Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 2, 2016

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THIS WEEK:

Voir Dire; Prosecutorial Misconduct

Herrington v. State, S16A0745 (11/21/16)

Appellant was convicted of felony murder based on aggravated assault. He argued that the trial court erred in denying his motion for a mistrial during voir dire. The motion was based on two areas of questioning by the prosecutor. First, when the prosecutor asked the prospective jurors whether they believed that it was fair to hold a person who was a party to a crime equally responsible for the crime, appellant objected on the ground that it was improper to ask the prospective jurors to prejudge the case. The trial court effectively sustained the objection by directing the prosecutor to move on before any of the prospective jurors answered the question.

The Court stated that the line between permissible inquiry into "prejudice" (a juror's fixed opinion that a certain result should automatically follow from some fact, regardless of other facts or legal instructions) and impermissible questions of "pre-judgment" (speculation about or commitment to the appropriate result based on hypothesized facts) can be hazy. Thus, in this area as in other areas of voir dire practice, appellate courts should give substantial deference to the decisions made by trial judges, who oversee voir dire on a regular basis, are more familiar with the details and nuances of their cases, and can observe the parties' and the prospective jurors' demeanor. Here, the Court found that the question was most reasonably viewed as seeking to determine prejudice in the mind of any prospective juror and that the question did not ask the jurors to prejudge the case based upon hypothetical facts. Therefore, there was no any harmful error here.

The prosecutor also asked the prospective jurors if any of them had heard about the murder that occurred on August 24, 2006, and he began to outline the alleged circumstances of the crime. Appellant objected and moved for a mistrial. The trial court denied the motion but cautioned the jury panel that nothing the attorneys said was evidence and that the evidence comes only from the witnesses and exhibits. The Court found that the prosecutor's line of questioning was not inherently improper, as it was meant to determine if any of the prospective jurors had prior knowledge of the case that might require their removal, and on objection that the prosecutor was misstating what the evidence would show, the court halted the questioning and gave an appropriate cautionary instruction. Under these circumstances, the prosecutor's statements were not inherently prejudicial and

did not deny appellant his right to a fair trial, and the trial court therefore did not abuse its discretion in refusing to strike the jury panel and restart jury selection.

O.C.G.A. § 16-6-5.1(b)(1); Paraprofessionals

State v. Morrow, S16G0584 (11/21/16)

Morrow was convicted of sexual assault under O.C.G.A. § 16-6-5.1(b)(1), which provides in pertinent part: "A person who has supervisory or disciplinary authority over another individual commits sexual assault when that person … [i]s a teacher, principal, assistant principal, or other administrator of any school and engages in sexual contact with such other individual who the actor knew or should have known is enrolled at the same school. …" The Court of Appeals reversed his conviction because the State failed to show he had supervisory or disciplinary authority. *Morrow v. State*, 335 Ga.App. 73 (2015). The Supreme Court granted the State's petition for cert.

The Court stated that the State certainly may carry its burden of proving "supervisory or disciplinary authority" by evidence that the accused had specific authority to direct a particular student and to enforce school rules and policies with respect to that particular student. "Supervisory or disciplinary authority" may be either general or specific. And here, the Court found, there was scant evidence that Morrow had the power to direct the victim and enforce her compliance with school rules and policies, whether generally or specifically. The evidence showed that Morrow was assigned to accompany a student with special needs to his classes and ensure that this student (as opposed to any other student) did not disrupt class. But there was at least some evidence from which a rational jury might properly have inferred that Morrow had an occasional and limited power to direct other students (including the victim) and to enforce their compliance with school rules and policies, at least when the teacher had stepped out of the classroom and no other school employee was present. As a result, the Court found that sufficient evidence was presented to show that Morrow had supervisory or disciplinary authority over the victim as required to prove a violation of O.C.G.A. § 16-6-5.1(b).

However, the Court found, the State failed to prove another essential element of its case. To show a violation of O.C.G.A. § 16-6-5.1(b)(1), the State must prove that the accused was a "teacher, principal, assistant principal, or other administrator of any school." The State argued that Morrow — who was employed as a paraprofessional — was a "teacher" because he was an educator by virtue of his involvement in the classroom education of students. But, the Court stated, our Education Code defines "teacher," "educator," and "paraprofessional" separately and distinctly, and O.C.G.A. § 16-6-5.1(b)(1) uses only the term "teacher." Moreover, O.C.G.A. § 16-6-5.1(b)(1) separately and distinctly identifies "teacher[s], principal[s], assistant principal[s], and other administrator[s]" as persons to whom the statute applies, but it says nothing of "assistant teachers," "paraprofessionals," "other educators," or "other school employees." The degree of specificity in the statutory identification of school administrators to whom the statute applies suggests that the statute does not use "teacher" in a generic or unusually broad sense.

Furthermore, the Court found, Morrow did not do the sorts of things that teachers typically do. In particular, there was no evidence that Morrow assigned class work, homework or any other tasks, gave lectures, taught lessons, graded work, administered tests, attended faculty meetings, or reported to school on teacher workdays. Nor did Morrow devote any meaningful portion of his time to the instruction of students. At most, the evidence showed that Morrow occasionally answered questions posed by students with special needs or students with limited proficiency in English, questions that could have been answered by almost any layperson. That was not enough to render Morrow a "teacher" for the purposes of O.C.G.A. § 16-6-5.1(b)(1). Moreover, the school was a public school, and any "teacher" at a public school is required to be certified as such by the Georgia Professional Standards Commission. Someone without a teaching certificate is legally proscribed from being employed as a "teacher" at the school, and it was undisputed that Morrow had no teaching certificate.

Thus, the Court concluded, as used in O.C.G.A. § 16-6-5.1(b)(1), "teacher" means a teacher, and it does not mean a paraprofessional or other educator. Moreover, the Court further found, the State failed to prove that Morrow was a person to whom O.C.G.A. § 16-6-5.1(b)(1) applies, and his conviction was properly set aside. In so holding, the Court stated that "[t]o the extent that the Court of Appeals held in *Hart v. State*, 319 Ga.App. 749 (738 SE2d 331) (2013), that a paraprofessional is a 'teacher' for purposes of O.C.G.A. § 16-6-5.1(b)(1), we overrule that decision."

Habeas Corpus; Voir Dire

Trim v. Shepard, S16A0960 (11/21/16)

McClain, Simon, and appellant were tried and convicted of several crimes in connection with an attempted robbery. At trial, there was a dispute about the qualification of a prospective juror, whose daughter previously had been prosecuted in the county for an armed robbery. During voir dire, the prospective juror expressed her discomfort with serving on the jury, explaining that the same prosecuting attorney had been involved in her daughter's case, and noting that her daughter had been represented in that case by the lawyer now representing appellant. The prosecuting attorney sought to have the prospective juror struck for cause, but McClain, Simon, and appellant wanted to keep her. Over their objections, the trial court excused the prospective juror.

McClain, Simon, and appellant appealed, and each claimed that the evidence was legally insufficient to sustain his convictions. In addition, McClain alone asserted that the trial court erred when it excused the prospective juror for cause. Finding the evidence legally sufficient, the Court of Appeals affirmed Simon and appellant's convictions. *Simon v. State*, 320 Ga.App. 15, 19-20 (1), 25 (4) (2013). But as to McClain, the Court of Appeals reversed his convictions, reasoning that a trial court has discretion to excuse a prospective juror for cause only after "an adequate inquiry has been conducted," and concluding that the inquiry into the impartiality of the prospective juror in question was inadequate.

Subsequently, appellant filed a habeas petition alleging ineffective assistance of appellate counsel in failing to raise the juror issue on direct appeal. The habeas court denied the petition. Warden Shepard essentially conceded the issue before the Supreme Court. Nevertheless, the Court stated that it is not bound by the litigation position of the Warden and would decide the issue for itself.

The Court noted that appellant must show that his appellate counsel was deficient

in failing to raise the juror issue on appeal and that if counsel had raised the issue, there was a reasonable probability that the outcome of the appeal would have been different. And here, the Court found, there were several reasons to doubt that *Simon* was decided correctly. First, the Court of Appeals relied upon *Kim v. Walls*, 275 Ga. 177 (2002), and the failure of the trial court to conduct an adequate voir dire. But, the Court stated, *Kim* should not be read as imposing upon a trial court the duty and responsibility to independently question a member of the venire when counsel for both parties do not wish to question the person further.

Second, the *Simon* Court relied principally upon cases in which it was claimed that a trial court erred by *refusing* to strike a prospective juror. But, the trial judge is the only person in a courtroom whose primary concern, indeed primary duty, is to ensure the selection of a fair and impartial jury. And for that reason, if a trial court were to err in assessing the impartiality of prospective jurors, it would be better that the trial court err on the side of caution by dismissing, rather than trying to rehabilitate biased jurors. Thus, the Court noted, our appellate courts have routinely affirmed the decisions of trial courts to excuse jurors for cause when — as here — there was a relationship between a juror and a lawyer, party, or witness that led the juror to express some doubt about his impartiality, even if the expression of doubt was equivocal.

Finally, the law was settled at the time of *Simon* that, even if a trial court abused its discretion in striking a prospective juror for cause, the erroneous allowing of a challenge for cause ordinarily affords no ground of complaint if a competent and unbiased jury is finally selected. The *Simon* Court failed to acknowledge this settled principle of law, and nothing in its opinion suggested that it even considered whether McClain ultimately was denied a "competent and unbiased jury." In any event, appellant failed to make a showing in this habeas case that he was denied a "competent and unbiased jury." Accordingly, the Court held, the soundness of *Simon* is doubtful, and it certainly could not be said that the claim of error upon which McClain prevailed in *Simon* was sufficiently clear and strong that any reasonably competent attorney would have raised it. Thus, the Court concluded, appellant failed to show that he was denied the effective assistance of counsel on appeal, and the habeas court was right to deny his petition for a writ of habeas corpus.

Right to Public Trial; Waiver

Benton v. State, S16A1085 (11/21/16)

Appellant was convicted of felony murder, aggravated assault, and possession of a firearm during the commission of a felony. Jury deliberations in appellant's trial began on Friday and continued well into the evening, and the court arranged for the jury to resume deliberations the next morning. As the courthouse was not generally open on Saturday, the court instructed the jury as to the procedures that jurors would use to enter the courthouse through the parking garage, including the need for identification, and a copy of a court order that was provided to the jurors to allow entrance. When one juror inquired about entry if arriving by public transit, the court said the juror should come in the main courthouse entrance, and then said: "I really don't want you coming in [that entrance] if I can help it." After discussion with a deputy sheriff, the court directed the juror who made the inquiry to meet with the deputy sheriff for specific instructions.

After the jury left the courtroom, the court told the parties "[t]he courthouse is not open to the public tomorrow, generally. There are certain people that I've allowed, different sides. So we make sure that certain people can be brought it. Everybody understand?" Neither the State nor the defense voiced any objection or concern, and, after the court established the time for the attorneys to appear in the morning, court was adjourned for the night. The next day, several individuals were allowed entry to the courthouse, but a number were turned away, including appellant's sister, mother, and grandmother.

Appellant contended that his constitutional rights were violated. The Court disagreed. A criminal defendant may forfeit a constitutional right by failing to timely assert it. Generally, to preserve appellate review of a claimed error, there must be a contemporaneous objection made on the record at the earliest possible time. Otherwise, the issue is deemed waived on appeal. And, this principle certainly applies when a criminal defendant seeks to assert that a trial court's action deprived him of the right to a public trial. Here, appellant did not object to the trial court's announcements regarding access to the courthouse on Saturday, and the procedures established to secure admittance, despite ample opportunity to do so, and therefore, the Court held, he waived his right to appellate review of the trial court's action.

Miranda; Request for Counsel

State v. Estrada, S16A1082 (11/21/16)

Estrada was charged with malice murder and other related crimes. The trial court granted his motion to suppress his statements and the State appealed.

The record showed that Estrada was 18 years old and in DeKalb County custody when two officer from a neighboring county came to question him about an open homicide investigation. Two audio recordings were made. At the beginning of the first recording, the lead investigator read Estrada his *Miranda* rights, told Estrada he was investigating a homicide, and explained he had spoken to Estrada's girlfriend who indicated Estrada was a witness to the crime. At that point, Estrada did not waive his *Miranda* rights either verbally or in writing. Approximately five minutes into this first recording, Estrada said he did not want to talk about anything that did not concern his DeKalb County case without a lawyer. Rather than ceasing further conversation with Estrada, the investigator told Estrada he would be arrested for felony murder the next day. Estrada then asked whether speaking with the officers without a lawyer would make a difference as to whether he would be charged with felony murder. The lead investigator did not answer this question, but rather responded he would give Estrada a few minutes to decide whether he wanted to waive his rights and said he could not give Estrada any legal advice. At that point, about nine minutes into the first recording, Estrada again stated he wanted an attorney. Estrada then made a few inculpating statements. At that point, the investigator told Estrada he could not talk to Estrada anymore because Estrada had asked for a lawyer. Estrada mentioned another detail about the homicide and the lead investigator again stated he could not speak with Estrada without his lawyer. Approximately eight minutes after Estrada had first invoked his right to counsel, the lead investigator and his partner stepped out of the room and stopped recording.

The lead investigator testified that five to six minutes elapsed between the first recording and the second recording, and during that time, Estrada was left alone in the interrogation room. Officers returned to the room and the second recorded interview commenced. At the beginning of the second recording, the lead investigator engaged in a two-minute monologue about why he wanted to talk to Estrada about the homicide. At the end of the speech, Estrada asked where he should start and the officer replied he should start at the beginning and Estrada was interrogated for over an hour during which time he made more incriminating statements. The Court found that at no point during the second recording did officers obtain clarification Estrada wanted to speak without an attorney being present; and never at any point did Estrada verbally state he was waiving his *Miranda* rights or sign a waiver form to that effect. The lead investigator also admitted Estrada never asked the officers to return to the room after the first recorded interview had ended.

The Court stated that when a defendant invokes his right to counsel, all interrogation is to cease until such time as an attorney is made available or until such time as the defendant reinitiates conversation with law enforcement and waives his right to having counsel present. Here, Estrada twice invoked his right to counsel in a manner that was unequivocal, but the officers did not end the interrogation so an attorney could be made available. While Estrada made a few comments after invoking his right the second time, he never retracted his unequivocal request for a lawyer and he never initiated additional conversation with officers after they left the room. Any police-initiated questioning after the invocation of counsel renders any purported waiver by the accused invalid. Thus, the Court held, the officers violated Estrada's constitutional rights when they did not cease interrogating Estrada after he first invoked the right to counsel. Accordingly, the trial court did not err when it suppressed Estrada's custodial statements.

Habeas Corpus; Motion to Set Aside Judgment

Case v. State, S16A1086 (11/21/16)

Appellant filed a habeas petition alleging that his guilty plea to child molestation was not knowingly and voluntarily entered. When neither appellant nor his counsel attended the final hearing on the petition, the habeas court dismissed the petition of want of prosecution. Appellant filed a motion to set aside, asserting that his habeas counsel had not received notice of the final habeas hearing and first became aware of the hearing when counsel received the final order denying habeas relief. The habeas court denied the motion and appellant filed an application for discretionary appeal pursuant to O.C.G.A. § 5-6-35(a)(8), without filing a notice of appeal.

Initially, the Court found that it had jurisdiction to hear the appeal. A habeas petitioner appealing from an order denying an actual motion to set aside pursuant to O.C.G.A. § 9-11-60(d) may properly appeal by following the application procedures of O.C.G.A. § 5-6-35(a)(8). However, appellant's motion to set aside was more properly classified as a motion to set aside to correct a clerical error pursuant to O.C.G.A. § 9-11-60(g), which entitled appellant to a direct appeal, rather than a motion to set aside based on a nonamendable defect appearing on the face of the record pursuant to O.C.G.A. § 9-11-60(d)(3), which would have needed to come by application.

Turning to the merits of the appeal, the Court noted that the habeas court concluded that the order dismissing the habeas petition and denying habeas relief could not be set aside because "the notice [of the final hearing] was mailed to the correct address [for appellant's attorney]." In reaching this conclusion, the habeas court specifically declined to consider an affidavit presented by appellant's habeas counsel "asserting that he did not receive [the notice]," as the habeas court believed that "this additional evidence [could not] constitute grounds for setting the [final habeas] order aside."

However, the Court found, the habeas court was incorrect because such an affidavit, if found to be credible, could establish that a judgment may be set aside based on that party's lack of notice of the very hearing that led to the judgment against them dismissing the case for want of prosecution. Thus, the affidavit should have been considered along with all of the circumstances of the case in order for the habeas court to make a proper determination on the motion to set aside. Accordingly, because the habeas court did not make a finding as to whether habeas counsel received notice of the final habeas hearing based on a consideration of the affidavit of habeas counsel under all of the circumstances of this case, the habeas court's analysis was incomplete. Therefore, the Court vacated the habeas court's decision and remanded the case to the habeas court for it to consider the motion to set aside in a manner that takes into account the affidavit of habeas counsel in the context of all the circumstances of the case.

Juveniles; O.C.G.A. § 17-7-50.1

Baxter v. State, S16G0184 (11/21/16)

In February 2014, Jason Baxter — who then was sixteen years of age — was arrested and charged with aggravated sexual battery, a crime of which the superior court has exclusive original jurisdiction. Baxter was detained pending indictment and trial. About a month after his arrest, Baxter — represented by counsel — executed a written waiver of his entitlement to have his case presented to the grand jury within 180 days, and Baxter and the State filed the waiver with the superior court. In October 2014, however, Baxter filed a motion to transfer his case to juvenile court, asserting that his case had not been timely presented to the grand jury as required by O.C.G.A. § 17-7-50.1 and that his waiver was ineffective. The superior court granted the motion, and the State appealed. In *State v. Baxter*, 333 Ga.App. 849 (777 SE2d 696) (2015), the Court of Appeals affirmed, reasoning that presentation to the grand jury within 180 days of detention is absolutely required (unless the time is extended by the superior court for good cause); that such presentation is essential to the jurisdiction of the superior court; and that parties cannot by agreement, consent, or waiver confer jurisdiction upon a court that otherwise is without it. The Supreme Court granted the State's petition for a writ of certiorari to review the decision of the Court of Appeals, and reversed.

O.C.G.A. § 17-7-50.1(a) does not say that a charge "shall be presented" within 180 days. Instead, it provides that the detained child "shall be . . . entitled" to have it presented within 180 days. The use of the term "entitle," without more, does not imply that the object is automatically given to the recipient, but rather, it most commonly is understood to mean that the person in question has a personal legal right to it. But personal legal rights (even those

guaranteed by the Constitution) generally can be relinquished. And, even assuming that the right to prompt presentation under O.C.G.A. § 17-7-50.1(a) is a right that can only be lost by way of an affirmative and intentional waiver (as opposed to a forfeiture), there was an express waiver here.

Thus, the Court found, a waiver of prompt presentation — at least so long as it is executed prior to the expiration of the time in which the child is otherwise entitled to have the case presented — does not amount to an improper attempt to confer jurisdiction upon the superior court by agreement or consent. Rather, the superior court starts out with exclusive original jurisdiction in cases in which a teenaged child is charged with aggravated sexual battery, and it is divested of that jurisdiction (and must transfer the case to juvenile court) only "[i]f the grand jury does not return a true bill against the detained child within the time limitations set forth in [O.C.G.A. § 17-7-50.1(a)]." O.C.G.A. § 17-7-50.1(b). If the child waives prompt presentation before the time has expired, the condition that divests the superior court of jurisdiction — the expiration of the time — never comes into being. Put another way, the jurisdiction of the superior court falls away only when the clock runs out, but so long as the clock is running, the child may agree to stop it.

Accordingly, the Court determined, the Court of Appeals misunderstood O.C.G.A. § 17-7-50.1 when it concluded that the statute does not permit a detained child to waive presentation within 180 days of the date of detention. For that reason, the Court of Appeals erred when it affirmed the transfer from the superior court to the juvenile court.

Statements; Motions to Suppress

Philpot v. State, S16A0767 (11/21/16)

Appellant was tried with two co-defendants, Glass and Lizze Philpot (appellant's sister) on offenses related to a drive-by shooting. Appellant and Glass were convicted of murder and other offenses; Lizzie was acquitted. Appellant contended that the trial court erred in denying his motion to suppress his custodial statements. The Court disagreed.

The Court noted that former O.C.G.A. § 24-3-50 provided "[t]o make a confession admissible, it shall have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury." At the hearing on appellant's motion to suppress, no evidence was presented to support appellant's assertion that his in-custody statement was not made voluntarily. Instead, the officer who interrogated appellant testified appellant made his statement voluntarily and without any promise of benefit or threat of harm. The Court noted that the State bears the burden of demonstrating the voluntariness of a defendant's in-custody statement by a preponderance of the evidence, and at the motion to suppress hearing, the State met that burden. In fact, the officer's testimony denying that he offered any hope of benefit as an incentive for appellant's custodial statement and his denial that he made any threat to arrest appellant's sister was undisputed.

At trial, however, conflicting evidence was presented. appellant testified he changed his initial narrative in response to the detective's threats to arrest his sister. The detective testified and denied this assertion. Appellant also testified he changed his story after being offered a hope of benefit when he was told "the first man talking is the first man walking." Again, the detective denied this statement was made.

The Court found that the portion of appellant's motion for new trial that raised again the admissibility of appellant's custodial statement was, in effect, a motion to reconsider the motion to suppress, and it is within the trial court's discretion to consider anew a motion to suppress that was previously denied. But where, as here, additional argument and evidence to support a claim that certain evidence should have been suppressed was known but not raised at the motion to suppress hearing, and the defendant did not ask the trial court during the trial to reconsider the motion to suppress in order to take new evidence into account, a court does not abuse its discretion in declining to reconsider the issue of admissibility at the motion for new trial. And here, the Court found, no reason was shown why appellant was not available to testify at the motion to suppress hearing, at which time the trial court could have made a factual determination based on credibility of witnesses and other evidence as to whether the disputed statements were made and, if made, a legal determination as to whether the statements created an improper inducement by the hope of benefit or fear of threat. Accordingly, the Court rejected appellant's assertion that the trial court erred by finding at the pre-trial hearing that appellant's custodial statement was admissible or that it abused its discretion by later denying his motion for new trial on this ground.

Sentencing; O.C.G.A. § 17-10-6.2(c)(1)

Evans v. State, S16G0280 (11/21/16)

Appellant was indicted on one count of child molestation, alleged to have occurred between January 1, 2009 and August 31, 2009, and two counts of sexual exploitation of children, that were alleged to have occurred on or about January 21, 2010. He was convicted of child molestation and one of the counts of sexual exploitation of children, and acquitted of the other count. At sentencing, the trial court opined that the law provided that it could not sentence appellant to less than the mandatory minimum of five years to serve in prison for the child molestation conviction because the conviction for sexual exploitation of children was a "relevant similar transaction," which precluded a downward deviation under O.C.G.A. § 17-10-6.2(c)(1)(C). The Court of Appeals affirmed, finding that the trial court had correctly applied O.C.G.A. § 17-10-6.2(c)(1)(C). *Evans v. State*, 334 Ga.App. 104 (2015). The Supreme Court granted appellant's petition for a writ of certiorari.

The Court stated that the term "relevant similar transaction" is not defined in O.C.G.A. § 17-10-6.2, but when that statute was enacted in 2006, "similar transaction" had a well-established legal meaning, and referred to an act independent of the criminal charge at issue, but similar to it. Also, former USCR 31.3 (A) - (D) addressed how evidence of independent acts extrinsic to the charge at issue might be admitted at trial for purposes recognized under Georgia's old Evidence Code; their purpose was to aid the trial court in preventing improper evidence that might prejudice the defendant from being placed before the fact finder. And, former USCR 31.3 (F) recognized that admission of evidence of extrinsic acts before the fact finder was not an issue when the court, sitting alone, sentenced a defendant after a finding of guilt, and thus specified that the procedures of former USCR 31.3 for placing such evidence before the fact finder "shall not apply to sentencing hearings."

And, the Court stated, USCR 31.3 (F) was simply a recognition that a trial court's role in sentencing is significantly different from its role in determining whether evidence of independent acts could be placed before the jury under the strictures of former USCR 31.3. Under O.C.G.A. § 17-10-2(a)(1), a sentencing hearing in a felony case is to be had after the jury is dismissed, and "[i]n the hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or nolo contendere of the accused, or the absence of any prior conviction and pleas." When the court determines sentencing, there is no prohibition on its consideration of evidence presented during the trial. Rather, when sentencing, a trial court may consider any evidence that was properly admitted during the guilt-innocence phase of the trial. Further, as to sentencing, each count stands alone; thus, when a trial court considers the appropriate sentence for Count 1 of an indictment, it is the only criminal charge at issue, and not any other counts in the indictment. It is in that light that the sentencing provision of O.C.G.A. § 17-10-6.2(c)(1)(C) must be read; when the trial court considers sentencing on any specific count, a similar act not included in that count is independent to it such that, even if it is charged in the same indictment, it can be a "relevant similar transaction" so as to preclude a downward modification of sentencing. Thus, the Court concluded, the commission of multiple separate sexual offenses may, or may not, be prosecuted as one action, but the presence of such "relevant similar transactions" prevents a downward modification of the sentence to be afforded such an offender, regardless of the specifics of the prosecution.

In so holding, however, the Court stressed that there must be *separate* "transactions". Thus, the Court opined, a defendant can, for what is essentially one sequence of events in which crimes are committed in rapid succession be found guilty of multiple crimes; that defendant would not, however, be the repeat offender that the General Assembly has focused upon. For instance, the crimes of enticing a child for indecent purposes and child molestation are both defined as "sexual offenses" under O.C.G.A. § 17-10-6.2(a), but the two crimes can occur sequentially, such as when the defendant persuades a child to go to his bedroom, where the defendant touches the victim in an indecent manner; in such circumstances, the enticement offense is complete before the child molestation act occurs. And, the two crimes do not merge as a matter of law, as each crime has an element that is not necessary to prove the other crime. In such a scenario, the defendant has engaged in one "transaction" that has resulted in two guilty verdicts, pursued through the same prosecution, but he has not, by virtue of this one sequence of events, become the repeat offender addressed by O.C.G.A. § 17-10-6.2(c)(1)(C). Such was not the case here, however, because the acts that appellant was convicted of committing were well separated in time and were not part of one sequence of events.

Gang Evidence; Discovery

Cushenberry v. State, S16A1039 (11/21/16)

Appellant was convicted of felony murder and conspiracy to commit armed robbery in connection with a shooting death. Appellant and co-indictee Jordan were tried together. His two other co-indictees, Finley and Taylor, were tried separately. Eleven days before appellant's trial started, the State gave appellant's counsel booking photographs of appellant and Finley and identified as a witness Sergeant Jesse Hambrick, who was responsible for gang intelligence. On the following day, ten days before trial, the State gave appellant's counsel documents regarding an examination of the tattoos on appellant's and Finley's faces that noted their similarity to tattoos on self-proclaimed Bloods gang member Lil Wayne.

On the Thursday before trial, the sheriff's office executed search warrants to photograph any other tattoos on appellant and Finley and all of the tattoos on Jordan and Taylor. The next day — the Friday before trial — the prosecutor received the additional photographs of appellant's tattoos from the sheriff's office and filed a notice of discovery, which included the photographs of appellant and related pictures of Lil Wayne, with the trial clerk's office at 10:39 a.m. That afternoon around 4:45 p.m., the prosecutor hand-delivered to appellant's counsel a compact disc with these photographs. Appellant's counsel had a problem accessing the contents of the disc, however, and she was unable to view the pictures until the Monday morning that trial began. That morning, the prosecutor provided additional discovery, which included, in pertinent part, a video of appellant's tattoos being photographed, the photographs of the co-indictees' tattoos, and copies of photographs from the MySpace pages of appellant and others.

After the jury was selected, appellant's counsel argued to the court that she was unable to effectively assist appellant because she had no opportunity to review and prepare to rebut the evidence provided on Friday and that morning, and she moved to exclude the evidence or to continue the trial. The trial court denied both motions, but offered appellant's counsel an opportunity to interview the State's gang expert, Sergeant Hambrick, about his expected testimony regarding this gang evidence. The court pointed out that Sergeant Hambrick was local, and the State agreed to make him available to the defense. This exchange took place seven days before Sergeant Hambrick testified in what turned out to be a ten-day trial.

Appellant first argued that the trial court should have granted his motion to exclude the gang evidence that was provided to the defense on the Friday before and the morning of trial because the late disclosure violated O.C.G.A. § 17-16-4, which generally requires the prosecutor to make available to the defense no later than ten days before trial all tangible evidence that the State intends to use at trial. But, the Court noted, the trial court found that the prosecutor had not acted in bad faith, but instead acted promptly as he received new evidence and the record indicated that the State's investigation into whether the crimes were gang-related had started in earnest only about a week earlier, after Jordan's trial ended. Furthermore, appellant's trial counsel testified at the motion for new trial hearing that she did not believe that the prosecutor acted in bad faith. Moreover, the Court found, the late-disclosed evidence did not alter appellant's theory of defense and appellant failed to show prejudice by receiving the evidence on the eve of trial.

Appellant also argued that the prosecutor committed misconduct by violating O.C.G.A. § 17-16-4, and specifically by delaying service of the gang-related evidence that the prosecutor received on the Friday before trial for six hours — from 10:39 a.m. to 4:45 p.m. But, the Court held, appellant did not raise this claim at trial, however, and so it was not properly

preserved for appeal. But, the Court noted, in any event, when a defendant alleges a factually specific claim of prosecutorial misconduct, the defendant must show actual misconduct and demonstrable prejudice to his right to a fair trial in order to reverse his conviction. And here, the Court found, appellant did not show that the prosecutor acted in bad faith or that the defense was demonstrably prejudiced, much less that any violation of O.C.G.A. § 17-16-4 rose to the level of a violation of constitutional due process.

Next, Appellant contended that even if the trial court did not err in denying exclusion of the late-disclosed evidence, the court erred in denying his motion to continue the trial. But, the Court found, instead of delaying the entire trial, the court gave appellant the opportunity to interview the State's gang expert witness, who testified a full week later. Providing this remedy instead of a continuance was well within the trial court's discretion under the circumstances, particularly because the allegations of gang affiliation should not have surprised appellant's counsel and did not alter his defense theory.

Finally, appellant argued that the trial court erred in granting the State's motion to quash his subpoena of the prosecutor to the motion for new trial. Appellant contended that the ruling was reversible error because no other witness could testify about when the prosecutor received the evidence, what action he took in handling the evidence, or why he delayed service for six hours on the Friday before trial. But, the Court found, the trial court noted that the subpoenaed prosecutor was handling the motion for new trial for the State, making it difficult for him also to be a witness, and the court concluded that the prosecutor's testimony was unnecessary because there was sufficient evidence of his handling of the gang evidence from other sources. In particular, the record included the date and time of the discovery filing at issue and the testimony from appellant's trial counsel about when and how she received the evidence from the prosecutor. Additionally, other witnesses from the sheriff's or district attorney's offices could have been called to testify about when the prosecutor received the compact disc containing the photographs and what his next steps were. Moreover, appellant failed to show prejudice from the late disclosure of this evidence and failed to preserve a prosecutorial misconduct claim during trial, and that provided a sufficient basis for denying appellant's claims regardless of the prosecutor's precise actions and motivations. Accordingly, the trial court's decision to quash the subpoena to the prosecutor was not an abuse of discretion.

Bench Conference; Right to Be Present

Williams v. State, S16A0834. S16A0835 (11/21/16)

Appellants, Williams and Smith, were convicted of murder and other offenses. Smith contended that the trial court committed reversible error by depriving her of her constitutional right to be present during all critical stages of her trial. The Court disagreed.

The record showed that during voir dire on the first day of trial, a Monday, one of the jurors asserted a hardship based on travel plans he had scheduled for the upcoming weekend; at the time, the trial court denied the hardship claim, and the juror was ultimately selected for the jury. The jury began deliberating on that Friday but failed to reach a verdict by the end of that day. Prior to the weekend recess, the juror in question inquired of the trial judge whether the seating of an alternate juror would be possible. This inquiry was made in open court, with the jury and all parties and their counsel present. Counsel thereupon approached the bench and engaged in an unrecorded colloquy with the court. Immediately following this bench conference, the trial court went back on the record and announced its decision, due to the juror's previously disclosed, pre-existing travel plans, to excuse the juror and seat the first alternate in his stead. The trial court instructed the jury that, when it reconvened on the following Monday, it would be required, as a newly constituted jury, to restart its deliberations in their entirety. Smith was present in the courtroom when this announcement was made and expressed no opposition or objection to the trial court's decision at the time.

The Court noted that Smith had the right to be present at the bench conference at which the juror's excusal was discussed. However, the Court noted, Smith was present in the courtroom while the bench conference was occurring and, though she was not privy to the discussion, she was present during the juror's inquiry before the bench conference and the court's announcement immediately thereafter that, due to the juror's previously disclosed hardship, the juror was being excused and replaced with an alternate. Thus, at the time, Smith was not only aware that she had been excluded from participation in the bench conference but also informed as to the nature of and reasons for the decision that was made outside her presence. In remaining silent in the face of this knowledge, Smith acquiesced in her trial counsel's waiver of her presence at the bench conference.

Statements; Motions to Suppress

Shepard v. State, S16A0884 (11/21/16)

Appellant was convicted of murder. He contended that the trial court erred in denying his motion to suppress his custodial statements. Specifically, appellant argued that the detectives told him not only that his cooperation would be made known to the prosecuting attorneys, but that they would act as his advocates and pass along his requests for lenient treatment. Thus, he argued, these assurances amounted to an improper promise of benefit. The Court disagreed.

The record showed that one detective said that he would "stand with [appellant] 100%," and the same detective answered, "yeah," when appellant asked if he possibly could get "an arrangement." And when appellant said that he wanted to make a "deal" with the district attorney, the other detective also responded, "yeah." After the second detective used the term "accessory," appellant asked if he would "get time" for that, and the detective said that it was something they had to discuss with the district attorney. Appellant also expressed his willingness "to give you what you need because you can help me," and he wrote down the terms of a possible arrangement to be passed along to the district attorney, including his offer to plead guilty to a lesser charge without jail time.

The Court noted that the statutory reference to "the slightest hope of benefit" means promises of reduced criminal punishment — a shorter sentence, lesser charges, or no charges at all. And here, the Court found, the record supported the trial court's finding that appellant's statement was not given as a result of any promise of reduced criminal punishment. The detectives never

told appellant that he would not be charged with murder, that he would be charged with a lesser crime, or that he would, in fact, receive a shorter sentence if he gave a statement. The noncommittal statements by the detectives did not approach the type of promise that would render his statement involuntary. The detectives merely acknowledged that appellant wanted a deal, that he perhaps could get some arrangement, and that they would talk with the district attorney, but it was clear to appellant that any agreement would require the assent of the district attorney. Appellant's personal belief that talking to the detectives would gain him favor from the State does not render his statements involuntary under former O.C.G.A. § 24-3-50. Accordingly, the Court concluded, because the record supported the trial court's finding that, under the totality of circumstances, appellant's statement was not induced by a promise of reduced criminal punishment, the court did not err when it denied his motion to suppress that statement.