

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JUNE 24, 2016

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## THIS WEEK:

- **Rule of Completeness; Jury Instructions**
- **Separation of Powers; Parole**
- **Forfeiture by Wrongdoing**
- **Grand Juries; Closing Arguments**
- **Rape Shield; Child Molestation**
- **Terroristic Threats; Conditional Threats**
- **Records Restriction; Clerk of Court's Records**
- **O.C.G.A. § 24-4-413; Corroboration of Victim**
- **DUI; Williams**

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### ***Rule of Completeness; Jury Instructions***

*Allaben v. State, S16A0166 (6/20/16)*

Appellant was convicted on re-trial of malice murder in connection with the strangling death of his wife. The evidence showed that appellant killed his wife and that he used a sleeper hold to subdue her. Thereafter, he wrapped her body in a blanket and placed it in the bed of his pickup truck; he then used that truck to transport his children to Virginia, the home state of his brother and sister-in-law. During the trip, appellant admitted to his children and later his sister-in-law that he had killed his wife. According to appellant's sister-in-law, appellant admitted that "he had a cloth with ether on it, [which] he put [] over [the victim's] mouth, and the cloth went too far down her throat and choked [her]." The sister-in-law further testified that appellant stated that he used the ether "so [the victim] could go to sleep" because he just "wanted to talk to her." After dropping

off his children in Virginia, appellant returned to Georgia and proceeded to the home of Jon Crane. Once there, appellant admitted that his wife was dead in the bed of his truck, and, eventually, surrendered to authorities.

During the State's case-in-chief, Crane testified on direct examination concerning various portions of his extensive post-incident conversation with appellant. Namely, Crane testified that appellant unexpectedly arrived at his house in the early morning hours, and claimed to need an attorney because he had his dead wife in the bed of his truck. During cross-examination, however, the trial court prohibited the defense from eliciting testimony from Crane that, during this lengthy conversation, appellant stated that his wife had been unfaithful and "that he didn't mean for [her death] to happen, that he loved her so much and [her death] was not what he wanted." Appellant argued that this testimony was admissible under the rule of completeness. The Court agreed.

O.C.G.A. § 24-8-822 provides as follows: "When an admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence." With respect to criminal cases, this rule of completeness requires that where a part of a conversation, which amounts to an incriminatory admission, is admitted in evidence, it is the right of the accused to bring out other portions of the same conversation, even though it is self-serving in its nature, or exculpatory, in that it justifies, excuses, or mitigates the act. However, O.C.G.A. § 24-8-822 does not make admissible parts of a statement that are irrelevant to the case and to the parts of the statement introduced into evidence by the opposing party.

The Court noted that the trial court concluded that the excluded portion of Crane's conversation with appellant "was not necessary to explain" Crane's testimony on direct examination. The Court found this conclusion problematic for two reasons. First, the trial court's ruling was based largely on the narrow testimony elicited by the State on direct examination, rather than the substance of Crane's entire conversation with appellant. Second, the State's examination of Crane was not particularly narrow; in fact, the State broadly asked Crane whether he "sa[id] *anything* about ... his wife," and questioned Crane at length about his conversation with appellant.

The defense's proffer of Crane's expected testimony demonstrated that the remainder of the conversation between the two men was, in fact, relevant to both Crane's direct testimony and the charges for which appellant was on trial. Specifically, it explained both the impetus for appellant's actions towards his wife as well as his intent at the time of the incident. In fact, the Court stated, appellant's intent with respect to the use of the ether and sleeper hold — whether he intended to kill his wife or merely subdue her — was the central, and perhaps only disputed issue at trial, and evidence on that point was sparse. Further, the excluded portion of Crane's testimony supported appellant's defense that the victim's death was unintentional. In light of the significant question of intent here, the exclusion of this testimony was not harmless though it represented only a small portion of Crane's testimony. Accordingly, the Court concluded, the trial court abused its discretion when it excluded Crane's testimony, and this ruling constituted reversible error.

Nevertheless, the Court then proceeded to address the issue of jury instructions because of the likelihood of reoccurrence on re-trial. Appellant first contended that the trial court erred by refusing to instruct the jury on simple battery and reckless conduct as lesser-included offenses of malice murder. The Court agreed. Here, the medical examiner testified that the purpose of a sleeper hold is to subdue an individual, yet the risk of death associated with it is significant enough that many police jurisdictions around the nation have prohibited such a maneuver. The jury also heard evidence that, in addition to her death, the victim was left with bruises and hemorrhages on her neck and face. Thus, the

Court found, this evidence was sufficient to warrant instructions on both simple battery and reckless conduct as lesser-included offenses of malice murder.

Appellant also contended that the trial court erred in failing to instruct the jury on simple assault and reckless conduct as lesser-included offenses of felony murder. For the reasons discussed above, the Court agreed that the jury should have been instructed on reckless conduct as a lesser-included offense of felony murder. And, it also agreed that appellant was entitled to an instruction on simple assault. Specifically, the evidence showed that appellant utilized the sleeper hold to either subdue or kill his wife; either way, there was evidence authorizing the jury to consider whether appellant "attempted to commit a violent injury" on his wife or placed her "in reasonable apprehension of immediately receiving a violent injury." Accordingly, appellant was entitled to an instruction on O.C.G.A. § 16-5-20(a)(1) and (2).

Finally, appellant contended that the trial court erred when it refused to instruct the jury on involuntary manslaughter on the grounds that he was previously acquitted of that offense in his first trial. The Court again agreed. Although a conviction or verdict of acquittal is an absolute bar to a subsequent prosecution for the same offense, double jeopardy protections may be waived. Here, appellant affirmatively waived his right to claim former jeopardy and, thus, the trial court erred when it concluded that double jeopardy barred involuntary manslaughter as a lesser-included offense in appellant's second trial. Further, the evidence was sufficient to authorize the jury to consider involuntary manslaughter as a lesser-included offense.

### **Separation of Powers; Parole** *Hayward v. Danforth, S16A0419 (6/20/16)*

Appellant appealed from the denial of his petition for writ of habeas corpus. The record showed that appellant was sentenced in 2007 to twenty-five years, with eight years to serve in prison, and seventeen years on probation. He was released on parole on February 19, 2009. On July 26, 2010, the trial court revoked the balance of appellant's sentence, calculating that the remaining time on his sentence was twenty years, three months, and eight days, which the court ordered appellant to serve in

the state penal system. Thereafter, appellant filed a habeas petition asserting that in revoking the remaining portion of his original sentence while he was in the legal custody of the Board of Pardons and Paroles, the trial court violated the Georgia Constitution's provision regarding the separation of powers. The habeas court rejected this argument leading to this appeal.

The Court stated that the Constitution vests the Parole Board with executive powers, including the power to parole convicted prisoners. A judicial attempt to control parole conditions violates the constitutional provision regarding the separation of powers. Thus, a trial court cannot, in a criminal sentence, purport to limit the power of the Board to grant parole in a manner not authorized by statute. Here, appellant had been granted parole by the Board and was in its legal custody until the expiration of his sentence, or until pardoned. Therefore, the habeas court erred in ruling that appellant was not in the Board's legal custody, and further erred in finding no violation of the separation of powers provision of the Georgia Constitution.

Moreover, the Court stated, regarding the seventeen-year portion of appellant's sentence that the trial court had originally specified to be served on probation, the habeas court noted that O.C.G.A. § 17-10-1(a)(1) provides that the trial court may revoke probation "even before the probationary period has begun." However, the Court stated, pretermittting any constitutional issue, O.C.G.A. § 17-10-1(a)(4) specifically sets forth that "[n]o revocation of any part of a probated sentence shall be effective while a defendant is in the legal custody of the State Board of Pardons and Paroles." Accordingly, the Court reversed the denial of habeas corpus.

### **Forfeiture by Wrongdoing** *Hickman v. State, S16A0524 (6/20/16)*

Appellant was convicted of attempted rape and murder. He argued that the trial court erred in admitting the victim's diary entries into evidence. The Court disagreed.

The Court noted that the trial court admitted the evidence under the doctrine of forfeiture by wrongdoing. This doctrine holds that one who obtains the absence of a witness by wrongdoing forfeits the right to confrontation. It has been codified in

Georgia's new Evidence Code as O.C.G.A. § 24-8-804(b)(5), which provides: "The following shall not be excluded by the hearsay rule if the declarant is unavailable as a witness: A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

The trial court found by a preponderance of the evidence that appellant killed the victim "to make her unavailable as a witness." Thus, the Court found, because the evidence was sufficient to satisfy the preponderance of the evidence standard, the trial court did not err.

Nevertheless, relying upon O.C.G.A. § 24-8-807, appellant argued that it was incumbent upon the trial court to find that the diary entry was more probative on the point for which it was offered than other evidence the State was able to procure. The Court again disagreed. By its own terms, O.C.G.A. § 24-8-807 does not apply to evidence which is admissible under another exception to the hearsay rule.

## **Grand Juries; Closing Arguments**

*Durden v. State, S16A0539 (6/20/16)*

Appellant was convicted of murder and related offenses. The record showed that the January 2013 term of the grand jury ran from January 14, 2013 to July 5, 2013. Sometime after the January-term grand jury was sworn, it was discovered that at least one of the members of the January grand jury was a convicted felon and therefore unqualified to serve. These individuals were replaced with qualified alternates. No additional oath was given after the alternates were placed on the January grand jury. After appellant's first indictment was quashed, the district attorney recalled the January grand jury on the last day of the January term of court to hear appellant's case. A true bill of indictment was returned against appellant that same day.

Appellant argued that the January grand jury should have been re-sworn after the body "reconvened" with the alternate grand jurors to hear and indict his case on the last day of the term of court. However, citing *State v. Grace*, 263 Ga. 220 (1993), the Court stated that a grand jury properly summoned, sworn, and charged to serve during a particular term of the court, may recess and reconvene as it sees

fit to conduct its business in the course of that term, and need not be re-sworn or recharged by the court during that term. This is because grand jurors, like any sworn officials, elected or otherwise, are presumed to remember their oaths on return from any break in the performance of their duties. Nothing in our state statutes or constitution which would require that the grand jury be re-summoned by court order, re-sworn and recharged each time they reconvene during a term to conduct business.

And here, the Court found, though alternate jurors were substituted during the January term of court, appellant pointed to no evidence that the January grand jury was ever formally discharged from its duties prior to the end of its term. Thus, the January grand jury continued to act within its term of court and remained empowered to act until the last day of its term. As there was no evidence that the January grand jury was previously discharged, the members of the January grand jury did not need to be re-sworn prior to returning appellant's second indictment.

Appellant also contended that the trial court should have given a curative instruction during the State's rebuttal closing argument because the prosecutor commented on his failure to testify. The record showed that defense counsel stated, "Mr. Durden doesn't have to prove anything, but Mr. Durden testified to you for some five hours." In rebuttal, the prosecutor argued, "He tells you that his client testified before you; no, he didn't. Testimony in a courtroom is placed under oath. Each witness that took that stand raised their right hand and promised before God to tell the truth. The defendant didn't do that."

The Court noted that because appellant did not object, it is precluded from reviewing the prosecutor's argument for plain error. Nevertheless, the Court found, the prosecutor's statement in closing argument did not amount to an infringement on appellant's constitutional right to remain silent. Because appellant did not, in fact, testify at trial, the prosecutor's rejoinder was a permissible attempt to correct defense counsel's misstatement, rather than an impermissible effort to comment on appellant's failure to testify. Further, during the charge of the court, the jury was instructed that statements made by the attorneys during closing arguments are not evidence and that they could not consider appellant's decision not to testify against him

in rendering a verdict. Accordingly, there was no error, much less plain error.

## **Rape Shield; Child Molestation**

*Sutton v. State, A16A0446 (4/20/16)*

Appellant was convicted of child molestation against two female victims, C.S. and A.J. The evidence showed that when A. J. was four years old, appellant placed some sort of substance A. J. called "glue" on her genitals and touched her. Prior to trial, appellant indicated that he intended to play A. J.'s recorded interview in which she initially identified another child as having put the glue on her. In the recorded interview, A. J. first discussed an incident in which the other young child had touched her. When asked about the incident at issue in this case immediately thereafter, A. J. said that the same young child had placed glue on her genitals, but then immediately corrected herself to identify appellant. The Court excluded the evidence under former O.C.G.A. § 24-2-3, the Rape Shield Statute.

Appellant contended that former O.C.G.A. § 24-2-3 did not require exclusion of A. J.'s statements as unrelated sexual history, because her statement would be used to impeach her. The Court disagreed. The Court stated that the general rule is that evidence of prior unrelated molestation is barred, and is not admissible simply to show the victim was confused. But, such evidence may be admissible to show other possible causes for behavioral symptoms typically associated with child sexual abuse accommodation syndrome or to explain certain medical testimony introduced at trial. Also, such evidence may be admissible to show the victim's lack of credibility where the victim has made prior false allegations of child molestation.

Here, however, the Court found that none of the exceptions to the general rule of inadmissibility applies. There was no expert testimony concerning child abuse accommodation syndrome, nor was any medical evidence admitted. Appellant was also unable to show that A. J.'s statements regarding the other child were false. Finally, the Court found, close review of the testimony at issue revealed that A. J., who moments earlier had been discussing activity with the other young child, merely misspoke and initially said the wrong name, but then

corrected herself to identify appellant as the offender, and was consistent in that testimony throughout the remainder of the interview, although she referred to appellant as both “Poppa Johnson” and “Poppa Sutton.” As a result, the Court concluded, the trial did not abuse its discretion in excluding A. J.’s testimony pertaining to the other young child.

### **Terroristic Threats; Conditional Threats**

*Looney v. State, A16A0393 (4/20/16)*

Appellant was convicted of terroristic threats. The evidence showed that an apartment complex leasing facilitator barred appellant from entering an apartment because appellant was not named on the lease. Appellant threatened to kill the leasing facilitator and his staff if appellant’s belongings were not returned to him in 24 hours.

Appellant argued that the evidence was insufficient to sustain his conviction for making a terroristic threat because any threat that he made referenced only future conduct and was “at all times conditional” on his property not being returned within 24 hours. The Court disagreed. A defendant need not have the immediate ability to carry out the threat to violate O.C.G.A. § 16-11-37(a). Moreover, a threat can be conditional and non-immediate and still qualify as a terroristic threat. Accordingly, the Court held, the evidence was sufficient to support his conviction.

### **Records Restriction; Clerk of Court’s Records**

*Woodhouse v. State, A16A0358 (4/20/16)*

Appellant appealed from an order denying his motion to seal the clerk of court’s records pursuant to O.C.G.A. § 35-3-37(m). The record showed that in 2011, appellant was arrested for false imprisonment and criminal trespass. But, after successfully completing a pretrial diversion program, his 2012 indictment on these charges was nolle prossed. In 2013, his criminal history record information on these two charges was restricted. In 2015, he sought to have the clerk of court’s records sealed pursuant to O.C.G.A. § 35-3-37(m). The trial court found that the statute was not applicable to appellant because the statute went into effect on July 1, 2013 and he was indicted in 2012.

Appellant contended that the trial court erred in not considering his motion on the merits. The Court agreed and reversed. Citing the Supreme Court’s recent decision in *Mosley v. Lowe*, \_\_\_ Ga. \_\_\_, 782 SE2d 43, (2016) the Court found that the provisions of subsection (m) apply to arrests prior to July 1, 2013. Accordingly, the Court vacated the trial court’s order and remanded for consideration of appellant’s motion on the merits.

### **O.C.G.A. § 24-4-413; Corroboration of Victim**

*Marlow v. State, A16A0573 (4/22/16)*

Appellant was convicted of rape and false imprisonment. Pursuant to O.C.G.A. § 24-4-413, the State presented evidence that appellant had sexually assaulted another young woman like the victim. Appellant contended that the trial court erred in charging the jury concerning the limited use of sexual assault extrinsic evidence admitted pursuant to O.C.G.A. § 24-4-413. Specifically, he argued, the court erred in instructing the jury that such evidence could be used to “corroborate” the victim’s testimony. The Court disagreed.

The credibility of a witness is always a material fact in issue at a criminal trial and here, the Court noted, appellant’s defense was that the victim was not credible. He argued that she was an unreliable witness with a history of drug use, homelessness, and extreme dependence — a “moocher.” In fact, appellant argued that she fabricated the evidence of rape for a variety of reasons.

The State’s extrinsic evidence that appellant had committed a similar sexual assault had the tendency to bolster the credibility of the victim by demonstrating that her circumstances were not unique. Indeed, it had the tendency to disprove a claim of fabrication by showing that appellant preyed on women in the victim’s desperate circumstances and intimidated them with guns and a violent temper. Thus, the evidence satisfied O.C.G.A. § 24-4-413’s relevance threshold. Citing federal caselaw, the Court noted that such evidence serves a legitimate purpose because it has undeniable value in bolstering the credibility of the victim and that federal courts have recognized that extrinsic evidence of similar sexual assaults may be offered for the purpose of corroborating the victim’s testimony when the defense argues

that the victim consented. Additionally, it was well settled under Georgia’s prior “similar transaction” law that, in sexual abuse cases, similar transaction evidence may be used to corroborate the victim’s testimony. For these reasons, the Court concluded, the trial court’s limiting instruction was not erroneous.

### **DUI; Williams**

*State v. Reid, A16A1237 (4/22/16)*

The State appealed from the grant of a motion to suppress. The evidence showed that after Reid was arrested for DUI, she was read her implied consent rights and taken to a county fire department for the blood draw by EMS. She signed the consent form at that time and her blood was subsequently drawn and tested. The trial court found that the State only showed that Reid acquiesced to the blood draw in the context of the implied consent law, i.e., out of concern she would lose her license if she refused the test. As such, the trial court suppressed Reid’s blood test results on the ground Reid’s consent to the blood test was not free and voluntary.

Citing *Kendrick v. State*, 335 Ga.App. 766, 769 (Feb. 23, 2016), the Court stated that a consent to search will normally be held voluntary if the totality of the circumstances fails to show that the officers used fear, intimidation, threat of physical punishment, or lengthy detention to obtain the consent. Here, the Court found, Reid verbally agreed to submit to the requested blood test, and she also executed a written consent that specifically indicated it was for the purpose of determining the presence of alcohol in her blood. The officer’s video of the stop and administration of the field sobriety tests showed Reid clearly understood the situation and articulately pleaded with the officer not to arrest her. The video also failed to show any coercive circumstances that would undercut the voluntariness of Reid’s consent. Accordingly, the Court concluded, since there was no evidence that Reid’s consent was anything but free and voluntary, the trial court erred in granting the motion to suppress.