

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 29, 2011

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Similar Transaction Evidence

Sands v. State, A11A0423 (July 7, 2011)

Appellant was charged with eleven counts of various sexual offenses against four boys and convicted on all counts. He argued that the trial court erred in admitting the similar transaction testimony of another adolescent boy. He maintained that his sexual contact with that 17-year-old male was consensual and therefore insufficiently similar to the offenses charged, which involved the molestation of boys aged 8, 11, 13, and 13. However, the Court found that the similar transaction victim testified that he was not a willing participant and that he hid

in the bathroom and called his father after appellant attempted to molest him, and that he subsequently fled the house and called 911.

The Court also found that appellant targeted the similar transaction victim in a similar way as the boys in the case at bar. Appellant, the pastor of a small evangelical church, befriended male adolescent children from his congregation who were living in homes with challenging circumstances. He then offered to “mentor” them and took the boys to his home or to the homes of other members of the congregation and molested them, including various acts of sodomy. Although the similar transaction witness was not a member of appellant’s church, appellant offered him a ride in his van, invited him to a church function, and took him to the apartment of a church member where he held “retreats” with boys. Therefore, the Court found that appellant’s acts were sufficiently similar.

Moreover, the Court emphasized that “the sexual molestation of young children or teenagers, regardless of the type of act, is sufficiently similar to be admissible as similar transaction evidence.” Here, the similarities between the present offenses and similar transaction were numerous and obvious. Therefore, the difference in the victims’ ages did not make the similar transaction inadmissible. Accordingly, the Court found no error and affirmed.

Statements

Frazier v. State, A11A0196 (July 12, 2011)

Appellant was convicted of aggravated assault and possession of a firearm during the commission of a crime. In *Frazier v. State*, 298 Ga. App. 487, 490-91 (2009), the Court reversed appellant’s conviction after finding that his statement was obtained in violation of *Miranda* and that defense counsel’s failure to

object to the admission of the statement during the State's case-in-chief was deficient and prejudicial. Appellant was retried and before his second trial, the trial court held that, while his statements were inadmissible for use in the case-in-chief, they were voluntary and thus potentially admissible to impeach him if he testified. He did not testify, and a jury, once again, found him guilty of the same offenses. Appellant argued that the trial court erred in finding his custodial statement voluntary and admissible for impeachment purpose, and that, but for that ruling, he would have testified at trial. Appellant further argued that because the trial court's ruling prevented him from testifying, it violated his Fifth and Sixth Amendment rights.

The Court first noted that a statement obtained in violation of *Miranda* may be used to impeach the defendant's credibility only if the court finds that the statement was voluntary. The Court also noted that voluntariness is determined based upon the totality of the circumstances. Appellant argued that his custodial statement was involuntary because it was conducted while he was obviously intoxicated, and was the product of unlawful interrogation that continued after he invoked his rights to counsel and to remain silent.

However, the Court found, the mere fact that a defendant was intoxicated at the time of his statement does not render it inadmissible. Although appellant maintained that the videotape reflected the "effects of the copious amount of alcohol" he had consumed, the Court stated that it could not review the videotape because it had not been provided to the Court on appeal. As a result, the Court's review was limited to the other evidence presented at the *Jackson-Denno* hearing. At the hearing, the police officer who conducted the interview testified that although appellant appeared to be under the influence of alcohol, he also appeared to understand what was going on, and his answers were responsive. After viewing the videotape, the trial court concluded that appellant's statement was voluntary. Because the trial judge's determination was not clearly erroneous, the Court affirmed.

Jury Charges

Britton v. State, A11A0339 (July 12, 2011)

Appellant was convicted of numerous charges including eight counts of aggravated

assault. He contended that the trial court erred in denying his motion for a mistrial relating to the court's instructions to the jury. The record showed that the jury handed out its written instructions to the jury before orally instructing them. After the jury had been deliberating almost two hours, it was brought to the attention of the court that the jury had been given a draft of the instructions and not the final version. There were some differences between the two versions. The trial court brought the jury back in. The court took back the instructions previously handed out and gave each juror a copy of the correct jury instructions. The court also instructed the jury to disregard the previous written instruction and to base their decision on the oral instructions given by the court and on those same instructions now written and given to the jury. Each juror indicated that he or she could begin anew and deliberate with the correct instructions.

After reviewing the final charge as a whole, including the remedial instructions, and both sets of written jury charges provided to the jury, the Court found no abuse by the trial court in the exercise of its discretion. Appellant did not contend that 1) there were errors in the oral charge; 2) there were errors in the written instructions handed out after the jurors were recalled and given remedial instructions; and 3) the written instructions provided with the remedial instructions strayed from the oral charge. Instead, he argued certain variations between the language of the initial written charge provided and the language of the oral charge. However, the Court found that even though the exact language differed, appellant failed to show a substantive difference and failed to establish that any prejudicial effect caused by the handout error was not corrected by the court's remedial instructions and second handout to the jury.

Entrapment

Millsaps v. State, A11A0038 (July 13, 2011)

After a jury trial, appellant was convicted of one count of violating the Computer or Electronic Pornography and Child Exploitation Prevention Act of 2007 by utilizing the internet to seduce, solicit, lure, or entice a child or another person believed by such person to be a child to commit an illegal sex act; attempted aggravated child molestation; and attempted child molestation. Appellant

argued, among other things, that the trial court erred by denying his motion for a directed verdict of acquittal based on entrapment. The evidence showed that an officer with the Internet Crimes Against Children Task Force operating in north Georgia posted an advertisement in the "Casual Encounters" section on the Craig's List website that appeared to be from an 18-year-old female, "Hannah," looking for a man with whom to "end . . . Summer Vacation with a Bang." Appellant emailed a response to the ad. The two began corresponding via instant messenger, where "Hannah" explained that she was actually 14 years old. Appellant and "Hannah" continued to communicate, discussed meeting in person, and discussed having sexual intercourse and oral sex. Appellant later had a telephone conversation with another task force agent, with whom he discussed plans to meet in person. Upon arriving at the location, appellant was apprehended and interviewed by officers, to whom he admitted he had intended to meet with "Hannah," had brought condoms with him, and might have had sex with her, as they had previously discussed.

Appellant contended that the trial court erred by denying his motion for a directed verdict of acquittal based on entrapment. The Court explained that entrapment is an affirmative defense that is established by showing that (1) the idea for the crime originated with the State agent; (2) the defendant was induced by the agent's undue persuasion, incitement, or deceit; and (3) the defendant was not predisposed to commit the crime. The Court found that, as testified to by a task force officer, appellant's statement to the officers after his arrest was that he intended to have sex with "Hannah" even though he was aware that she purported to be 14 years old. The Court held that even without such admission, however, the trial court correctly charged the jury on entrapment, and the jury's conclusion that entrapment did not occur is supported by the record evidence. The trial court's judgment was affirmed.

Terroristic Threats; Involuntary Intoxication

Koldewey v. State, A11A0190 (July 13, 2011)

Appellant was convicted of terroristic threats made against a superior court judge. He challenged the sufficiency of the evidence. The evidence showed that appellant, who was

on probation and in drug court rehabilitation, told his mother that he was having violent thoughts. His mother took him to a state-run facility that treats clients for mental health disorders and drug and alcohol addiction and where appellant had been evaluated previously. During the intake interview, appellant made the terroristic threats about the judge. He then repeated the threats to another person who was asked to sit in on the interview.

The Court held that the crime of making terroristic threats focuses solely on the conduct of the accused and is completed when the threat is communicated to the victim with the intent to terrorize. That the message was not directly communicated to the victim does not alone preclude a conviction where the threat is submitted in such a way as to support the inference that the speaker intended or expected it to be conveyed to the victim. Here, the Court found, there was no evidence that appellant made the threatening statements to anyone other than the mental health staff during an intake interview done for diagnostic purposes. He was taken to the center specifically because of his violent thoughts, which he had generally complained of to his parents, but he had avoided articulating any threat until speaking to staff. The intake nurse testified that during the intake interview, appellant stated that he did not want to hurt himself or others. While true that intent to terrorize need not be proven by direct evidence and may be inferred from the circumstances, the Court held that the circumstances here demanded a finding that the purpose of appellant's threats against the judge was for diagnosis and treatment at a mental health facility and not for the purpose of terrorizing the judge. Therefore, his conviction was reversed.

Appellant also contended that the trial court's instruction on involuntary intoxication was burden shifting, citing *State v. Moore*, 237 Ga. 269 (1976). The trial court instructed the jury as follows: "... a person shall not be found guilty of a crime when, at the time of the conduct constituting the crime, the person did not have sufficient mental capacity to distinguish between right and wrong in relation to the criminal act because of involuntary intoxication. Involuntary intoxication means intoxication caused by a consumption of a substance through excusable ignorance. A defendant asserting this defense bears the burden of proving it by a preponderance of the evidence that he

was mentally not responsible at the time of the crime. If the defendant meets this burden, the State would then have the burden to disprove or negate that defense."

The Court found that *Moore* established a bright line rule that any jury charge which place any burden of persuasion upon the defendant in criminal cases shall not be given and such charges will be deemed erroneous and subject to reversal, absent harmless error or invited error. Nevertheless, despite what the Supreme Court stated in *Moore*, that Court also approved trial courts' charges on insanity, a virtually identical affirmative defense, that explicitly place the burden of proof as to that issue on the defendant. Therefore, the Court held, "[d]espite any apparent conflict with the bright-line rule in *State v. Moore*, the Georgia Supreme Court has approved of jury instructions placing the burden of proof on the defendant to prove that he lacked the capacity to distinguish between right and wrong. We decline to depart from this line of reasoning here. And thus, we discern no reversible error."

Garza; False Imprisonment

Curtis v. State, A11A0186 (July 13, 2011)

Appellant was convicted of aggravated assault with intent to murder; kidnapping with bodily injury; aggravated battery; and hindering a person making an emergency telephone call. He argued that the evidence was insufficient to support his conviction for kidnapping because the State failed to prove asportation. The evidence showed that appellant viciously attacked his girlfriend in her house. At some point, she was able to escape and ran outside. He followed, caught her and literally dragged her back inside where he resumed his attack upon her. The Court found that appellant's act of dragging the victim by her hair inside the house to begin his attack anew, after she temporarily managed to escape and was screaming for help, was sufficient evidence of asportation to support his conviction. Although the movement was arguably of minimal duration, this act was not an inherent part of the violent attack that the victim had just endured. Instead, and significantly, it allowed appellant to reassert his control over the victim and to reinitiate his savage beating without interference, further isolating her from rescue and increasing her risk of harm. Consequently, the movement was not "merely

a criminologically insignificant circumstance attendant to some other crime," but rather was representative of the "evil" that the kidnapping statute was designed to address.

Appellant also contended that the trial court erred in failing to give his requested charge on the lesser included offense of false imprisonment. The Court was "constrained" to agree. In light of the standard set forth in *Garza*, there was some evidence from which the jury could have convicted appellant on the lesser-included offense of false imprisonment. Moreover, the Court could not say that the evidence of kidnapping was so overwhelming so as to render the trial court's failure to give the charge harmless. It therefore reversed appellant's kidnapping conviction, but noted that because the evidence was sufficient to sustain the kidnapping conviction, the State was authorized to retry him without violating the Double Jeopardy Clause.

Speedy Trial; OCGA § 17-7-170

Hudson v. State, A10A1911 (July 11, 2011)

Appellant appealed from the denial of his motion for discharge and acquittal. The record showed that appellant was indicted on June 23, 2009 and filed eleven documents under one certificate of service on August 6, 2009. One of these documents was a demand for speedy trial. The trial court dismissed the demand for not being filed as a separated document and later denied his motion for discharge and acquittal.

The Court reversed. OCGA § 17-7-170 (a) pertinently sets forth the required form of a statutory speedy trial demand: "A demand for speedy trial filed pursuant to this Code section shall be filed as a separate, distinct, and individual document and shall not be a part of any other pleading or document. Such demand shall clearly be titled 'Demand for Speedy Trial'; reference this Code section within the pleading; and identify the indictment number or accusation number for which such demand is being made." The Court found that notwithstanding the absence of a separate certificate of service attached directly to appellant's speedy trial demand filing, his demand was otherwise its own separate, distinct, and individual document that was not a part of any of the ten additional documents filed on August 6, 2009. Therefore, his speedy trial demand complied with the pleading requirements as contem-

plated by OCGA § 17-7-170 (a). Consequently, the trial court erred in dismissing the speedy trial demand and the Court reversed the trial court's order and remanded the case for further proceedings to determine whether appellant's statutory speedy trial demand satisfied all the remaining requirements of OCGA § 17-7-170.

OCGA § 15-6-18; Place of Trial

Osborn v. State, A11A0748 (July 13, 2011)

Appellant appealed his convictions contending that the trial court violated OCGA § 15-6-18. The Court agreed and reversed. The record showed that due to a bomb threat, the trial court moved part of voir dire from the courthouse to a church. Appellant's objection that this violated the separation of church and state was denied. On motion for new trial, appellant contended that the trial court violated OCGA § 15-6-18. This statute provides in part, that in those counties that fall within certain population limits, if for any cause it shall or may be impractical to hold any session or sitting of any superior or state court at the courthouse or other place provided by law, a court session may be moved if approved by the governing authority of the county; is moved to a place open and accessible to the public; and if a criminal case, is moved with the consent of the accused. Here, the move was done without county governmental approval and was done without the consent of the accused. Thus, because the State failed to comply with the mandates of the statute, appellant's conviction was reversed for a new trial.

Inconsistent Verdict Rule

Holcomb v. State, A11A0721 (July 13, 2011)

Appellant was charged with malice murder, felony murder (aggravated assault) and aggravated assault. The jury acquitted him of malice and felony murder, but convicted him of involuntary manslaughter as a lesser-included offense and aggravated assault. Appellant contended that the trial court erred by denying his motion for new trial on the ground that the jury returned mutually exclusive verdicts of aggravated assault and involuntary manslaughter without specifying the methodology upon which the verdicts were based. The State agreed with appellant and recommended reversing the verdict.

The Court reversed. Appellant was found guilty of aggravated assault with a deadly weapon (OCGA § 16-5-21 (a) (2)) and involuntary manslaughter (OCGA §16-5-3). With regard to the count of aggravated assault, the trial court charged the jury that to find that appellant had assaulted the victim, they could do so in one of two ways pursuant to OCGA §16-5-20, the underlying crime of simple assault. The trial court charged section (a) (1) of OCGA §16-5-21 which states that a person commits assault when the person "[a]ttempts to commit a violent injury to the person of another." This subsection requires a showing of criminal intent on the part of the defendant. The trial court also charged the jury that they could find appellant had committed a simple assault pursuant to OCGA §16-5-21 (a) (2), which states that a person is guilty of a simple assault if he "[c]ommits an act which places another in reasonable apprehension of immediately receiving a violent injury," requiring evidence only of criminal negligence on the part of the defendant. With regard to involuntary manslaughter as a lesser-included offense to malice murder and felony murder, the trial court instructed the jury in two ways: first, that the jury could determine that appellant had committed involuntary manslaughter by intentionally pointing a firearm at the victim; and second, that the jury could determine that appellant had committed involuntary manslaughter by consciously disregarding a substantial and justifiable risk that his act or omission would cause the death of another.

Because the Court could not conclusively state that the verdict rested exclusively on either criminal negligence or criminal intent so as to eliminate the reasonable probability that the jury might have returned a mutually exclusive verdict by finding appellant acted with both criminal intent and criminal negligence at the same time as to the same victim, it was necessary to reverse his convictions and remand for a new trial.

Jury Charges; Duty to Retreat

Hill v. State, A11A0578 (July 8, 2011)

Appellant was convicted of aggravated assault. He contended that the trial court erred by not instructing the jury on the principle of no duty to retreat in self-defense cases. The evidence showed that the appellant and

the victim argued earlier in the day. Later, appellant was driving down the road when somebody threw a beer bottle that hit and cracked his windshield. The victim was in the group of people from whence the bottle was thrown. Appellant then steered his car at the victim and ran him down. Nevertheless, the testimony at trial of the victim, witnesses and appellant were conflicting as to who did what and who threatened whom.

The Court held that Georgia law provides that one who is not the aggressor is not required to retreat before being justified in using such force as is necessary for personal defense or in using force which is likely to cause death or great bodily harm, if one reasonably believes such force is necessary to prevent death or great bodily harm to himself or to prevent the commission of a forcible felony. Where self-defense is the sole defense, and the issue of retreat is raised by the evidence or placed in issue, the defendant is entitled to a charge on the lack of a duty to retreat. Furthermore, a trial court commits reversible error in failing to give the charge, even absent a written request or timely objection to its omission, where the evidence of the defendant's guilt is not overwhelming and the prosecution has raised the issue of retreat when questioning witnesses or in closing arguments.

Here, self-defense was appellant's sole defense. Based upon his testimony, appellant was simply trying to drive home when the victim, who earlier that day had threatened to take his car and shoot him, approached his car, threw a beer bottle at the windshield, threatened to "bust" him, and reached under his shirt as if grabbing for a gun. Hence, under appellant's version of the facts, he was not the initial aggressor and reasonably believed that force was necessary to prevent death or great bodily harm. Moreover, the issue of retreat was squarely placed in issue by the prosecutor's cross-examination of appellant, by appellant's explanation of why he did not drive away from the victim, whom he characterized as the aggressor, and by the prosecutor's closing argument. Additionally, the evidence of appellant's guilt was not overwhelming, given that the case turned solely on the credibility of appellant, the victim, and the other witnesses. Under these circumstances, the trial court committed reversible error in failing to charge the jury on the lack of a duty to retreat.

Search & Seizure; *Miranda*

State v. Austin, A11A0601 (July 13, 2011)

The State appealed from the trial court's grant of Austin's motion to suppress. The evidence showed that the police, in tactical gear, answered a "shots fired" call at a residence. They encountered the occupant, Austin, who was belligerent, perhaps intoxicated, and at one point, took a fighting stance with an officer. In response, an officer handcuffed Austin, and in doing so told him that (1) he was not under arrest, (2) he was being cuffed for both the officers' protection and his own, and (3) he needed to calm down. Thereafter, Austin admitted to having fired a gun but said that he had done so while engaging in target practice in his backyard. Eventually, he calmed down and offered to show the officers the gun in his bedroom. While still in handcuffs, he allowed the officers inside. While in the bedroom, the officers saw the gun under the mattress and also saw, in plain view, a small baggie of marijuana. The officers told Austin that he could not have marijuana in his house. They asked him to tell them if he had any additional marijuana or guns in the house. Austin then showed them a gallon bag of marijuana in his dresser and other weapons throughout the house. At this point, the officers formally arrested him.

The Court affirmed in part and reversed in part. As to the search, the Court found that the burden of proving consent was on the State and is examined under a totality of circumstances test. Here, Austin invited officers to follow him inside his home to examine the handgun he claimed to have fired. There was no indication that Austin was coerced into doing so. Instead, the idea to lead officers to the gun was Austin's own. And under the circumstances, it was perfectly reasonable to handcuff Austin and to leave the handcuffs on as he led officers through his home. Moreover, the fact that a suspect is handcuffed does not in and of itself render his or her consent involuntary. Accordingly, Austin voluntarily consented to leading officers through his home to see the handgun he claimed to have fired, resulting in a lawful seizure of that gun and of the small amount of marijuana that officers subsequently observed in plain view.

However, the Court found, the State failed to meet its burden of showing that Austin voluntarily consented to expanding the search of his home. While Austin appar-

ently acquiesced to the officer's directive to give him the additional drugs and guns, not a single factor demonstrated free consent or showed that Austin felt free to refuse to do so. Unlike when Austin himself suggested that the officers come inside his home to view his handgun, at the point when Austin consented to the search of his dresser, he (1) was handcuffed inside his home with two officers, (2) knew officers had spotted marijuana in plain view, and (3) was explicitly told "you can't have that in your house." Under these circumstances, the Court concluded, a reasonable person would feel free to decline the officers' request to search or otherwise terminate the encounter. Therefore, any drugs found after this point was properly suppressed.

As to the statements made, the Court found that any statements made by Austin between the time he was placed in handcuffs and the point when the officers discovered marijuana on his bedside table (after Austin voluntarily led them through his home) were admissible even in the absence of *Miranda* warnings. But, after the officers seized the marijuana found in plain view on the dresser, a reasonable person would have considered him or herself in custody at this point. Accordingly, any of Austin's statements made thereafter were properly excluded.

Character

Howard v. State, A11A0602 (July 7, 2011)

Appellant was convicted of kidnapping and other related offenses. He contended that the prosecutor placed his character into evidence during cross examination. The record shows that appellant took the stand in his own defense. The prosecutor asked appellant if the date of his "termination" from employment was Oct 12, 2006. Appellant contended that use of the word "termination" implied that he was fired for misconduct. The Court disagreed. It found that the word "termination," used with reference to employment, means simply the "end" or "conclusion" of employment. Therefore, the prosecuting attorney did not improperly comment on appellant's character.

Severance; Sentencing

Holland v. State, A11A0100 (July 7, 2011)

Appellant and her husband were jointly indicted and tried on shoplifting and obstruc-

tion charges. The jury acquitted the husband of all charges and convicted appellant of shoplifting. She contended that the trial court erred in denying her motion for severance. She argued that the court's denial of severance forced her "to choose between her right to a defense and her spousal privilege." OCGA § 24-9-23, provides that "[h]usband and wife shall be competent but shall not be compellable to give evidence in any criminal proceeding for or against each other." The Court stated that appellant's argument presented a conflict between a "right" and a "privilege." On the one hand, the Constitution guarantees a criminal defendant the fundamental right to testify at trial on his or her own behalf. This right is "personal," and can be waived only by the defendant and only if done knowingly, voluntarily, and intelligently. On the other hand, OCGA § 24-9-23 provides a privilege to protect the harmony and unity of marriage, which can be waived. The Court noted that appellant cited no authority prohibiting a spouse from having to choose between not testifying and testifying against her husband. In essence, she argued that she was compelled *not to testify*, which is not safeguarded by OCGA § 24-9-23 and is not a denial of due process. Moreover, the trial court found that although appellant claimed that she wished to testify, the evidence showed that, after consultation with her attorney, had decided that it was not in her best interest to testify based on her prior criminal record and that if she did so, "she would have just been crucified" by the prosecutor. Finally, there was nothing confusing about the evidence and no danger that the evidence against appellant's husband would be considered against her. Therefore, the trial court did not abuse its discretion in denying the motion for severance.

Appellant also contended that the trial court erred in sentencing her under OCGA § 17-10-7 without exercising its discretion to probate or suspend the sentence. The evidence showed that the State presented four prior felony convictions. However, there were certain statements in the record that indicated the trial court may have believed that it was required to sentence appellant to serve 10 years. Therefore, because appellant demonstrated that the trial court may not have exercised its discretion to consider probating or suspending a portion of her sentence, "out of an abundance of caution," the Court vacated her sentence and remanded

the case for resentencing with direction to the trial court to exercise its discretion in re-imposing sentence.

Hearsay; Bolstering

Brown v. State, A11A0657 (July 13, 2011)

Appellant was convicted of rape, statutory rape, aggravated battery and aggravated child molestation. The victim was 14 years old. Appellant contended that the trial court erred in allowing certain testimony of the examining nurse. Specifically, he did not object to the examining nurse's testimony to the extent that statements were made for purposes of medical diagnosis or treatment, which were admissible under the OCGA § 24-3-4. Rather, his challenge to the examining nurse's testimony was based upon her recounting of the victim's statements regarding the events leading up to the rape incident and identification of him as the perpetrator, which he argued were not admissible under the medical diagnosis and treatment exception and improperly bolstered the victim's credibility.

The Court agreed that the victim's statements to the examining nurse identifying appellant as her perpetrator and providing information unrelated to the purpose of medical diagnosis and treatment were outside the scope of the hearsay exception defined in OCGA § 24-3-4 and that a witness' credibility may not be bolstered by the opinion of another, even an expert, as to whether the witness is telling the truth.

However, it is also true that a witness's prior consistent statements may be admissible under certain circumstances. Here, the victim's credibility was the center of appellant's defense. Under the facts of the case, the statements made to examining nurse by the victim were admissible as prior consistent statements. Moreover, the trial court instructed the jury as to the limited use of the testimony and expressly stated that the evidence was not offered to prove the truth of what the victim reported to the nurse. Therefore, its admission was not error.

Non-Verbal Hearsay; Video Surveillance Tapes

Hammock v. State, A11A0861 (July 12, 2011)

Appellant was convicted of theft of an automobile. The evidence showed that ap-

pellant was in a gas station convenience store. The victim entered the store after pumping gas and leaving her keys in the car. Appellant jumped ahead of her in line, then walked out. When the victim walked out, her car was gone. The victim, the owner and an officer watched the surveillance tape which showed appellant walking out of the store, getting in the victim's car and driving off. The tape was unavailable for viewing at trial. Appellant contended that any testimony from any of the three people who viewed the tape was inadmissible hearsay.

The Court disagreed. It found that the witnesses did not offer any testimony about what someone else said or wrote outside of court. Rather, they testified about their personal observations of the conduct that appeared on the videotape. This testimony did not ask the jury to assume the truth of out-of-court statements made by others. Instead, because the value of the testimony rested on the witnesses' own veracity and competence, the testimony was not hearsay. The Court also determined that to the extent *In re C. G.*, 261 Ga. App. 814, 815 (2003), holds otherwise and finds that a surveillance videotape merely depicting nonverbal conduct constitutes a hearsay statement, it is disapproved.

DUI; Intoxilyzer 5000 Testing

State v. Padidham, A11A0678 (July 13, 2011)

The State appealed from the decision of the trial court suppressing the results on an alco-sensor test and the subsequent Intox 5000 test. The State first contended that the alco-sensor test result was suppressed in error because Padidham was not in custody when the test was administered. The Court agreed. The trial court held that the results were inadmissible because Padidham was in custody and therefore should have been read *Miranda* warnings before the test. The Court, however, found that the evidence showed that after Padidham was stopped, the officer had him do some field evaluations, and then told Padidham he had called for another officer to bring an alco-sensor. Padidham was permitted to wait in his own car rather than a police car; he was not handcuffed; and he was told by the officer that he had been stopped for speeding and was going to be given a ticket. The officer told Padidham that he thought he was too intoxicated to drive, but that he was going to

verify this suspicion. He did not tell Padidham that he would be arrested. The Court found that Padidham may not have been free to leave during the eight to ten minutes that elapsed before the alco-sensor test was administered, but not every detention is an arrest. Under the circumstances, therefore, a reasonable person in Padidham's position would conclude that his freedom was only temporarily curtailed and that a final determination of his status was simply delayed. Thus, the trial court erred in granting the motion to suppress the alco-sensor test result.

The Court also found that the trial court erred in suppressing the results of the Intox 5000 test. The evidence showed that after the test was administered, the results of the test were not given to Padidham for eight hours. The trial court agreed with the defense that this violated the procedural rules in the "Georgia Bureau of Investigation Division of Forensic Sciences Intoxilyzer 5000 Georgia Operator's Training Manual," which allegedly states that the results shall be given to the individual tested. The trial court found that this means that the test results should be given promptly. But, the Court found, administrative, procedural, and clerical steps performed in conducting a test do not constitute a part of the approved method of analysis. Thus, any deviation from the procedure purportedly set out in the training manual would go to the weight rather than the admissibility of the test results. Thus, the suppression was in error.

Character of Victim; Drug Usage

Askew v. State, A11A0446 (July 12, 2011)

Appellant was convicted of aggravated assault. He contended that the trial court erred in granting the State's motion in limine to redact a portion of the victim's medical records showing cocaine metabolites in the victim's urine. The Court found that evidence of drug use is inadmissible when it is intended only to impugn a victim's character and has no relevance to any disputed issues in the case. Here, the cocaine was detected in a urine screening, and there was no evidence about the quantity of cocaine in the victim's system or when it was ingested. Further, the doctor testified that the screening would provide no assistance in providing that information. Although appellant maintained that the victim's cocaine use was

relevant as to the victim's ability to recall the events of the attack and identify his attackers, there was evidence presented that the victim suffered a significant head injury, which could also explain his ability to correctly access the identity of his attackers and his perception of the attack. The emergency room doctor testified that the paramedics had reported that the victim initially displayed an "altered mental state" which could indicate in medical terms, disorientation, unresponsiveness, lack of clarity in judgment or a decreased level of consciousness. Thus, as the evidence as to effects of the cocaine in the victim's body was merely speculative, the trial court did not abuse its discretion in granting the State's motion in limine to exclude it.