

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 17, 2012

State Prosecution Support Staff

Chuck Olson
General Counsel

Joe Burford
State Prosecution Support Director

Laura Murphree
Capital Litigation Director

Fay Eshleman
Traffic Safety Resource Coordinator

Gary Bergman
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Todd Hayes
Traffic Safety Resource Prosecutor

THIS WEEK:

- **Aggravated Child Molestation; Bolstering Testimony**
- **Child Pornography; Sentencing**
- **Informant; Cocaine Sale**
- **Juveniles; Burden of Proof**

Aggravated Child Molestation; Bolstering Testimony

Gaston v. State, A12A0962 (8/7/2012)

Appellant was convicted of child molestation, aggravated child molestation, and aggravated sexual battery against R. C., who was his girlfriend's minor daughter. Appellant argued that the court improperly allowed testimony that invaded the jury's province as the arbiter of witness credibility and amounted to improper bolstering of the victim, R. C. The Court agreed. The Court pointed to the following exchange during the State's direct examination of R. C.'s father, which occurred over the objections of appellant's counsel:

Q. . . . [W]hen [R. C.] told you that she had been sexually molested by [Appellant] in 2006, did you believe her? A. Yes Q. What was the answer[?] A. Yes. Q. You believed her, but then you sent her back in 2007 and 2008? A. Yes. Q. And why did you do that? A. I was told to. Q. Do you regret that decision? A. I regret it. Q. When [R. C.] told you that she had been molested by [Appellant] twice in 2008, did you believe her? A. Yes.

The trial court overruled appellant's contemporaneous objections to this testimony. It also denied appellant's later motion for mistrial based on this testimony and declined to give a

curative jury instruction. The credibility of a witness, including a victim witness, is a matter for the jury's determination under proper instruction from the court. It is well established that in no circumstance may a witness's credibility be bolstered by the opinion of another as to whether the witness is telling the truth. The State argued that the father's testimony that he believed R. C.'s 2006 and 2008 outcries did not bolster her credibility because the testimony concerned his state of mind rather than the girl's truthfulness. However, the Court found that this was not a meaningful distinction. The State further argued that appellant should be precluded from objecting to the impermissible bolstering because, during opening statements, his counsel raised the issue of whether the father believed R. C. by questioning the father's decision to send the girl back to Georgia after her 2006 outcry. Specifically, the State pointed to the following assertion by appellant's counsel: "You're going to hear from . . . the child's father. And [the prosecutor] is saying that [the father] felt he had to send the child back. Well, ask yourself this question: Who in their right mind is going to send . . ." (At that point the State objected to the opening statement as argumentative and appellant's counsel did not revisit the topic.) In addressing this, the Court stated that even assuming without deciding that this single statement by defense counsel was enough to preclude appellant from objecting to testimony on the issue of whether the father believed R. C.'s 2006 outcry, defense counsel's statement had no bearing at all upon whether the father believed R. C.'s 2008 outcry. The Court found that the father did not "send the child back" to Georgia after the 2008 outcry, and his bolstering of R. C.'s testimony regarding the

2008 incidents was impermissible.

Moreover, the Court held that the improper bolstering testimony required reversal. The Court found that R. C.'s credibility was central to the case against appellant, in that the primary evidence that the crimes occurred was the testimony of R. C. and of the people to whom she had described the incidents. Moreover, the court did not issue a curative instruction or take other corrective action to mitigate the impact of the bolstering testimony. Thus, the Court held that it could not conclude that the error in allowing the testimony improperly bolstering R. C.'s credibility was harmless. However, the Court found no merit to appellant's arguments that the evidence was insufficient to support his convictions or that his convictions must be merged for sentencing purposes.

Child Pornography; Sentencing

Haynes v. State, A12A0811 (8/8/2012)

Appellant was convicted by a jury on eight counts of sexual exploitation of children. The trial court denied his motion for new trial, and he appealed. The Court affirmed appellant's conviction, but remanded for re-sentencing.

Citing the recent Georgia Supreme Court case of *Hedden v. State*, 288 Ga. 871 (2011), appellant argued that the trial court erred by determining that it had no discretion, pursuant to OCGA § 17-10-6 (c), to deviate from the mandatory minimum sentencing provisions set forth in OCGA § 17-10-6.2 (b). The State conceded, and the Court agreed, that *Hedden* was controlling and that, therefore, appellant's sentence must be vacated and the case remanded for re-sentencing.

Informant; Cocaine Sale

Chandler v. State, A12A1424 (8/8/2012)

Appellant was convicted of two counts of sale of cocaine (OCGA § 16-13-30 (b)) and contended that the trial court erred in failing to grant his pretrial motion to reveal the identity of the State's confidential informant. The Court found no error and affirmed.

Viewed in the light most favorable to the jury verdict, the evidence showed that in early 2009, the Barrow County Sheriff's Office ("BCSO") conducted a large scale investigation of drug sales in the City of Winder.

On March 11, 2009, a BCSO investigating officer drove a confidential informant (the "CI") to a grocery store parking lot to make a controlled buy from a suspected drug dealer known as "Smiley." The investigating officer saw "Smiley," who he later identified as appellant, arrive in green vehicle and park about 10 feet away from where the investigating officer and the CI were waiting in an undercover vehicle. The investigating officer remained in the vehicle and observed as the CI walked over to appellant and engaged in the drug transaction. The CI gave appellant \$50 in exchange for approximately 6.6 grams of crack cocaine. The investigating officer had equipped the CI with an audio transmitter, which allowed a nearby surveillance team to hear and record the conversation between the CI and appellant. About two weeks later, the investigating officer arranged for the CI to make another controlled drug buy from appellant. Upon arriving at the prearranged meeting place—an apartment complex in close proximity to where the first drug transaction had occurred—the investigating officer saw appellant waiting outside. The CI got out of the undercover vehicle, walked over to appellant, and exchanged money for less than one gram of crack cocaine. This second transaction was also recorded in audio. Following this second transaction, appellant was arrested and charged with two counts of sale of cocaine. Appellant contended that the trial court erred in failing to grant his pretrial motion to compel the State to disclose the identity of the CI. Specifically, he argued that since there was a conflict in testimony as to the identity of the individual who sold crack cocaine to the CI, the CI's testimony was material to his defense. The Court disagreed.

The Court noted that for purposes of determining whether the State must reveal the identity of the CI, the trial court must conduct a two-step hearing: Initially, the trial court should hear evidence to determine: (a) that the confidential informant is an alleged informer-witness or informer-participant whose testimony appears to be material to the defense on the issue of guilt or punishment; (b) that the testimony for the prosecution and the defense is or will be in conflict; and (c) that the CI was the only available witness who could amplify or contradict the testimony of these witnesses. If the threshold is met, the trial court must conduct an in camera hearing of the CI's testimony. Here, to the extent

appellant wished to call the CI merely to impeach the CI or the investigating officer's testimony, disclosure of the CI's identity was not required. While appellant also asserted that the CI was the only witness who could amplify or refute any conflicting testimony regarding his participation in the offense, the Court found his claim was without merit. The Court noted that the State's evidence showed that the investigating officer engaged in visual surveillance throughout the controlled operations and clearly observed appellant when he sold drugs to the CI. Appellant admitted that he was known as "Smiley," and that he lived in the apartment complexes where the second drug transaction took place and which was near the location of the first drug transaction. Although appellant suggested that the investigating officer could have confused appellant with several individuals in his neighborhood resembling him, the audiotape recording of the transaction enabled the jury to compare the voices heard in the recording to appellant's voice when he testified at trial. Consequently, the audiotape recording was a key factor in diminishing the need for the CI to amplify or refute any conflicting testimony. Accordingly, the Court held that the trial court did not err in refusing to require the State to reveal the identity of the CI.

Juveniles; Burden of Proof

In the Interest of R.S., A12A0887 (8/10/2012)

Following a hearing in the Juvenile Court of DeKalb County, the trial court adjudicated R. S. and Q. H. delinquent for burglary. They appealed and the Court found that since the juvenile court applied a lesser standard than proof beyond a reasonable doubt in adjudicating R. S. and Q. H. delinquent, it must reverse and remand for further proceedings. The record showed that a witness noticed a group of male youths running from her neighbor's backyard, carrying a "flat thing" she suspected was a flat-screen television. The youths put the "flat thing" into a truck and drove off. She noticed that two of the youths were wearing blue jeans and white t-shirts. The witness then called the police, who found evidence of forced entry in the back of the neighbor's house. The police called the neighbor, who told them that his house had two flat-screen televisions, a video game console, and two digital cameras. All of those items were missing from the house

at the time the police investigated. Another officer made contact with a blue pickup truck less than a mile away from the burglary. There were six boys in the cab of the truck, including Q. H., and R. S. was found in the bed of the truck. Both Q. H. and R. S. were wearing blue jeans and white t-shirts. A camera taken from the home was found under the driver's seat of the pickup truck, but no televisions were found in the truck.

Q. H. and R. S. argued that their adjudication of delinquency should be reversed because the trial court erroneously applied a "clear and convincing" standard to the evidence. The Court agreed and stated that in order to adjudicate a juvenile delinquent under the Juvenile Code, the trial court must find the juvenile guilty beyond a reasonable doubt. However, at the conclusion of the hearing, the trial court found that there was "clear and convincing evidence that [R. S. and Q. H.] committed the act of burglary." The Court found that since clear and convincing is a different and lesser standard of proof than beyond a reasonable doubt, the trial court did not apply the correct standard of proof in evaluating the evidence. The Court noted that while the State conceded that the trial court did not apply the correct standard of proof, it argued that the trial court's statement was mere *lapsus linguae*. Citing to *In the Interest of J. O.*, the State argued that the law contemplates the possibility that a judge may apply one standard while mistakenly articulating another. However, the Court found that in *In the Interest of J. O.*, the trial court's application of the wrong standard of proof did not warrant reversal when the trial court corrected itself in a written order, so that "[the trial court's] remark at trial was a mere *lapsus linguae* and . . . it knew and had applied the correct standard of proof." Here, the trial court made no such finding. Although the trial court stated the facts upon which it based its finding, its only statement regarding the standard of proof demonstrated error. The Court therefore reversed and remanded the case for further findings applying the correct standard of proof.