that, among other things, it had been used to facilitate the purchase of the cocaine. Appellant filed an answer, asserting an ownership interest in the Jeep and requesting that the Jeep be released to her. Following the forfeiture hearing in which the parties stipulated to the facts, the trial court entered an order of disposition granting the forfeiture of the Jeep to the State.

Appellant argued that the trial court erred in finding that the forfeiture was not an excessive fine in violation of the Eighth Amendment to the United States Constitution and in failing to perform the proper constitutional analysis on the record. The Court stated that the Eighth Amendment Excessive Fines Clause applies to civil in rem forfeitures. In *Howell v. State of Georgia*, 283 Ga. 24, 26 (2008), the Supreme Court of Georgia adopted the test applied by the United States Court of Appeals for the Second Circuit in *von Hofe v. United States*, 492 F.3d 175, 186 (III) (2nd Cir. 2007), for inquiring into whether a forfeiture constitutes an excessive fine. According to the decision in *Howell*, a trial court should take into account the following considerations: (1) the harshness, or gross disproportionality, of the forfeiture in comparison to the gravity of the offense, giving due regard to (a) the offense committed and its relation to other criminal activity, (b) whether the claimant falls within the class of persons for whom the statute was designed, (c) the punishments available, and (d) the harm caused by the claimant's conduct; (2) the nexus between the property and the criminal offenses, including the deliberate nature of the use and the temporal and spatial extent of the use; and (3) the culpability of each claimant.

Here, appellant argued before the trial court that the forfeiture of the Jeep based on the purchase of $30 worth of cocaine was an excessive fine under the Eighth Amendment. In response to appellant's motion, the trial court, in its order of disposition, merely stated that the forfeiture of the vehicle was constitutional and the excessive fine assertion was denied. Nothing in the order of disposition suggested that the trial court considered *Howell* or made any findings pursuant to the detailed analysis required by that decision. Accordingly, the Court vacated the trial court's order of disposition and remanded the case for further proceedings in the trial court consistent with *Howell*. Because a hearing was conducted, the Court stated, no further evidentiary hearing was necessary, unless the trial court concludes otherwise. But regardless of whether another evidentiary hearing is held, the trial court was directed to enter a new order including findings of fact and conclusions of law pursuant to the analysis required by *Howell*, and either party was entitled to appeal the trial court's new order within 30 days of its entry.

Sufficiency of the Evidence; Merger

Wickerson v. State, A13A0145 (5/22/13)

Appellant was convicted of multiple counts of armed robbery and aggravated assault, based upon allegations that he and two accomplices robbed four victims at gunpoint in the course of one evening. Appellant contended that there was insufficient evidence to prove that he was involved in the robbery of the second and third victims. The Court did not agree.

The evidence showed that four victims were robbed at gunpoint within a three mile radius of one another. In one of the robberies, a plumber and his assistant (the second and third victims) were trying to repair a broken water main when they saw two men slowly approach, walking toward the back of a parked utility truck. The two men then walked around the truck, and one of them pointed a handgun at the back of the plumber's head, said that it was a robbery, and made the plumber and his assistant turn around. While the first robber held the plumber at gunpoint, the second robber approached the plumber's assistant and began striking him. When the plumber attempted to stop the second robber from hitting his assistant, the first robber struck the plumber twice in the head with the revolver, causing him to bleed heavily and ultimately requiring multiple stitches on the back right and left sides of his head. At the first robber's command, the plumber got down on the ground, after which the second robber began to kick him in the side. The robbers took the plumber's wallet and tool bag and his assistant's Blackberry cell phone. The robbers eventually walked away, and the plumber's assistant went to a nearby apartment and had the tenant call the police while the plumber lay on the ground.

At trial, the State presented testimony and exhibits pertaining to pre-trial photographic lineups that had been shown to the first, second, and fourth victims by a police detective. The second victim, the plumber, had identified the other male robber in a pre-trial photographic lineup as one of the men who had robbed him but had been unable to identify appellant. The plumber testified that he had been focused on the other man, the robber who had held the revolver to his head and struck him with it, and thus was unsure of the identity of appellant. The State also called several law enforcement officers as witnesses.

Appellant challenged the sufficiency of the evidence to convict him of armed robbery under Counts 2 and 3 of the indictment. Count 2 of the indictment charged him with the armed robbery of the plumber, and Count 3 charged him with the armed robbery of the plumber's assistant. Appellant emphasized that the plumber was unable to identify him as one of the perpetrators and that the plumber's assistant never testified at trial. Consequently, appellant contended that his convictions on Counts 2 and 3 were contrary to the weight of the evidence and must be reversed. The Court disagreed.

O.C.G.A. § 16-8-41(a) provides that "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." In determining whether there was sufficient evidence that the armed robberies at issue were committed by appellant, the Court was mindful that every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime. One is concerned in the commission of a crime where the person either directly commits, intentionally causes another to commit, intentionally aids or abets the commission of, or intentionally advises or otherwise encourages another to commit the crime. A person's involvement

in the commission of a crime may be inferred from that person's presence, companionship, and conduct before, during and after the crime.

Applying these principles, the Court concluded that the evidence previously discussed was sufficient to authorize a rational jury to find beyond a reasonable doubt that appellant, either directly or as a party to the crime, participated in the armed robberies of the plumber and his assistant. Although there was no direct testimony from the plumber identifying appellant as one of the two men involved in those crimes, circumstantial evidence of identity may be sufficient to enable a rational trier of fact to find a defendant guilty beyond a reasonable doubt. Furthermore, even though the plumber's assistant did not testify at trial, the testimony of a victim is not required to sustain a conviction where there is other evidence that the defendant committed the acts which establish the elements of the offense.

Here, there was sufficient other evidence circumstantially connecting appellant to the robberies of the plumber and his assistant to sustain his convictions. The plumber identified appellant's co-defendant as one of the two robbers, and the first victim identified appellant as having committed an armed robbery with the co-defendant ten minutes *before* the robbery of the plumber and his assistant, and the fourth victim identified appellant as having committed an armed robbery with the co-defendant ten minutes *after* the robbery of the plumber and his assistant. Additionally, a patrol officer saw both appellant and co-defendant together shortly after the robberies when they exited from a gold Cavalier, which was registered in the name of appellant's mother and from which a Blackberry cell phone matching the description of the one stolen from the plumber's assistant was later recovered. The patrol officer further observed appellant and co-defendant flee into an apartment unit where the tool bag of the plumber with his apparent blood on it was later recovered, along with a .357 caliber revolver matching the handgun described by the plumber as being used in the robbery. This combined circumstantial evidence was sufficient to permit a jury to infer that appellant was one of the two men involved in the armed robberies of the plumber and his assistant. While appellant denied any involvement in those offenses and attempted to present an alibi defense, the jury was entitled to disbelieve his version of the facts. Accordingly, the Court concluded that there was sufficient evidence to support the verdicts for armed robbery.

The Court also, sua sponte, addressed a merger issue related to one of appellant's aggravated assault convictions. Appellant was convicted and sentenced for the armed robbery of the plumber (Count 2) and for the aggravated assault of the plumber for striking him in the head with a handgun (Count 8). The Court was constrained to hold that the trial court erred in failing to merge Count 8 into Count 2 for sentencing purposes. The Court concluded that the aggravated assault of the plumber was a lesser included offense of the armed robbery of the plumber and that the trial court erred by not merging the assault into the robbery. Appellant's conviction and sentence for aggravated assault under Count 8 therefore was vacated, and the case was remanded to the trial court for resentencing.

Miranda Rights; Confrontation Right

Lindsey v. State, A13A0051 (5/21/13)

Appellant was convicted of two counts of armed robbery. He contended that the trial court erred in admitting his taped statement and his co-defendant's taped statement. The evidence showed that appellant and two co-defendants robbed the victims in a restaurant parking lot, and fled their vehicle after it was stopped by the police. Appellant was located in the woods and arrested. Later that morning, appellant was interviewed by an investigator who read appellant his *Miranda* rights, and appellant waived his rights in writing. During the interview, appellant told the investigator that he was present during the robbery, he exited the car and he approached the two victims to distract them while the other participants got ready to rob the victims. Appellant also said that he spoke to the first victim and told her to calm down because she was screaming and crying. Appellant said that they were stopped by police a few minutes after they drove away from the robbery scene. Appellant and the others exited the car and fled.

Based on information appellant provided during the interview, the investigator obtained a photograph and showed it to appellant. Appellant identified the person in the photograph, his co-defendant, as one of the men in the car with him during the robbery. The investigator then retrieved a tape recorder and took appellant's recorded statement, during which appellant confirmed that he got out the car to distract the two victims. The investigator subsequently interviewed the co-defendant. The co-defendant confirmed that he, appellant and appellant's brother were involved in the armed robbery.

Appellant contended that the trial court erred in admitting his statement to the investigator. Specifically, appellant argued that his taped statement was not free and voluntary because the investigator did not reread his *Miranda* rights, following a significant time-gap between the signing of the waiver of rights form and the beginning of the taped interview. The Court discerned no error.

In ruling on the admissibility of an in-custody statement, a trial court must determine whether, based upon the totality of the circumstances, a preponderance of the evidence demonstrates that the statement was made freely and voluntarily. Here, the evidence at the *Jackson v. Denno* hearing showed that appellant was taken into custody for obstruction shortly before 3:00 a.m. The investigator testified that approximately six hours later, he interviewed appellant about the armed robbery in this case. Prior to advising appellant of his rights, the investigator got basic information from appellant, including his birthday, address, physical description and the fact that appellant had a high school education. The investigator then gave appellant his *Miranda* warnings, appellant indicated that he understood all of his rights, he appeared to be coherent, and he did not appear to be under the influence of drugs or alcohol. Appellant then signed a waiver of counsel form, which set forth his rights and specifically provided that no promises or threats were made to induce him to sign the waiver.

Prior to making his taped statement, appellant told the investigator that he was present during the robbery, he approached the first victim and told her to calm down because she was screaming. The investigator spoke with appellant for approximately an hour and a half before he recorded appellant's statement. During the unrecorded portion of the interview, the investigator encouraged appellant to cooperate and tell the truth, and he let appellant know that he could be identified by witnesses. The investigator testified, however, that he did not threaten appellant or promise

him anything for giving the statement. After listening to the taped interview, the trial court ruled that appellant's statement was freely and voluntarily given.

Appellant did not testify at the *Jackson v. Denno* hearing, and no evidence showed that he was coerced or threatened during the unrecorded portion of his interview with the investigator. Moreover, the Court found, in light of the continuous nature of the interrogation, the investigator was not required to specifically re-apprise appellant of his *Miranda* rights before he made the taped statement. Accordingly, the trial court did not abuse its discretion in finding that, under the totality of the circumstances, appellant's taped statement was freely and voluntarily made following a waiver of his *Miranda* rights.

Appellant also contended that the trial court violated his confrontation right when it admitted his co-defendant's taped statement after the co-defendant took the stand and refused to provide meaningful testimony regarding the armed robbery. The Court stated that the Confrontation Clause imposes an absolute bar to admitting out-of-court statements in evidence when they are testimonial in nature, and when the defendant does not have an opportunity to cross-examine the declarant. Statements made to police officers during an investigation qualify as testimonial. Nevertheless, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. It is therefore irrelevant that the reliability of some out-of-court statements cannot be replicated, even if the declarant testifies to the same matters in court. The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.

Here, appellant failed to show that the Confrontation Clause barred admission of his co-defendant's taped statements to police officers. Notably, the co-defendant testified at appellant's trial that he committed the armed robbery, and appellant was with him. The co-defendant admitted giving a taped statement to the investigator about the robbery, although he refused to answer the State's questions about his statement. While appellant argued that he was denied the right to confront his co-defendant, he expressly declined the opportunity to cross-examine him. Moreover, while appellant argued on appeal that his co-defendant refused to testify, at trial, appellant specifically argued that his co-defendant did not refuse to testify, and that the prosecutors could have done more at trial to elicit testimony from him. Since the co-defendant was present at trial to defend or explain his statement, and appellant declined the opportunity to cross-examine him, the Confrontation Clause did not bar admission of the co-defendant's taped statement.

Sequestration; Expert Witnesses

Puckett v. State, A13A0264 (5/17/13)

Appellant was convicted on DUI (less safe) and DUI (per se) and one count of speeding. She challenged the trial court's decision to sequester her expert witness during the presentation of the State's case. Under O.C.G.A. § 24-9-61, either party has the right to have the witnesses of the other party examined out of the hearing of each other. This statute, known as the rule of sequestration, has been broadly applied by trial courts to exclude all witnesses from hearing the testimony of any other witnesses, and this practice has been expressly approved by the appellate courts. Furthermore, a trial court is vested with broad discretionary powers in enforcement of the sequestration rule, which will not be controlled absent abuse of discretion.

The evidence showed that when the officer who stopped appellant suspected that she was driving under the influence of alcohol, and a DUI Task Force officer was summoned to complete the investigation. The DUI Task Force officer performed a series of field sobriety tests on appellant, which included the horizontal gaze nystagmus ("HGN") test, the walk-and-turn test, and the one-leg-stand test. The results of each of these tests indicated impairment. Although a video camera mounted inside the officer's patrol car recorded most of the field sobriety evaluations, the officer's administration of the HGN test was performed outside the view of the camera. Based on the results of the field sobriety testing and both officers' observations of appellant at the scene, appellant was placed under arrest and charged with driving under the influence of alcohol. Prior to trial, appellant filed a motion to suppress which challenged, inter alia, the officer's failure to administer properly the HGN test. After an evidentiary hearing, the trial court denied the motion.

On the first day of trial, the State called the DUI Task Force officer as a witness and had him testify as to his training and experience in conducting standardized field sobriety tests, including the HGN test. On the second day of trial, appellant's counsel brought a defense witness into the courtroom to observe the continuation of the officer's testimony, and the State requested that the rule of sequestration be invoked. In response, appellant's counsel stated that she planned to call the witness later as an expert on the subject of field sobriety evaluations, and she requested that the witness be permitted to stay in the courtroom to assist in the defense and to observe the officer's testimony regarding the administration of the HGN test because such information was not recorded on the video of the traffic stop. The trial court denied appellant's request and applied the rule of sequestration equally to both parties.

Appellant claimed that the trial court abused its discretion when it excluded her defense witness from the courtroom during the officer's testimony, thereby violating appellant's right to a fair trial. Specifically, appellant argued that she was unable to mount a full and complete defense because her defense witness was unable to provide testimony to appraise, critique, or refute the officer's method of administering the HGN test. The Court noted that it was undisputed that appellant's witness did not observe the actual HGN test that was administered to appellant at the scene of the traffic stop. Thus, any opinion he could have properly formed with regard to the officer's method of administering the HGN test would have to have been based on the officer's testimony or on hypothetical questions posed by counsel.

Even when an expert witness would be assisted by hearing the testimony of preceding witnesses instead of answering a hypothetical question and could assist counsel in conducting the cross-examination, the grant or denial of such exemption from the rule of sequestration lies within the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. Here, the trial court noted that appellant had previously challenged the officer's method of administering the HGN test in a motion to suppress and had the benefit of his testimony prior to trial. Furthermore, nothing prevented appellant's counsel from using the facts obtained from the

officer's in-court demonstration of the HGN test at trial to pose hypothetical questions to the defense counsel for the purpose of challenging the officer's method of administering the HGN test. Moreover, appellant elicited testimony from the witness on the proper method of administering the HGN test and how the reliability of the results can be compromised if the test is not conducted properly, which the jury could consider in comparison to the officer's in-court demonstration. Therefore, the Court found, the witness sequestration did not prevent appellant from challenging the officer's method of administering the HGN test. While the trial court could have allowed appellant's expert witness to remain unsequestered under the circumstances of this case, the trial court did not abuse its discretion in requiring the expert to be sequestered. Accordingly, the trial court's judgment was affirmed.