

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 11, 2009

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Ineffective Assistance of Counsel

Angus v. State, A09A1263

Appellant was convicted of rape, statutory rape, child molestation, enticing a child for indecent purposes, and contributing to the delinquency of a minor. He was acquitted of VGCSA. He contended that his trial counsel was ineffective for requesting certain jury charges. The first charge was as follows: "I charge you that any conflicts in the evidence are to be reconciled wherever possible. All witnesses are *presumed to speak the truth* and, if possible, you should not attribute a false statement to any of them. If you find that this cannot be done, then you should believe the evidence that is most reasonable and believable to you and *decide the case by the preponderance of the evidence* as you find it to be." The Court

held that decisions as to which charges will be requested and when they will be requested fall within the realm of trial tactics and strategy. They provide no grounds for reversal unless such tactical decisions are so patently unreasonable that no competent attorney would have chosen them. As to this charge, it was not objectively unreasonable for trial counsel to request the "presumption of the truth" portion of the charge. However, the second part of the request seemed to imply that the State need only prove guilty by a preponderance of the evidence. Nevertheless, the charge appeared in the section dealing with witness credibility and the jury was properly charged on the correct burden of proof over ten times. Therefore, the Court held, appellant was not prejudiced by the improper charged language.

Appellant also contended that trial counsel never should have requested the following charge based on OCGA § 24-4-22: "I charge you that where a party has evidence by which the party may repel a claim or charge against him/her, and omits to produce it, or having more certain and satisfactory evidence, relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim is well founded; but this presumption may be rebutted." The Court found that this charge "has long been held by Georgia courts not to apply to criminal cases because of its tendency to shift the burden onto the defendant to bring forward evidence in his defense, thereby nullifying the presumption of innocence." The Court concluded that although the request was deficient performance, in the context of the present case, the charge would not be understood by a reasonable juror to create a conclusive presumption or shift the burden of persuasion onto the defendant, and therefore there was no prejudice.

Appellant was convicted of eight counts of serious injury by vehicle, driving under the influence, reckless driving, failure to maintain lane, and improper passing. He contended that the trial court erred in not granting him a new trial based on ineffective assistance of counsel. The evidence at trial showed that a two-car collision occurred on a four-lane divided highway when one car crossed the median and crashed into another car heading in the opposite direction. The drivers of both cars were seriously injured. Even though appellant was not involved in the collision directly, witnesses testified that he caused the accident by passing a car on the right shoulder of the road, which caused that car to swerve left and “spook” the driver of the car next to him traveling in the fast lane, who then lost control, crossed the median, and collided with an oncoming car. Appellant’s counsel called no witnesses in his defense and merely argued that his actions were not the proximate cause of the accident.

The trial court found that defense counsel was deficient for failing to reasonably investigate appellant’s case. The Court agreed. Although counsel is not obliged to investigate all information provided by a defendant or all potential theories of the case, counsel is obliged to conduct a reasonable investigation. Here, appellant had two passengers in his vehicle but defense counsel made no efforts to contact one and minimal efforts to contact the other. Both were readily available if counsel had only made the effort. Since he made no effort to question these two witnesses about their potential testimony, the failure cannot be considered a trial tactic.

The trial court found that the failure did not prejudice appellant’s case. The Court disagreed. The two witnesses, had they been called would have testified that Appellant did not appear to be under the influence, he was not driving recklessly, and they would have explained why he passed on the shoulder of the road. Because of his counsel’s failure to investigate the case, interview the passengers in his truck, and call them as witnesses, the Court could not say that no reasonable probability existed that, absent his counsel’s errors, the fact finder would not have had a reasonable doubt respecting his guilt. Therefore, the trial court erred in not granting appellant a new trial.

Speedy Trial

Davis v. State, A09A1053

Appellant contended that the trial court erred in denying his motion to dismiss the indictment on the ground that his constitutional right to a speedy trial had been violated. The Court agreed and reversed. Constitutional speedy trial claims must be analyzed under the four-part balancing test of *Barker v. Wingo*. Under this test, a trial court considers: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant’s assertion of the right to speedy trial; and (4) the prejudice to the defendant. In applying this test, the Court found that the 35 month delay, but for a couple of months, was attributable to the State. The reasons for the delay were attributable mostly to the State and even though the delay was not deliberate, the factor was still weighed against it. Appellant asserted his rights 17 months after arrest and then again 34 months thereafter. The motions, which asserted that he be tried immediately, were sufficient to assert his constitutional rights. The Court found that taking into account the two lengthy periods during which appellant failed to pursue his right to a speedy trial, it would weigh this factor against him, although it did not weigh it heavily against him because he first asserted his right prior to his case being placed on the trial calendar. Finally, as to the prejudice factor, the Court found that two witnesses, who were illegal aliens, were no longer available. These two witnesses were not interviewed by appellant’s counsel for tactical reasons, but the record showed that their statements were exculpatory and thus, their unavailability at the time prejudiced the defense. Weighing the four factors, the Court held that the trial court abused its discretion in denying the motion to dismiss.

State v. Moses, A09A1284

The State appealed from the grant of appellant’s motion to dismiss the indictment for violating his constitutional rights to a speedy trial. The record showed that appellant was arrested on December 9, 2004 for the offenses of armed robbery, aggravated assault with intent to rob, possession of a firearm during the commission of a felony and possession of a firearm by a convicted felon. He was indicted for those offenses on or about December 21, 2004. His case was called for trial on June 12,

2006, but dismissed for “want of prosecution” because the State declared it was not ready to proceed. Moses was re-indicted on June 30, 2006. On November 14, 2008 Moses filed a motion to dismiss the indictment, asserting that his constitutional right to a speedy trial had been violated. In this motion, he asserted a demand for trial, noting that his case had not yet been placed on a trial calendar. Following a hearing, the trial court granted the motion on January 8, 2009.

The State conceded that the delay was presumptively prejudicial, thus triggering the four-factor *Barker-Doggett* balancing test. The length of the delay was four years and weighted against the State. The State also conceded that the responsibility for the delay belonged with the State. The Court determined that the trial court erred in its determination that Moses asserted his constitutional rights when he announced ready for trial in June, 2006. Instead, the Court found that Moses did not assert his rights until the motion to dismiss in November, 2008. Thus, this factor should have been weighted against him. Nevertheless, the Court stated, given the circumstances of this case, it should not be weighted heavily against him. Finally, the Court focused on the prejudice prong of the test. The trial court found that because of the length of the delay, actual prejudice was presumed, relieving Moses of the burden of making a specific showing in regards to this factor. The Court disagreed because the 4 year delay fell a year short of the 5 year delay the courts have previously held gives rise to a presumption of actual prejudice. However, the trial court also found that Moses made a sufficient showing of prejudice that his defense will be hampered in that any possible alibi witnesses will be deemed less credible by a jury because they will assume memory issues due to the four years of delay. Although a generalized statement that the memories of witnesses have faded over time is not deemed sufficient, the Court held that memory lapses that substantially relate to a material issue are deemed prejudicial. Therefore, even though the trial court erred in certain respects, the Court could not say that the trial court abused its discretion in granting the motion to dismiss the indictment.

Ditman v. State, A09A2020

Appellant was indicted on one count of ag-

gravated child molestation and one count of child molestation. He contended that the trial court erred in denying his motion to dismiss the indictment on constitutional speedy trial grounds. The record showed that there was a 20 month delay between his arrest and the date that he filed his motion for discharge and acquittal. In addition, another 16 months elapsed between the time his motion was filed and the time the trial court ruled upon it. Thus, the total delay was approximately 36 months. This was presumptively prejudicial, thus triggering the four-factor *Barker-Doggett* balancing test.

The 36 month delay was uncommonly long and weighed against the State. The trial court found that the reason and responsibility for the delay was equally attributable to the State and Appellant. The Court found otherwise. It held that the State was responsible for the delay. Specifically, the Court noted that the State intentionally slowed or failed to give appellant his statutorily required discovery until appellant withdrew his statutory speedy trial demand. Thus, the trial court erred in failing to weigh this factor against the State.

The Court found that the timeliness of the demand must be weighed against the appellant. Even though the waiver of the statutory speedy trial demand was done without his knowledge or consent, it was done by his attorney as his representative. Nevertheless, the Court determined, given the 16 month delay after the assertion of his rights, this factor must not weigh heavily against him.

Finally, the Court looked at the prejudice factor. The test for whether a defendant has been prejudiced requires the court to consider three interests: preventing oppressive pretrial incarceration, minimizing a defendant's anxiety and concern, and limiting the possibility that the defense will be impaired. The most important component of the prejudice analysis is whether the defendant's ability to raise a defense was impaired by the delay. Here, the Court found that appellant's defense was hampered because he was no longer able to locate the victim's mother. Although the testimony that appellant claimed she would have provided would not have completely exculpated him, it would have lent credence to his claim that although he was around the victim at times during his relationship with his mother, he did not sexually abuse the child. In balancing the four factors, the Court

concluded three of the four factors weighed against the State and specifically that appellant was denied his constitutional right to a speedy trial and to due process based on the State's intentional act of trading discovery responses for a speedy trial right. Thus, the trial court abused its discretion in denying the motion for discharge and acquittal.

Search & Seizure; Miranda *State v. Lupuloff, A09A1095*

The State appealed from the grant of Lupuloff's motion to suppress evidence and statements. The record showed that a woman was checked into a hotel and left her purse on the counter. She realized it a couple of minutes later, but when she went back it was gone. An officer called to the scene reviewed the surveillance tape and saw a man who a hotel employee identified as Lupuloff take the purse off the counter. Lupuloff could not be found, so the officer asked that he be called when Lupuloff returned. In the meantime, the officer obtained an arrest warrant. The officer was called back to the hotel several hours later and saw Lupuloff walking in the parking lot. The officer approached him and asked Lupuloff if he could help him with an incident that occurred in the front lobby. The officer mentioned that there was a surveillance tape and asked if he could remedy a missing item. Without saying a word, Lupuloff went to his car, pulled out the purse and told the officer that nothing was missing from it.

The officer testified that he intended to arrest Lupuloff when he approached him and he was not free to leave, but that he never gave Lupuloff that impression. The trial court found that Lupuloff was in custody when approached and that therefore, the officer should have given him his *Miranda* warnings before asking him about the theft. The Court disagreed. It held that a person is considered to be in custody and *Miranda* warnings are required when a person is (1) formally arrested or (2) restrained to the degree associated with a formal arrest. Unless a reasonable person in the suspect's situation would perceive that he was in custody, *Miranda* warnings are not necessary. Thus, the relative inquiry is how a reasonable person in the defendant's position would perceive his situation. The subjective views of the police and the defendant are not relevant. Applying these principles, the Court

held that a reasonable person in Lupuloff's position would not have believed that his freedom was curtailed in a significant way when he was first approached by the officer, told about the missing purse and asked if he could help. Accordingly, the trial court's order granting Lupuloff's motions in limine and to suppress were reversed.

Influencing the Winning of a Lottery Prize; O.C.G.A. § 50-27-27

Riddle v. State, A09A0473

Appellant was convicted of influencing the winning of a lottery prize in violation of O.C.G.A. § 50-27-27 (b), which is the penalty portion of the Georgia Lottery for Education Act, and which provides: "Any person who influences or attempts to influence the winning of a prize through the use of coercion, fraud, deception, or tampering with lottery equipment or materials shall be punished by a fine not to exceed \$50,000.00 or by imprisonment for not longer than five years or both." He argued that the criminal statute proscribing the offense did not apply to his conduct. The evidence showed that a Shell station was burglarized and two rolls of lottery tickets were taken. A little over three hours later, appellant was caught attempting to cash two winning tickets from the stolen rolls of tickets. Appellant argued that the Code section does not proscribe the act of presenting a stolen lottery ticket for redemption of a prize but only to prohibit political influence on the operation of the state lottery system. The Court disagreed. It noted that the legislature intended the lottery to be an entrepreneurial enterprise and that the lottery be a source of revenue to be used by the State of Georgia for educational purposes. "The Act explicitly prohibits *payment* of prizes 'arising from claimed tickets that are stolen,' and knowingly presenting a stolen ticket for redemption frustrates both this prohibition and the entrepreneurial purpose of the Act." Therefore, consistent with the Act's language and purpose, the Court held that the fraudulent or deceptive presentation of a stolen lottery ticket for redemption of a prize is prohibited by OCGA § 50-27-27 (b).

Appellant also argued that because he was unsuccessful in redeeming the winning tickets, he did not actually influence the winning of a ticket. But the Court noted that appellant

was accused of influencing the winning by presenting the stolen tickets. His presentation of the tickets was the completed criminal act, not the receipt of a lottery prize.

Jury Charges; Merger

Pierce v. State, A09A1261

Appellant was convicted of for aggravated battery, aggravated assault, terroristic threats, false imprisonment, family violence battery (three counts), simple battery (two counts), and criminal trespass. He argued that the jury charge on terroristic threats was improper because it did not match the indictment. The indictment charged appellant with terroristic threats for threatening “to commit a crime of violence, to wit: Murder, with the purpose of terrorizing another in reckless disregard of the risk of causing such terror. . . .” The trial court charged the jury as follows “A person commits the offense of terroristic threats when that person threatens to commit any crime of violence with the purpose of terrorizing another. No person shall be convicted of terroristic threats on the unsupported testimony of the party to whom the threat is made. Whether there is sufficient support is a matter solely for you, the jury, to decide.” The Court held that jury instructions must be read and considered as a whole. If the instructions sufficiently limited the jury’s consideration to the elements of the offense as charged in the indictment such that no reasonable possibility exists that the jury could have convicted the defendant of committing the crime in a manner not alleged in the indictment, no reversible error occurred. Here, the Court determined that considering the charge as a whole, the jury was not misled or confused about the charge of terroristic threats in the indictment.

Appellant also argued that his conviction for family violence battery should have merged with his conviction for family violence aggravated battery. The Court noted that to convict appellant of family violence aggravated battery, the State had to prove that he maliciously caused bodily harm to the victim, with whom he once lived, by seriously disfiguring her thighs resulting in scar tissue and discoloration. On the other hand, to convict him of family violence battery, the State had to prove that he intentionally caused substantial physical harm and visible bodily harm, i.e., “bodily harm capable of being perceived by a person other than

the victim and may include, but is not limited to, substantially blackened eyes, substantially swollen lips or other facial or body parts, or substantial bruises to body parts, to the victim, with whom he once lived, by beating her with a belt.” The Court determined that nothing in the indictment showed that the charges were based upon appellant’s actions at different times or places, or that the victim’s injuries charged in the battery count were different from those in aggravated battery count. Thus, each battery was not a separate and complete criminal act but rather was part of a continuous criminal act, committed at the same time and place and inspired by the same criminal intent. Therefore, the battery count should have been merged into the aggravated battery.

Jury Charges; Judicial Comment

Bright v. State, A09A2323

Appellant was convicted of child molestation. He contended that the trial court erred by instructing the jury on the law of voluntary intoxication. Specifically, he argued that because he did not assert intoxication as a defense to the charges, the instruction on that issue constituted an impermissible expression of the court’s opinion on the evidence in violation of OCGA § 17-8-57. The Court held that if there is any evidence, however slight, upon a particular point, it is not error to charge the law in relation to that issue. Here, there was considerable evidence that appellant was drinking alcohol and may have been intoxicated on the night that he sexually molested the victim. Additionally, the victim testified that she believed appellant was drunk on the night in question. Given these circumstances, the Court held, the trial court did not err by instructing the jury on voluntary intoxication.

Search & Seizure

Thomas v. State, A09A2116

Appellant was convicted of possession of cocaine with intent to distribute, possession of marijuana with intent to distribute, and felony obstruction of an officer. He contended that the trial court erred in denying his motion to suppress. The Court agreed and reversed. The evidence showed that an officer saw appellant in a parking lot known for drug activity. He started driving toward the lot. He saw appel-

lant standing next to a parked vehicle and observed him reach into the passenger side of the vehicle and then walk away. Believing that the interaction between appellant and the vehicle was a drug transaction, the officer exited his patrol car and called to him, saying, “Hey, come over here and let me talk to you.” Appellant did not respond so the officer ran in front of him and insisted that appellant stop and be frisked. When appellant refused to accompany the officer to his patrol car, a struggle ensued. During the struggle appellant pulled a bag out of his pocket and threw it away. After putting handcuffs on appellant and placing him in the patrol car, the officer retrieved the bag. The officer then transported both appellant and the bag back to the police station, despite the fact that he had not yet looked at the bag to determine its contents. Upon opening the bag at the police station, the officer determined that it contained drugs, and he formally arrested appellant and read him his *Miranda* rights.

The Court held that the initial encounter between appellant and the officer could be viewed as a consensual, first-tier encounter only if a reasonable person in appellant’s position would have felt free to decline the officer’s request to speak with him or otherwise terminate the encounter. Here, the evidence showed that from the time he entered the parking lot in his patrol car, appellant was not free to leave that parking lot until he had allowed the officer to question him. When appellant attempted to walk away from the officer, the officer responded by physically blocking his path, demanding that he submit to a pat-down, and physically restraining him. Furthermore, the officer acknowledged at trial that appellant had been detained and was not free to leave the scene until the officer had completed his investigation, which would, as a matter of course, include frisking him for weapons. By the officer’s own admission, therefore, his stop of appellant was a second-tier, investigative detention that required the officer to have a particularized and objective basis for suspecting that appellant was or was about to be involved in criminal activity. But the officer lacked a reasonable articulable suspicion to justify a Terry stop of appellant. Mere presence in a know drug area is not sufficient. Neither was the officer’s observation of appellant reaching into the vehicle sufficient to support a Terry stop. Moreover, the officer’s

testimony that he wished to frisk appellant before even speaking with him merely because he considered that standard police procedure demonstrated a complete misunderstanding of basic Fourth Amendment law. Therefore, the trial court erred in denying appellant's motion to suppress.

Kidnapping; Search & Seizure

Kollie v. State, A09A1545, A09A1564

Appellants were convicted of 24 counts of a 29-count indictment stemming from one home invasion and two restaurant robberies (Applebee's and Fuddrucker's). They contended that the 6 counts of kidnapping should be reversed under *Garza*. The first count was the kidnapping of the 6-year-old child during the home invasion. The evidence showed that when appellants entered the home, the 6-year-old child victim ran to her room to hide. Kollie went to her room, seized her, and brought her back to the foyer, dragging her with a gun to her head. The Court found that while the movement of the child was relatively short and occurred during the commission of the armed robbery and burglary, it was not an inherent part of those separate offenses. The movement also presented a significant danger to the victim independent of the danger posed by the armed robbery and burglary, as the victim was assaulted with the gun and present when Kollie and Brandt threatened to "molest and kill" her if the family called police. Lastly, the movement placed the victim in additional danger by enhancing Brandt and Kollie's control over her. Under these circumstances, the Court held that the movement of the child victim constituted sufficient asportation to support the kidnapping charge.

Two kidnapping counts applied to a busboy and cook at Applebee's. The evidence showed that Brandt and Kollie, brandishing guns, approached the two victims and ordered them to get out of their vehicle and onto the ground. The two victims were then dragged to a dumpster near the back of the restaurant where they were ordered to gain access to the restaurant. The Court determined that the movement was short in duration, but arguably occurred prior to the armed robbery. The movement was an inherent part of the crimes as the victims were used to gain access to the restaurant. But the movement from their

vehicle to the back of the restaurant near a dumpster enhanced Brandt and Kollie's control over the victims and isolated them from protection or rescue. Therefore, there was sufficient evidence of asportation to sustain the kidnapping convictions on these counts.

The next two counts of kidnapping applied to the manager and line cook at Applebee's. The evidence showed that the Applebee's manager and line cook were inside the restaurant when appellants entered. The line cook was dragged at gunpoint from the kitchen to the front of the restaurant, and the manager was forced to an office in the back where she was ordered to open the safe. After taking money from the safe, appellants forced the manager back to the front of the restaurant. The Court found that the movements of the manager and the line cook back and forth through the restaurant were short in duration, occurred during and incidental to the armed robbery and burglary, and did not present a significant danger to the victims independent of the danger posed by those crimes. Therefore, the movement of these two victims did not constitute asportation, and the kidnapping convictions on these two counts were reversed.

The last kidnapping charge related to the Fuddrucker's tractor-trailer delivery truck driver. The evidence showed that the driver was approached by appellants as he stepped out of the restaurant freezer and ordered to "get down." They then tied the victim's ankles and hands with duct tape and took him to the restaurant's office. After a few minutes, they took the victim outside and put him in the back of his trailer, shut the door, and locked it. The Court held that the first movement of the victim, from the freezer to the office, was not sufficient evidence of asportation. But, the second movement of the victim from the office to the back of the trailer that was parked outside, was short in duration, yet occurred after appellants took items from the restaurant and the keys from the victim, and was not an inherent part of the armed robbery and burglary. The movement also served to isolate the victim from rescue. Under these facts, the Court determined the element of asportation was established and the evidence was sufficient to sustain the convictions for kidnapping on this count.

Finally, Brandt challenged the trial court's denial of his motion to suppress the

evidence found in the truck he and Kollie were driving when arrested. He contended that because he and Kollie were secured in the back of separate police vehicles, there was no safety concern to justify a search of the truck. He argued that therefore the search was in violation of the Fourth Amendment as held in the United States Supreme Court's recent decision of *Arizona v. Gant*, ___U. S. ___, 129 SC 1710, 173 LE2d 485 (2009), decided after the trial court's ruling on Brandt's motion to suppress and after he filed his notice of appeal. The Court found that because the scope of the search fell within the scope of the Supreme Court's decision in *Gant*, it vacated the trial court's order denying Brandt's motion to suppress and remanded to the trial court to conduct a hearing and consider the holding in *Gant*.

Search & Seizure; Jury Charges

Duprel v. State, A09A1674

Appellant was convicted of DUI. He argued that the trial court erred in denying his motion to suppress. The evidence showed that a municipal officer was sitting in his vehicle at a gas station when he noticed appellant "revving" the engine of his motorcycle and driving around the parking lot. Upon speaking with appellant, the officer believed that appellant may have been under the influence. The gas station was within the city limits but the property upon which the store sat fell under the jurisdiction of the county Sheriff's Office. The officer then held appellant there until a sheriff's deputy arrived to evaluate appellant's condition.

Appellant argued that the trial court erred in denying his motion to suppress because the municipal officer placed him under arrest outside of his jurisdiction and without probable cause, citing OCGA § 40-13-30 for the proposition that municipal officers cannot make arrests outside of city limits unless jurisdiction is granted pursuant to a local or other law. The Court held that as a general rule, a municipal police officer is authorized to investigate crimes and/or arrest suspects only for those infractions that occur within that officer's territorial jurisdiction. But, an officer has authority to arrest a person accused of violating any law or ordinance governing the operation of a vehicle where the offense is

committed in his presence regardless of territorial limitations. This rule is codified at OCGA § 17-4-23 (a), which provides specifically that “[a] law enforcement officer may arrest a person accused of violating any law or ordinance governing the operation, licensing, registration, maintenance, or inspection of motor vehicles by the issuance of a citation, provided the offense is committed in his presence.” Because Morrison had a reasonable suspicion that appellant had been driving under the influence after he saw appellant operating his motorcycle and appellant admitted that he had been driving, the municipal officer had authority to arrest appellant.

Appellant also contended that the trial court erred when it refused to charge the jury on “attempted” driving under the influence. The Court noted that appellant cited no authority that authorizes a charge on attempt to commit the offense of driving under the influence as a lesser included offense. Moreover, where the evidence shows either the commission of the completed offense as charged, or the commission of no offense, the trial court is not required to charge the jury on a lesser included offense. The evidence was sufficient to support appellant’s conviction.

Res Gestae; Bolstering

Wright v. State, A09A1400

Appellant was convicted of felony shoplifting. She contended that the trial court erred in admitting a videotape of her husband committing the crime of shoplifting, and in allowing a witness to narrate the videotape as it was viewed by the jury. The evidence showed that appellant and her husband came into a store together. The husband wandered around the store stealing items and placing them in a bag. He then met up with appellant and they switched bags. The husband was taken into custody and appellant left the store with the merchandise and was apprehended outside.

During trial, the videotape showing appellant’s husband taking items from the store and the exchange between her and her husband was entered into evidence over appellant’s relevance objection. Evidence of circumstances surrounding an arrest is generally admissible if it is relevant to the crimes charged. Although only a portion of the videotape may have been relevant to this case, where appellant met her husband and exchanged shopping bags, the

Court held that upon the tender of demonstrative or documentary evidence, part of which is admissible and part inadmissible, and where the objection is to the evidence as a whole, it is not error to admit it all. Although the videotape does not show appellant committing a crime, it does show her in possession of the merchandise for which she was charged, and the attendant circumstances leading up to her being in possession of the goods. It was therefore admissible as part of the *res gestae*.

Appellant also contended that it was error for the trial court to allow the loss prevention officer to narrate the videotape while it was being viewed by the jury. The trial court permitted the State to show the surveillance videotape in conjunction with the testimony of the loss prevention officer. The officer testified regarding the relevant portions of the videotape, explained what he thought the videotape depicted, and the events as he observed them during his surveillance. The Court held that because the loss prevention officer’s testimony did not reflect his personal belief as to the veracity of the evidence, it constituted neither improper bolstering nor a statement of opinion upon an ultimate issue of fact for the jury. The issue went to weight not admissibility.

Gangs

In the Interest of X.W., A09A1041, A09A1042

Appellants, X. W. and B. W. were involved in a fight at their county high school. Both were adjudicated delinquent for felony gang activity pursuant to OCGA § 16-15-4 and disrupting a public school. The evidence showed that X. W. arranged a fight between J. M. and B. W. during lunch. J. M. was fighting as part of a gang initiation into X. W.’s gang, the Bloods. J. M., a member of the Crips, was fighting to earn back lost respect from his gang.

X. W. argued that the delinquency petition failed to allege that he held or occupied a position of an organizer, supervisory position or any other position of management, which he asserted was an essential element of OCGA § 16-15-4 (e). The petition charged that X. W. participated in criminal street gang activity pursuant to OCGA § 16-15-4 (e) in that he “did engage in directly or indirectly, criminal gang activity, a crime of violence in the State of Georgia, as defined in 16-15-3 (1) (J), to wit: said child did organize and promote an affray

between J. M. and B. W. for purposes of promoting their status in rival gangs.” OCGA § 16-15-4 (e) provides that “[i]t shall be unlawful for any person who occupies a position of organizer, supervisory position, or any other position of management with regard to a criminal street gang to engage in, directly or indirectly, or conspire to engage in criminal gang activity.” The Court held that the evidence shows that X. W. instructed J. M. on becoming a Bloods member, organized the fight for J. M. and B. W., and gave J. M. the “Book of Knowledge” (a book about Bloods history and jargon). There was also evidence that J. M. paid X. W. a “gang tax,” and that X. W. referred to himself as a “3 star lieutenant” in the Bloods gang. Therefore the evidence was sufficient.

X. W. also argued that the petition failed to allege that three or more persons were associated with the gang activity. He maintained that neither of the delinquency petitions under which he was charged set forth that it must be proved, as an essential element, that three or more persons were associated in fact with the alleged gang, whether informally or formally. Criminal street gang activity is defined under OCGA § 16-15-3 (2) as “any organization, association, or group of three or more persons associated in fact, whether formal or informal, which engages in criminal gang activity as defined in paragraph (1) of this Code section. The existence of such organization, association, or group of individuals associated in fact may be established by evidence of a common name or common identifying signs, symbols, tattoos, graffiti, or attire or other distinguishing characteristics” The Court held that based on the a juvenile and gang investigator’s testimony regarding his familiarity with the Bloods gang that there were more than three members of the Bloods gang, and J. M.’s testimony that X. W. facilitated the affray to further a gang activity, specifically J. M.’s membership in the Bloods, the evidence was sufficient to support the juvenile court’s finding that X. W. committed an act which, had he been an adult, would have resulted in a conviction of participation in criminal street gang activity.

Plea Negotiations; Merger

Works v. State, A09A2251

Appellant was convicted of aggravated assault, aggravated battery, and giving a false name to a law enforcement officer. He con-

tended that the trial court improperly engaged in plea negotiations between him and the State. Judicial participation in the plea negotiation process is prohibited by court rule in Georgia. However, if the parties negotiate a tentative plea agreement, a trial court may indicate whether it will concur with the agreement. A trial court may not involve itself in plea negotiations so as to render a guilty plea involuntary. Thus, while a trial court may communicate its willingness to accept a particular plea agreement independently negotiated by the parties, it is inappropriate for the trial court to tell a defendant that a rejection of a plea proposal will result in greater punishment in the event of a conviction by a jury. Here, the prosecutor, after learning that the eyewitness did not appear for trial and knowing that the victim was reluctant to testify, presented a recommendation to the court that appellant plead guilty and be sentenced to ten years and serve three years in custody. The trial court stated that due to the severity of the charges, she would not accept the recommendation. The trial judge then stated that she would accept a plea recommendation of fifteen years to serve ten years, which plea appellant had already declined. The Court held that these actions did not amount to improperly engaging in plea negotiations because the trial judge made no statement as to the sentence that would be imposed if appellant did not accept a plea proposal. Nor did the trial court threaten appellant with a stricter sentence if he decided to exercise his right to go to trial instead of pleading guilty.

Appellant also argued that the aggravated battery and aggravated assault should have merged. The evidence showed that appellant got into a fight with his girlfriend while they were together in a car. Appellant beat his girlfriend and stabbed her with a screwdriver. A person commits the offense of aggravated assault when he assaults with a deadly weapon or with any object, device, or instrument that, when used offensively against a person, is likely to or actually does result in serious bodily injury. The Court found that appellant was found guilty of this offense because there was evidence that he assaulted the victim with a screwdriver. A person commits aggravated battery when he maliciously causes bodily harm to the victim by rendering a member of her body useless. Appellant was found guilty of this offense because the victim's left lung was nonfunctional for a period of time due to the

stab wound. Because aggravated assault and aggravated battery are two separate offenses with different elements of proof, the charges did not merge, and it was irrelevant that both crimes stemmed from a single act. Therefore, the trial court did not err in refusing to merge the two convictions.