

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING OCTOBER 26, 2007

## Legal Services Staff Attorneys

**David Fowler**  
Deputy Executive Director  
for Legal Services

**Tom Hayes**  
Regional Offices Director

**Chuck Olson**  
General Counsel

**Joe Burford**  
Trial Services Director

**Lalaine Briones**  
Trial Support

**Laura Murphree**  
Capital Litigation

**Fay McCormack**  
Traffic Safety Coordinator

**Patricia Hull**  
Traffic Safety Prosecutor

**Gary Bergman**  
Staff Attorney

**Tony Lee Hing**  
Staff Attorney

**Rick Thomas**  
Staff Attorney

**Donna Sims**  
Staff Attorney

**Jill Banks**  
Staff Attorney

**Al Martinez**  
Staff Attorney

**Clara Bucci**  
Staff Attorney

**Brad Rigby**  
Staff Attorney

## THIS WEEK:

- **Juror Qualification**
- **Jury Instructions – Lesser Included Offense**



### *Juror Qualification*

McGuire v. State, A07A0841 (10/10/07)

Appellant appeals the denial of his Motion for New Trial alleging that the trial court erred when it failed to strike a juror for cause. The record shows that Juror 2 indicated that she would find it difficult to sit in judgment of another person. The defense questioned Juror 2 regarding the defendant's right to remain silent. Juror 2 stated that she, "just felt like if they don't have anything to hide, they'll stand up and tell you." The Juror further stated that she couldn't honestly say whether she would be able to follow the trial court's instructions regarding the burden of proof. The defense pressed her further whether she could follow the trial court's instruction that the State has the burden of proof in a criminal case. Juror 2 responded, "I can't answer that truthfully." The trial court denied appellant's motion to strike. On appeal, the Court of Appeals found that the juror never indicated she could set aside her opinion of guilt if the appellant did not testify and could not answer truthfully whether she could follow the trial court's instructions regarding burden of proof. The Court held that the trial court abused its discretion in failing to strike Juror 2 for cause. The judgment of the trial court was reversed.

### *Jury Instructions – Lesser Included Offense*

Brown v. State, A07A2120 (10/09/07)

Appellant appeals his convictions for two counts of first degree vehicular homicide and the denial of his motion for new trial. Appellant claims the trial court erred when it refused to give appellant's written request to charge on second degree vehicular homicide. The record shows that appellant was driving on a two lane road when he did not see a car stopped in his lane that was signaling to turn left. Appellant yanked his truck to the left, striking the rear of the stopped vehicle, then striking an oncoming pick-up truck head-on. The two occupants of the oncoming pick-up truck were killed. At the hospital, appellant's blood alcohol was .258. A state-administered test given an hour after the initial hospital test showed a BAC of .16. At trial, there was repeated testimony that appellant was following the vehicle in front of him too closely and that was what caused him to turn his vehicle into the oncoming lane. A written request to charge a lesser included offense must always be given if there is any evidence that the defendant is guilty of the lesser included offense. The Court of Appeals held that they had no choice but to reverse the trial court's denial of appellant's motion for new trial on the first degree vehicular homicide counts. Although the appellant was DUI, a jury could still conclude that some other traffic offense, in this case following too closely, was the proximate cause of the collision and the victims' deaths.

Appellant was convicted of child molestation, aggravated child molestation, and aggravated sexually battery. The record showed that appellant had sexually abused his niece. At the time of the abuse, appellant was living in his mother's home with his sister and her young children. The appellant who was approximately thirty years of age had always lived with his mother and had never dated nor had a sexual relationship. During an interview with investigators, appellant stated that he would masturbate in his room to relieve his sexual tension. The appellant also admitted that he viewed pornography on his computer. During the trial, the trial court granted appellant's motion in limine prohibiting the State from eliciting evidence concerning appellant's virginity and practice of masturbating in his bedroom. However, the trial court ruled that the State could question appellant concerning his computer usage and his failure to date women. Defense counsel reserved his right to object with regard to the computer pornography and appellant's failure to date. The State's theory of the case was that appellant was sexually frustrated and was unable to develop a dating or sexual relationship with a woman his age therefore he preyed upon the victim. During direct examination, appellant never broached the topic of his virginity, his practice of masturbating, viewing computer pornography or his failure to date. On cross-examination, the State questioned appellant with regard to never dating, never having a serious relationship, viewing computer pornography in his room, and masturbating. Neither defense counsel nor the trial court interceded.

On appeal, the appellant contends that the trial court erred when it permitted the State to question him regarding his sexual history and habits. The Court of Appeals found that the trial court erred and held that the improper line of questioning prejudiced the appellant thus requiring a new trial. First, the Court reasoned that it was not necessary for the defense to object to the line of questioning during cross. The motion in limine preserved the objections for purposes of appeal. The Court opined that because the State failed to produce evidence that appellant viewed child

pornography; that he viewed pornography in the presence of the victim; or that he masturbated in the presence of the victim, the evidence was not admissible to demonstrate lustful disposition. The specific practice of viewing pornography or masturbating must be linked to the crime charged. With regard to the evidence of appellant's sexual history and sexual inexperience the Court concluded that this too was inadmissible. Although the State sought to introduce the evidence for the purpose of demonstrating appellant's "motive" to engage in sexual behavior with a weaker compliant victim due to his frustration and inability to develop sexual relationships with contemporaries, the Court concluded that the State was required to link the conduct to the charged offense.