

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 9, 2009

Legal Services Staff Attorneys

David Fowler
Deputy Executive Director

Chuck Olson
General Counsel

Lalaine Briones
Legal Services Director

Joe Burford
Trial Services Director

Laura Murphree
Capital Litigation Director

Fay McCormack
Traffic Safety Coordinator

Gary Bergman
Staff Attorney

Tony Lee Hing
Staff Attorney

Donna Sims
Staff Attorney

Jill Banks
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Brad Rigby
Staff Attorney

THIS WEEK:

- Out-of-time Appeal; *Boykin*
- Plea in Bar; Double Jeopardy
- Right to Counsel
- Guilty Plea; *Boykin*
- Evidence Tampering
- Evidence; Photograph of Victim
- Hearsay
- Expert Witness
- Venue
- Search & Seizure
- Motion to Withdraw Plea; Ineffective Assistance of Counsel
- Implied Consent; Ineffective Assistance of Counsel
- *Brady*; Discovery
- Attempt to Influence Official Action; Sufficiency of Evidence
- Speedy Trial; Indictments
- Evidence; Videotapes
- Res Gestae
- Child Hearsay; Impeachment
- Justification; Victim's Prior Acts of Violence
- Child Hearsay
- Prior Inconsistent Statements; Hostile Witnesses
- Hearsay; Character
- Similar Transactions
- Opinion Testimony

Out-of-time Appeal; *Boykin*

Adams v. State, S09A0715, S09A0716

Appellant filed two appeals contending that the trial court erred in denying him an out-of-time appeal from his guilty pleas to

two separate indictments. An appeal will lie from a judgment entered on a guilty plea only if the errors asserted on appeal can be resolved by facts appearing on the face of the record. Appellant first contended that the language used by the prosecutor in informing him of his rights at the guilty plea hearing failed to convey to him that he would be waiving his privilege against compulsory self-incrimination. The record showed that the prosecutor stated as follows: "Let me advise you, sir, that you have the right to a trial by jury. At a trial by jury you would be presumed innocent, the State would have to prove you guilty beyond a reasonable doubt. *You wouldn't have to give any evidence harmful to yourself.* You could subpoena witnesses, present defenses in your own behalf, your lawyer could confront and cross examine any witness who testified against you." The Court held that under *Boykin v. Alabama*, 395 U.S. 238, 243 89 SC 1709, 23 LE2d 274 (1969), a trial court must ensure a defendant's receipt of adequate information about his rights, so that his decision to plead guilty is truly intelligent and voluntary. But, "nothing in *Boykin* requires that during a guilty plea proceeding, any precisely-defined language or magic words must be used." Here, appellant was sufficiently informed of his privilege against self-incrimination when he was told that he "wouldn't have to give any evidence harmful to himself."

Appellant also contended that there was no factual basis for the offenses charged in the second indictment. Under USCR 33.9, the trial court must make an inquiry on the record as may satisfy the judge that there is a factual basis for the plea. The State conceded there was no factual basis presented at the hearing for the offenses of terroristic threats and simple battery charged in the second indictment. Nevertheless, the Court held that while an indictment

is not evidence and cannot be treated as such by the factfinder in determining guilt beyond a reasonable doubt, an indictment alone may contain enough information to establish the facts alleged by the State and satisfy the elements of the charges to which a defendant was pleading guilty. Here, the indictment set forth that appellant threatened to murder a certain named individual; that appellant communicated his threat of violence to that individual; and that appellant so acted with the purpose of terrorizing that individual. The indictment also set forth that appellant intentionally caused substantial physical harm to the same individual by striking that person about the head and face with his fists. Although the indictment itself was not read into the record, appellant stated during the guilty plea hearing that he understood the charges and was pleading guilty to them because he was guilty. Thus, appellant failed to demonstrate that a manifest injustice will result unless his guilty plea to the second indictment was invalidated.

Plea in Bar; Double Jeopardy *Ellis v. State, S09A0767*

Appellant argued that the trial court erred in concluding that his prosecution for murder and aggravated assault was not barred by double jeopardy. The record reveals that on July 23, 2001, appellant was arrested for repeatedly shaking the victim, a child, which resulted in serious injuries to her. In connection with the shaking incident, on February 22, 2002, appellant pled guilty to one count of felony cruelty to children and was sentenced to fifteen years. Subsequent to the entry of the plea, however, the victim died, allegedly as a result of the injuries she sustained from the shaking incident.

On June 3, 2008, appellant was charged with malice murder, felony murder, and aggravated assault in connection with the July 23, 2001 shaking incident involving the victim. Appellant contended that the three charges are barred by double jeopardy. The Court agreed and disagreed. As to the murder and felony murder charges, the Court held that since the murder was not yet complete because the victim had not died at the time of the cruelty to children conviction, the subsequent prosecution for murder was not barred by the express terms of OCGA § § 16-1-7 (b) and 16-1-8 (b) dealing with procedural double jeopardy.

However, the same facts in this case that supported the initial charge of felony cruelty to children also supported a charge of aggravated assault. Unlike the facts that supported the murder charges here, which arose later, all of the facts necessary to support an aggravated assault charge were known by the prosecutor to exist at the time that appellant was initially indicted for cruelty to children. Thus, absent an order from the trial court that in the interest of justice the charges needed to be tried separately, the State was required to prosecute him for aggravated assault in the same prosecution that it had initiated against him for cruelty to children. Therefore, the aggravated assault charge was barred by double jeopardy.

Right to Counsel

Merriweather v. Chatman, S09A0930

Appellant filed a habeas corpus petition alleging that the trial court violated his constitutional right to counsel by forcing him to proceed with an appeal pro se. The record from appellant's conviction showed that after the denial of appellant's motion for new trial the trial court asked if he wished to have counsel on appeal or proceed pro se and appellant said "pro se." The Court held that defendant has a right to pursue an appeal pro se if preceded by an appropriate waiver of the right to appellate counsel. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open. Here, the record reflected that the trial court asked appellant several times whether he was sure he wanted to proceed without a lawyer but, the record does not reflect that the trial court gave appellant any instruction or admonition about the dangers of self-representation. Thus, the habeas court erred when it denied appellant's writ based on its conclusion that appellant knew the dangers of proceeding without counsel prior to waiving his right to appellate counsel.

Guilty Plea; Boykin

Sanders v. Holder, S09A0847

Appellant appealed from the denial of his petition for writ of habeas corpus contending

that the trial court erred in not granting his petition as to a 1989 conviction because he was not properly advised of his rights when he pled guilty. The record showed that the only evidence the habeas court had before it was the transcript of the plea hearing. In a habeas corpus proceeding, the State has the burden to show that the defendant's guilty plea was voluntarily, knowingly, and intelligently made. Under *Boykin v. Alabama*, 395 U.S. 238, 243 89 SC 1709, 23 LE2d 274 (1969), the entry of a guilty plea must involve the waiver of three federal constitutional rights: the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. The Court found that the only record evidence presented by the State showed that appellant was not informed of his right against compulsory self-incrimination prior to entering his plea. Therefore, the habeas court erred when it found that appellant's plea was voluntarily, knowingly and intelligently made and when it denied the petition for habeas relief.

Evidence Tampering

Merritt v. State, S09A1088

Appellant was convicted of murder, evidence tampering and other crimes related to the killing of her husband. She argued that there was insufficient evidence to support her conviction for the charge of tampering with evidence. The Court agreed. The victim was found in a reclining position although evidence showed the victim was shot upright. A pillow with a bullet hole in it had been placed behind the victim's head after the shooting. OCGA § 16-10-94 (a) provides that "A person commits the offense of tampering with evidence when, with the intent to prevent the apprehension or cause the wrongful apprehension of any person or to obstruct the prosecution or defense of any person, he knowingly destroys, alters, conceals, or disguises physical evidence or makes, devises, prepares, or plants false evidence." The Court held that intent clearly is a necessary element of the crime. Assuming that appellant moved the body and the pillow, the mere repositioning of the victim or moving of the pillow did not, in and of itself, give rise to an inference that the perpetrator intended to frustrate her own apprehension or to obstruct the prosecution. Indeed, the moving of the body and pillow did nothing more than to point the investigation toward

the likelihood that the perpetrator knew the victim and that robbery was not the motive. Thus, the Court held, there was no evidence as to why the body and pillow were moved and the State offered no reasonable explanation in this regard. Therefore, there was insufficient evidence of intent to tamper with evidence by repositioning the body and moving the pillow and appellant's conviction was reversed.

Evidence; Photograph of Victim

Keita v. State, S09A0933

Appellant was convicted of murder and other charges. He argued that the trial court erred in admitting a cover of a funeral pamphlet into evidence. Photographs of a deceased victim are admissible to prove the victim's identity. Here, the Court found, the cover of the pamphlet contained a non-inflammatory photograph of the victim in a suit and tie, and it contained no personal information about the victim other than the indication that he had a Christian funeral service. The minimal Christian references around the photograph also were not unduly prejudicial. Accordingly, the Court noted, while it would have been preferable for the trial court to have admitted the photograph of the victim alone without extraneous material that was unnecessary to aid in identifying him, the trial court did not abuse its discretion in admitting the pamphlet.

Hearsay

Treadwell v. State, S09A0702

Appellant was convicted of felony murder and robbery of an 81 year old victim. He contended that the trial court erred in admitting the hearsay statements of the victim concerning the appellant to a neighbor and to family members after the attack. The evidence showed that the neighbor found the victim lying in the neighbor's driveway. The victim told the neighbor that appellant took the victim's pistol. The victim was taken to the hospital by ambulance. At the hospital, the victim was visited by his nephew. The victim told the nephew that appellant took his pistol and car and had been bothering him to move in with the victim and shut the victim out of his own house. A niece of the victim also visited him at the hospital. The victim told her that the appellant beat him up. Thereafter, the victim died from his injuries.

The Court held that all the testimony was admissible. As to the statements to the neighbor, they were admissible as part of the *res gestae* and also admissible under the necessity exception because there was a close relationship between the neighbor and the victim and thus, there existed particularized guarantees of trustworthiness. As to the statements of the victim to the nephew and the niece, they too were admissible under the necessity exception after the State showed particularized guarantees of trustworthiness through the close relationship between the two witnesses and the victim.

Appellant also argued that the trial court erred by allowing the medical examiner to testify that the victim's death was caused by complications "following an assault." The Court held that when an expert personally observes data collected by another, the expert's opinion is not objectionable merely because it is based, in part, on the other's findings, and even when such testimony is based on hearsay, the lack of personal knowledge does not result in exclusion of the expert's opinion but merely presents a jury question as to the weight it is to be given. Here, the medical examiner's consideration of the victim's medical history was plainly warranted as the interval between the precipitating assault and the resulting death would have permitted the initial physical signs of the assault to subside. Furthermore, the medical examiner's finding that the victim's death was the result of complications from an assault did not invade the province of the jury.

Expert Witness

Brown v. State, S09A1073

Appellant was convicted of felony murder and aggravated assault. He argued that the trial court denied him the right to present a defense by erroneously excluding "teaching" testimony by a psychologist who performed an evaluation of appellant at appellant's request, regarding his depression. Appellant argued that his depression was clearly a factor in his actions, and that by preventing the witness from so testifying, the trial court effectively coerced appellant into testifying on his own behalf in order to address his "behavior and *mens rea*." The Court found no error. Appellant never raised the defenses of insanity, delusional compulsion or mental incompetency.

Rather, at trial appellant adamantly denied that he had "snapped," and recounted how he tried to methodically inflict the victim's injuries. The expert's written report, following the evaluation of appellant, stated that appellant was then competent to stand trial, that there was no evidence that appellant was not able to determine right from wrong at the time of the killing, and that there was no evidence that appellant was acting on the basis of a delusional compulsion. Appellant sought to introduce evidence of his depression at the time of the attack as a circumstance for the jury to consider in deciding whether he had the intent to kill the victim. But the Court held, any depression suffered by him was not a legal defense to the murder; the expert evidence was irrelevant to the state of mind necessary to determine his guilt in light of the absence of an insanity or other relevant mental health defense. Therefore, the trial court did not abuse its discretion in disallowing this testimony.

Venue

Brewster v. State, A09A0889; A09A0890; A09A0891; A09A0892

Four appellants were convicted of fleeing or attempting to elude a police officer, reckless driving, and speeding. They all contended that the State failed to prove proper venue. At trial, a state trooper testified that he was patrolling in the area of Newton County, where he came into contact with four motorcyclists. The officer was asked to identify State's Exhibit 1, which he identified as a map of Newton County and the route he took in pursuit of the motorcyclists. The officer further testified his entire pursuit route was included on the map. Appellants contended that venue was not proved because the trial court did not take judicial notice of the map. However, the Court found that the map of Newton County was not admitted to prove venue. Instead, it was properly used only to clarify and illustrate the officer's testimony regarding his pursuit route. The trooper specified that he was patrolling Newton County when he encountered appellants. Where the officer has clearly specified the county in which the convicted crimes took place, the trial court need not take judicial notice based on an inference that the officer was acting within the confines of a specific county. Moreover, venue was established because the only testimony regarding the pursuit was of-

ferred by the officer, who further verified that the entire route of the pursuit began and ended within the confines of Newton County.

Search & Seizure

Boyd v. State, A09A1183

Appellant was convicted of possession of methamphetamine with intent to distribute. He contended that the trial court erred in denying his motion to suppress. The evidence showed that two officers noticed a vehicle weaving in traffic and pulled it over. While one officer dealt with the driver to determine if the driver was intoxicated, the other officer spoke to appellant. The officer knew appellant and knew he was involved with methamphetamine. The officer asked him if he had any weapons and he said no. The officer then asked for consent to pat him down and appellant agreed. The officer found a knife on appellant. The officer then started to pat him down again. The appellant screamed and resisted when the officer started going past his knees. The officer called for a drug-sniffing dog. The dog arrived in 15 minutes and alerted on appellant's shoes. A search of his shoes revealed the methamphetamine.

The Court held that the officers had a valid basis to stop the vehicle for a traffic violation and to investigate whether the driver was impaired. As a precautionary measure, the officers were entitled to order the driver and appellant to get out of the vehicle. During the stop, the officers were also entitled for their own protection to conduct a pat-down of the outer clothing of the driver or any occupant of the vehicle to discover weapons upon reasonable suspicion that the person was armed. The officer's knowledge of appellant's prior involvement with a substantial quantity of methamphetamine would alone have justified the officer's pat-down in light of the well-known association of weapons and drugs. Considering the officer's knowledge of appellant's involvement with and recent use of methamphetamine, along with appellant's false denial that he had a weapon on his person, the officer had a reasonable basis to suspect that he may be armed with another weapon on his person. Under these circumstances, it was reasonably prudent to conduct a second pat-down for his own safety to determine if appellant was still armed with another weapon. When appellant started to scream, this highly suspicious behavior, along with other information

that he and the driver were involved with and had recently used methamphetamine, provided the officers with a reasonable basis to suspect that appellant was hiding illegal drugs. At that point, the officers had a basis independent of the traffic stop to briefly detain appellant to investigate their reasonable suspicion of other criminal activity. To investigate this suspicion, the officers immediately summoned a trained drug-sniffing dog, and detained appellant for about 15 minutes before the dog arrived, sniffed his shoes, and alerted to the presence of illegal drugs. The record showed that the officers acted diligently to investigate their suspicion and that the 15-minute detention was not unreasonable under *Terry*. When the trained drug-sniffing dog detected the odor of illegal drugs emanating from appellant's shoes, this provided probable cause for the search conducted by the officers that revealed the methamphetamine hidden in the shoe. Therefore, trial court correctly denied appellant's motion to suppress evidence of the methamphetamine.

Motion to Withdraw Plea; Ineffective Assistance of Counsel

Gresham v. State, A09A1431

Appellant appealed from the denial of his motion to withdraw his guilty plea to burglary and possession of tools for the commission of a crime. He contended his court-appointed conflict lawyer was ineffective and withdrawal was necessary to correct a manifest injustice. Specifically, appellant contended that his lawyer refused his calls, never visited him, did not investigate and was unprepared for trial. Thus, he argued, he was "railroaded" into a plea after the jury was sworn. The Court held that the evidence showed that defense counsel reviewed appellant's prior counsel's file, which contained investigation results and witness interviews; that he personally spoke with other witnesses; that he met with appellant on three or four occasions; and that he thoroughly discussed the plea with him. Moreover, neither appellant's testimony nor his questioning of his defense counsel revealed what counsel may have seen in appellant's file that convinced him that taking a plea was a prudent decision. The record contained none of the letters appellant allegedly wrote to counsel during the course of the representation, and appellant did not show what he would have told the attorney

had he taken appellant's calls or responded to his correspondence. Although the defense attorney withdrew all the motions filed by appellant's prior counsel, appellant failed to show that he would have won any of the motions. Therefore, although defense counsel "may have been overly busy, may not have spent much time with [appellant], may not have communicated with him regularly, may not clearly recall some aspects of the case, and may not have prepared for the trial very far in advance," the evidence supported the trial court's determination that appellant made a knowing, voluntary and intelligent waiver of his rights and knowingly, voluntarily and intelligently entered his plea of guilty.

Implied Consent; Ineffective Assistance of Counsel

Thrasher v. State, A09A1406

Appellant was convicted of DUI. He contended that he received ineffective assistance of counsel because his counsel failed to file a motion to suppress the results of his blood test. The Court agreed and reversed. The evidence showed that appellant caused an accident and left the scene. He was found and returned to the scene almost one hour later. The officer questioning appellant believed from his observations of appellant that appellant was under the influence of methamphetamine. Appellant was arrested for leaving the scene but no indication was made that he was also under arrest for DUI. Appellant was transported to the jail and approximately one hour later, appellant was read his implied consent rights. He agreed to a blood test and the results were positive for methamphetamine.

The Court found that an arresting officer must read a person's implied consent rights contemporaneously with an arrest for driving under the influence involving an accident. Here, the evidence showed that the officer believed he had probable cause to arrest appellant for driving under the influence of methamphetamine immediately after questioning him at the scene of the accident. The Court found that appellant was, in fact, under arrest for driving under the influence when he was arrested at the scene of the accident and that he was not read his implied consent rights until nearly an hour had elapsed thereafter. Therefore, the unexcused delay of almost one hour from the time of appellant's arrest to the time

he was read his implied consent rights as a matter of law, rendered inadmissible the results of chemical testing on the blood sample he gave. Consequently, trial counsel's failure to move to suppress the results of the chemical testing in the instant circumstances constituted deficient performance and the deficient performance prejudiced appellant because the results of the trial would likely have been different had the results of the test been suppressed.

Brady; Discovery

Manaois v. State, A09A1886

Appellant was convicted of aggravated assault. He contended that the State committed a Brady violation by failing to disclose the identity of a potential witness named "Nicole" and that similarly violated OCGA § 17-16-8 (a) by failing to provide the same information. The evidence showed that the victim worked in a restaurant when the victim's friend, "Nicole," came in with a swollen eye. The victim went outside to confront appellant who allegedly caused someone hit her. Appellant then shot the victim.

Investigators with the D. A.'s Office were able to determine "Nicole's" last name but were unable to locate her. Appellant contended that the failure to reveal this information was a Brady violation. The Court noted that defense counsel stated that she really did not want "Nicole" to testify because her testimony would have most likely been favorable to the prosecution. Therefore, the Court held, the trial court properly found that no Brady violation occurred because appellant failed to show that the State failed to provide information favorable to the defense.

The Court also held that the State did not violate OCGA § 17-16-8 (a). This section requires the prosecutor and the defendant's attorney to disclose the identities and addresses of all persons they intend to call as witnesses at trial. Since the State could not find "Nicole" and did not call her as witness at trial, no violation occurred.

Attempt to Influence Official Action; Sufficiency of Evidence

Beard v. State, A09A1179

Appellant was convicted of one count of a state officer or employee improperly attempt-

ing to influence official action by another state officer or employee (OCGA § 16-10-5) and one count of violation of his oath as a public officer (OCGA § 16-10-1). Appellant challenged the sufficiency of the evidence convicting him of the attempt to influence official action. OCGA § 16-10-5 provides as follows: "Any officer or employee of the state or any agency thereof who asks for or receives anything of value to which he is not entitled in return for an agreement to influence or attempt to influence official action by any other officer or employee of the state or any agency thereof shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years." The crux of the State's case was that appellant entered into an agreement to influence his supervisor into taking official action.

The evidence showed that appellant was a prison guard. He found an inmate in possession of marijuana. He told the inmate that he would not report him if the inmate paid appellant \$5000.00. The inmate agreed to pay \$2000.00. Thereafter, the inmate had a relative send a \$500.00 money order to appellant's friend. The inmate eventually reported appellant and appellant was arrested. The Court held that the evidence was insufficient to support his conviction. The Court found that while the evidence would have been sufficient to support a charge of bribery under OCGA § 16-10-2, there was no evidence presented that the appellant took any action, substantial or otherwise, to improperly influence his supervisor to refrain from taking official action against the inmate for possession of marijuana.

Speedy Trial; Indictments

Falagian v. State, A09A0846

Appellant was charged with three counts of theft by taking arising from three bogus checks cashed at the victim's check cashing business. He contended that the trial court erred in denying his plea in bar based on constitutional speedy trial grounds. The Court, utilizing the *Barker-Doggett* balancing test, affirmed the trial court. First, the Court held that the length of the delay (54 months) between the time of arrest and the assertion of appellant's constitutional rights was weighed against the State. The Court found that the State offered no reason for the delay and thus, this too must be weighed against the State. The

appellant waited 54 months before asserting his rights and this must weigh against him. As to the last factor, prejudice from the delay, the Court found that appellant alleged no real prejudice (oppressive pre-trial incarceration or impairment of his defense) but instead only asserted anxiety from the charges "hanging over his head." In weighing the four factors, the Court held that the trial court did not abuse its discretion in denying the plea in bar.

Appellant also alleged that the indictment should have been dismissed under the rule of lenity because he was indicted for theft by taking and the charges would also support an indictment of the lesser offense, deposit account fraud. But, the Court stated, the rule of lenity entitles the accused to the lesser of two penalties where the *same* conduct would support either a felony or misdemeanor conviction. Since theft by taking and deposit account fraud are both felony offenses, the rule of lenity was inapplicable.

Evidence; Videotapes

Dixon v. State, A09A0844

Appellant was convicted of armed robbery, kidnapping and possession of a firearm during the commission of a crime. He contended that the trial court erred in admitting into evidence a video generated by an unmanned surveillance camera and photographs taken therefrom, because the State failed to lay the required foundations. Under OCGA § 24-4-48 (c), a video or photograph produced by an unmanned camera may be introduced into evidence "provided that prior to the admission of such evidence the date and time of such photograph, motion picture, or videotape recording shall be contained on such evidence and such date and time shall be shown to have been made contemporaneously with the events depicted in the photograph, videotape, or motion picture." Where a video or photograph lacks accurate date and time stamps, its admission may nonetheless be proper upon additional corroboration. Here, the video in evidence lacked both date and time stamps. The photographs, however, contained date and time stamps which corresponded to the date and time of the incident. A police investigator testified at trial that he photographed one of the surveillance video screens upon his arrival at the scene, and he authenticated the state's photographs by testifying that they accurately

reflected what he observed on the screen on the date of the incident. Moreover, the victim identified appellant at trial and testified to his actions; and a review of the surveillance video in evidence revealed that its contents corresponded to the victim's testimony. The Court held that taking these factors together, the trial court did not abuse its discretion in admitting the video and photographs into evidence.

Res Gestae

Crane v. State, A09A1156

Appellant was convicted of voluntary manslaughter. He contended that the trial court erred in not admitting res gestae statements he made to an intern with the district attorney's office. The evidence showed that after appellant shot the victim; he was placed in the back seat of a patrol car. The intern was sitting in the front passenger seat. Once there, appellant activated his Nextel two-way radio, and spoke first with a female caller and then with his father. Under OCGA § 24-3-3, res gestae declarations are those "accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought." The Court held that although appellant made statements to, and in the presence of, the intern shortly after the shooting, it could not conclude that such statements were "free from all suspicion of device or afterthought." Appellant advised the female caller that he could not talk because he was in the back of a patrol car, and asked her not to call him back. Appellant's recounting of recent events to his father was a narrative and thus, not part of the res gestae. While there was no evidence that appellant was influenced by others prior to making the statements, he was clearly aware that the person in the front seat was an intern and interested in a career as a detective. This consciousness was reflected in his final phone conversation in which he advised the caller that he was in a patrol vehicle but could not explain the reason or continue the conversation.

Child Hearsay; Impeachment

Conn v. State, A09A1176

Appellant was convicted of child molestation. He contended that the trial court violated his right to confrontation by admitting a

videotaped interview of the victim pursuant to OCGA § 24-3-16. Appellant contended that the video was testimonial and the State argued that it was nevertheless admissible because the victim was available to testify at trial. The record showed that the victim, who was approximately eight years old at trial, gave mostly non-verbal responses to the prosecutor on direct examination. Both the trial court and prosecutor tried to have the victim make oral statements, but the victim would mostly just shake her head "yes" or "no" to specific questions concerning the molestation. The defense attorney on cross-examination announced that he had no questions. Appellant argued that her limited responses made her "unavailable" at trial. The Court disagreed. The victim was made available for cross-examination at trial, but counsel specifically chose not to question her. Under these circumstances, the trial court did not abuse its discretion when it admitted the video recording of the victim's statement into evidence.

Appellant also argued that the trial court erred in charging the jury on the impeachment of a witness by a conviction of a crime of moral turpitude. At trial, appellant testified and through character witnesses, placed his character into issue. He contended, however, that the facts of the case did not authorize the impeachment charge because his prior public indecency conviction was not a conviction of a crime involving moral turpitude. The Court, found that *In re Threlkeld*, 273 Ga. 331 (2001), a case in which the Supreme Court of Georgia treated misdemeanor public indecency as a crime involving moral turpitude in the context of attorney discipline, justified the trial court's impeachment charge.

Justification; Victim's Prior Acts of Violence

Strozier v. State, A09A1464

Appellant, a 26-year-old male, was convicted of two counts of aggravated assault against a person over the age of 65. He defended the charges on grounds of justifiable self-defense and contended that the trial court erred in not admitting his evidence of the victim's prior child molestation of him and another. The evidence showed that the victim entered appellant's room to retrieve her tape recorder. The victim said something to appellant which caused appellant to attack the

victim with his fists. Appellant contended that the victim attacked him with the tape recorder and he punched her only to defend himself.

The Court stated that although a victim's bad character, including prior violent acts, is generally not relevant or admissible, an exception may apply where the defendant claims he justifiably used force in self-defense. Because a victim's prior acts of violence against a defendant or third parties show the victim's violent character, these acts are admissible to support the defendant's claim that the victim assaulted the defendant in accordance with this violent character. Child molestation is, by its very nature, a crime involving a forcible and violent act, and, if relevant, admissible for the purpose of establishing a justification defense. But here, appellant claimed he justifiably used force in self-defense after the victim assaulted him by repeatedly hitting him in the face with a tape recorder. Evidence that the victim previously committed the proffered acts of child molestation was not relevant to this justification defense. Showing that the victim had a disposition to engage in sexual acts considered forcible and violent only because of their non-consensual nature did not tend to support a claim that the victim hit appellant in the face with a tape recorder in accordance with a disposition toward actual violence. Therefore, the victim's prior acts of child molestation were not relevant to appellant's justification defense.

Child Hearsay

Lynn v. State, A09A1810

Appellant was convicted of aggravated child molestation and child molestation. He contended that the trial court erred in admitting the videotaped forensic interview of the child victim. The Court first noted that neither the original nor a copy of the videotape interview was included in the record received by the Court from the trial court. Citing OCGA § 17-5-55, the Court went through the procedure for handling evidence after trial and for purposes of maintaining a record on appeal. The Court then found that it did not need the videotape because appellant's arguments were premised on the assertion that the victim lacked credibility. Under Georgia's Child Hearsay Statute, OCGA § 24-3-16, such videotaped interviews may be admitted if, among other things, the trial court finds that the circumstances of the statement provided sufficient indicia

of reliability. Factors to be used in assessing credibility include the following: (1) the atmosphere and circumstances under which the statement was made (including the time, the place, and the people present); (2) the spontaneity of the child's statement to the persons present; (3) the child's age; (4) the child's general demeanor; (5) the child's condition (physical or emotional); (6) the presence or absence of threats or promise of benefits; (7) the presence or absence of drugs or alcohol; (8) the child's general credibility; (9) the presence or absence of any coaching by parents or other third parties before or at the time of the child's statement, and the type of coaching and circumstances surrounding the same; and, the nature of the child's statement and type of language used therein; and (10) the consistency between repeated out-of-court statements by the child. These factors are not to be mechanically applied but considered in a manner best calculated to facilitate the determination of the required degree of trustworthiness.

Utilizing these factors in determining whether the trial court erred in finding sufficient indicia of reliability in the contested videotaped interview, the Court held that the trial court did not abuse its discretion in rejecting appellant's arguments as to the victim's credibility.

Prior Inconsistent Statements; Hostile Witnesses

Gober v. State, A09A1924

Appellant was convicted of armed robbery and theft by receiving. He argued that the trial court erred in admitting a prior inconsistent statement of a key witness and in allowing the State to treat two of its other witnesses as hostile. At trial, a key State's witness initially sought to invoke the Fifth Amendment, and repeatedly answered that he did not remember the events in question. Appellant contended that the prior statement was not inconsistent and that the introduction of the videotape of the prior statement violated his right of confrontation. The Court disagreed. First, the videotape was properly admitted as a prior inconsistent statement because contrary to appellant's argument, the witness did not simply claim at trial that he did not remember any of the events of on the date in question. In fact, he specifically denied many substantive statements regarding the crimes that he made

in his videotaped statement. Thus, because the witness's testimony directly contradicted the statements he made in his videotaped statement to police, the videotape was admissible as a prior inconsistent statement and could be used as substantive evidence. Moreover, because the witness did not completely refuse to testify, which would have wholly precluded appellant from any cross-examination regarding the inconsistent statement, appellant was not denied his right to confrontation.

Appellant also contended that the trial court erred in allowing the State to treat two of appellant's co-conspirators as hostile witnesses. The record showed that the two witnesses were part of a threesome of armed gunmen who committed the armed robbery, with appellant, the fourth co-conspirator, driving the getaway vehicle. The two witnesses had pled guilty prior to trial and had not appealed. At trial, the prosecutor was permitted to ask leading question of each witness after each witness refused to testify on Fifth Amendment grounds. Citing *Lingerfelt v. State, 235 Ga. 139, 140-141 (1975)*, appellant contended that because the witnesses refused to answer under the Fifth Amendment, the prosecutor violated his right to confrontation because through the leading questions, the State was able to get the substance of the testimony without effective cross-examination. However, the Court held that in *Cates v. State, 245 Ga. 30, 32-33 (1980)*, the Georgia Supreme Court carved out an exception to the *Lingerfelt* doctrine, holding that the trial court could allow a prosecutor to ask such leading questions of a witness who refused to testify where (i) the trial court had properly found that the witness had no right to claim a Fifth Amendment privilege (because he had already been convicted for his participation in the same crime and no appeal had been pursued), and (ii) defense counsel had available to him or her the witness's version of the crime and therefore could also ask leading questions that showed inconsistencies or tended to exculpate the appellant. Here, both witnesses had previously pled guilty to their participation in the same crimes of which appellant was accused, and therefore the trial court properly found they were entitled to no Fifth Amendment privilege. Defense counsel had available to him the testimony of both witnesses from appellant's first trial, which he used to appellant's advantage by asking one gunman whether he previously testified that he

was not with appellant on the date in question. As to the other gunman, appellant expressly declined the opportunity to query the witness (after the witness had refused to answer the State's questions). Thus, with regard to this witness, appellant was not denied the right of confrontation, he simply did not exercise it.

Hearsay; Character

Bynum v. State, A09A1623

Appellant was convicted of child molestation. He contended that the trial court erred in admitting the *Miranda* waiver form because it contained hearsay and placed his character in evidence. The form contained a notation from the interviewing officer which stated as follows: "The girl's saying that he was touching them in private parts of there [sic] body." The trial court had excluded as similar transaction evidence an alleged molestation by appellant of the victim's sister. Appellant contended that the statement was hearsay and that this was a backdoor method of admitting evidence of the similar transaction which since it was ruled out, improperly placed his character into evidence. The Court held that a statement is considered hearsay only if the witness is testifying to another party's statement in order to prove or demonstrate the truth of that statement. Otherwise it is a verbal act and thus original evidence rather than hearsay. Here, appellant's hearsay objection was meritless because the interviewer wrote the statement as well as read it into evidence; thus, it was original evidence. As to the character evidence objection, the interviewer's explanation of the nature of the interview was highly relevant to whether the statement appellant gave was voluntary. Therefore, trial court did not abuse its discretion in admitting the waiver form, even if it incidentally placed his character in issue.

Similar Transactions

Evans v. State, A09A2153

Appellant was convicted of multiple counts of child molestation, aggravated child molestation, and statutory rape, and on single counts of sexual contact with a psychotherapist client and of enticing a child for indecent purposes. He argued that the trial court erred in admitting two similar transactions. The evidence showed that appellant, a psychotherapist, engaged multiple sexual acts with a client

under the age of 16. He argued that the court erred in admitting a similar transaction that he engaged in multiple sexual acts with his step-daughter when she was under the age of 16. At trial, it was appellant who first drew attention to this similar transaction. His defense strategy was that the similar was a virtual copycat of the acts he allegedly performed on the victim and therefore, the victim was falsely mimicking the previous allegations. The Court held that appellant was responsible for introducing this testimony. Therefore, any error was induced and provides no grounds for reversal.

The State also introduced as a similar transaction that appellant had sexual contact with a 32-year-old female client in his office during a counseling session. Appellant contended that the evidence was not similar to the allegations that he committed child molestation. However, the Court held that the evidence was admitted as a similar transaction to the charge under OCGA § 16-6-5.1 (c) (2) that appellant committed sexual assault on a client while he was engaged as a psychotherapist. Thus, the prior transaction involved appellant's taking his pants off and rubbing his private part against the adult female patient in his office during a session in which he was counseling her as a psychotherapist was sufficiently similar to his engaging in sexual intercourse with the female victim in his office during a session in which he was counseling her as a psychotherapist.

Opinion Testimony

Moore v. State, A09A1485

Appellant was convicted of felony obstruction of a corrections officer. He argued that the trial court improperly allowed an officer to offer opinion testimony without having him tendered as an expert or presenting a basis for the opinion. The evidence showed that the victim officer was a member of the prison's emergency response unit. The officer was summoned to appellant's cell to escort appellant to another cell. Appellant picked up some baby powder, shook it and threw it at the officer before lunging at the officer and attacking him. The officer opined that the shaking of the powder was an attempt to get the powder in his eyes and that the throwing of the powder was a threat to his safety. The Court held that the testimony was properly admitted. The evidence was not expert testimony, but rather

lay testimony. A lay witness is permitted to give his opinion as to a defendant's behavior, so long as it is based upon personal observation and the witness states the facts upon which his opinion is based. Here, the officer's testimony regarding his opinion of what appellant was attempting to do with the baby powder was based on his personal observation of the situation and explanation of the facts upon which his opinion was based.