

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING DECEMBER 4, 2009

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## THIS WEEK:

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- Accident; Self-Representation
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### ***Motion to Vacate Void Sentence***

*Harper v. State, S09A1019*

Appellant was convicted of murder in 1982. He filed a motion to vacate void judgment, claiming the trial court lacked jurisdiction to hear his case and its judgment was void. The trial court denied his motion and he appealed. The Court held that prior to its recent decision in *Chester v. State*, 284

Ga. 162 (2008), the law in Georgia was that a petition to vacate or modify a judgment of conviction was not an appropriate remedy in a criminal case. In *Chester*, the Court held that OCGA § 17-9-4 allows criminal defendants to challenge their convictions at any time by filing any motion or pleading alleging their conviction is void. The Court determined that “[t]his case and the many cases filed in the year since *Chester*, however, have exposed the deficiencies of that opinion and we find it was wrongly decided.” The Court therefore overruled *Chester*. The law now is that there are only three ways to challenge a conviction after it has been affirmed on a criminal direct appeal: 1) an extraordinary motion for new trial, OCGA § 5-5-41; 2) a motion in arrest of judgment, OCGA § 17-9-61; or 3) a petition for habeas corpus.

*Harris v. State, S09G0870*

The Court granted certiorari to decide whether the Court of Appeals erred in concluding that a riding lawnmower is a “motor vehicle” as that term is used in the statute punishing theft of a motor vehicle, OCGA § 16-8-12 (a) (5) (A). The Court held in a lengthy opinion that a riding lawnmower is not a “motor vehicle” as that term is used in the motor vehicle theft statute. It therefore reversed appellant’s conviction, but noted that since he was also convicted of theft by taking, on remand that conviction will be “unmerged” from the reversed count and he should be sentenced on that count. Moreover, because the value of the stolen lawnmower exceeded \$500.00, appellant still will face a sentence of up to 10 years, and so he may receive the same sentence, particularly given his recidivist status.

## Right to Counsel

*Wilkerson v. State, S09A0840*

Appellant was convicted of murder. He contended that the trial court erred in permitting him to waive his right to counsel and represent himself at trial and further erred in informing him that, once he made the decision to represent himself, he could not change his mind and request representation by counsel. The Court first held that the record reflected that the trial court, through its colloquy, demonstrated that appellant made a knowing and intelligent waiver of his right to counsel. Once a defendant properly waives his Sixth Amendment right to counsel, that right is no longer absolute. The right to counsel, however, does not evaporate following a valid waiver, and a defendant may make a post-waiver request for counsel if, for example, he discovers he is overwhelmed by the trial process. It is in the trial court's discretion whether to grant or deny a defendant's post-waiver request for counsel. Here, the trial court erred by telling appellant that once he waived his right to counsel he would no longer be eligible for appointed counsel. The better practice would have been for the trial court simply to caution appellant that, due to his assertion of the right to represent himself on the day of trial and the potential disruption of trial proceedings, the court would *likely* deny any mid-trial request for counsel. Nevertheless, the Court held that under the particular circumstance of this case, there was no error. The Court found that it appeared that neither appellant nor his standby counsel believed the trial court when it made the erroneous statement to appellant. Furthermore, neither appellant nor his standby counsel objected to this erroneous statement of the law.

## Sex Offender Registry; Constitutionality

*Dunn v. State, S09A1369*

Appellant's probation was revoked when he failed to notify the Sheriff that he had moved into a temporary address before moving into a permanent address. Appellant argued that OCGA § 42-1-12 violated the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that its requirements regarding notification of a change of address are vague. Specifically, he

argued that the statute is unconstitutionally vague in failing to define the term "temporary residence." The Court disagreed. The Due Process Clause requires that the law give a person of ordinary intelligence fair warning that specific conduct is forbidden or mandated. Vagueness may invalidate a criminal law on either of two bases: A statute may fail to provide notice sufficient to enable ordinary people to understand what conduct it prohibits or requires, or the statute may authorize and encourage arbitrary and discriminatory enforcement. Vagueness challenges to criminal statutes that do not implicate First Amendment freedoms must be examined in the light of the facts of the case to be decided. Here, the Court found that the "temporary residence" provides fair warning to persons of ordinary intelligence as to what is required to comply with the statute. The Court also found that the term "temporary residence" does not in any way authorize and encourage arbitrary and discriminatory enforcement.

Appellant further asserted that OCGA § 42-1-12, as applied to him, violated the guarantees of equal protection under the law. Specifically, he argued that as a sexual offender residing in Georgia, he has the obligation to notify the sheriff of his resident county of any change of his residence within 72 hours, but that a sexual offender who is not a full-time resident of Georgia is provided at least 14 days before he or she must provide any residence information to the sheriff. The Court held that appellant's arguments were based on a misreading of the statute. Under OCGA § 42-1-12 (e) (7), a nonresident sexual offender is required to register if he or she: (1) "enters this state for the purpose of employment or any other reason for a period exceeding 14 consecutive days . . ."; or, (2) "enters this state for the purpose of employment or any other reason . . . for an aggregate period of time exceeding 30 days during any calendar year . . ." Contrary to appellant's reading, OCGA § 42-1-12 (e) (7) does not give a nonresident sexual offender who falls under its definition license to remain in this State for fourteen consecutive days without providing notification to the appropriate sheriff. Rather, it brings such a person within the ambit of OCGA § 42-1-12; the *obligations* of those who are required to register are unaffected by the specifications in OCGA § 42-1-12 (e) (7). OCGA § 42-1-12 (e) declares who shall register; OCGA § 42-1-12

(f) prescribes the obligations of those persons. When OCGA § 42-1-12 (e) (7) applies to a hypothetical nonresident sexual offender, that person, like appellant, must update his information within 72 hours of a change of address as required in OCGA § 42-1-12 (f) (5). Since appellant was charged with failing to do that very thing; any nonresident sexual offender who is required to register by virtue of the specification of OCGA § 42-1-12 (e) (7) is equally subject to the requirement that he or she register a new address within 72 hours of changing that address, and equally subject to being charged with a violation.

## Prior Consistent Statements; Conspiracy

*Mister v. State, S09A1338*

Appellant and two co-defendants were charged with malice murder and other related charges against two victims. The two co-defendants plead guilty to voluntary manslaughter and aggravated assault prior to trial. Appellant went to trial and was convicted of felony murder and aggravated assault. He contended that the trial court erred in permitting the State to question a co-defendant about his prior consistent statements that he gave regarding the crimes at his guilty plea hearing about one month before appellant's trial. A witness's veracity is placed in issue so as to permit the introduction of a prior consistent statement if affirmative charges of recent fabrication, improper influence, or improper motive are raised during cross-examination. To be admissible to refute the allegation of recent fabrication, improper influence, or improper motive, the prior statement must predate the alleged fabrication, influence, or motive. Here, the prior statements by the co-defendant at his guilty plea hearing did not predate any improper motive he may have had to testify against appellant, which clearly existed by the time of the plea hearing where the statements were made and where the co-defendant pled guilty to reduced charges in exchange for cooperating against appellant. The trial court therefore erred. However, the Court held, the error was harmless given the overwhelming evidence of appellant's guilt.

Appellant contended that the trial court erred by not defining the object of the conspiracy for the jury. The Court noted that appellant was not charged with the substan-

tive crime of conspiracy. OCGA § 16-4-8. Instead, the charge on conspiracy was given as a theory by which the jury could connect him as a party to the crimes in question based on his agreement with his two co-defendants. Whether a conspiracy exists is a question for the jury to determine. Here, the trial court did not charge that the object of the uncharged conspiracy was, as the State suggested, a robbery, or was, as appellant suggested, a drug sale. It was therefore not error, in this situation, to leave that determination to the jury.

### **Brady; Giglio**

*Gonnella v. State, S09A0985*

Appellant was convicted of felony murder and possession of a firearm during the commission of a crime. He contended that the State violated *Brady* and *Giglio* by failing to reveal the deal it had with his accomplice who was the State's primary witness against him. The Court agreed and reversed appellant's convictions. The record showed that prior to trial the accomplice, who was charged with malice murder, pled to voluntary manslaughter and received a sentence of 20 years (15 years incarcerated and five years probation) in exchange for his truthful testimony. This information was provided to appellant. The State did not provide to appellant a plea document that allowed for the accomplice to request a sentence reduction following his testimony. The Court held that by failing to provide appellant with a crucial detail regarding the accomplice's plea agreement, the State deprived appellant of the ability to impeach the accomplice by demonstrating a motive for him to lie; i.e., that in testifying in such a way so as to secure appellant's conviction, the accomplice would gain an avenue, provided by the State, by which he might possibly arrange for a lighter sentence for himself. The fact that the accomplice's attempt after trial to have his sentence reduced was unsuccessful was irrelevant because it was the deprivation of appellant's ability to fully cross-examine the accomplice based upon the State's agreement with him that constitutes the denial of due process. Nor was the failure to produce this information harmless since the accomplice was the State's primary witness and the jury acquitted appellant of malice murder.

### **Impeachment Evidence; Expert Witness**

*Howard v. State, S09A1083*

Appellant was convicted of murder and numerous other crimes. He contended that the trial court improperly limited his cross-examination of his co-defendant. The co-defendant, whose trial was separated from appellant's, agreed to testify against appellant. The evidence showed that the co-defendant had no deal with the State regarding charges or sentences in exchange for his testimony. Before he testified, the trial court ruled that appellant could question the co-defendant about the charges pending against him, but not about the possible sentences he faced for those charges. The Court found no error under *Watkins v. State, 276 Ga. 578 (2003)*. Appellant was allowed to elicit that the witness was charged with the same murder, the same aggravated assault, and the same attempted armed robbery as appellant and that those charges were still pending. Thus, while the jury was not informed about the specific sentences facing the witness—and facing appellant, as to whom such punishment information, offered directly, would clearly be inadmissible,—the jury knew the witness faced very serious charges like murder that obviously can carry significant sentences. Appellant also cross-examined the witness regarding whether he hoped to gain favorable treatment on the charges due to his testimony. In response, the co-defendant admitted several times that, although he had no deal with the State, he hoped the charges against him would be *dismissed* because of his testimony—a benefit far greater than any sentence reduction. Therefore, the trial court did not abuse its discretion in limiting appellant's cross-examination.

Appellant contended the trial court erred in prohibiting him from calling an eyewitness identification expert to testify as to the issues affecting the reliability of eyewitness testimony. The court held that if eyewitness identification of the defendant is a key element of the State's case and there is no substantial corroboration of that identification by other evidence, trial courts may not exclude expert testimony without carefully weighing whether the evidence would assist the jury in assessing the reliability of eyewitness testimony and whether expert eyewitness testimony is the only effective way to reveal any weakness in

an eyewitness identification. Here, the Court found, there was substantial corroboration of the eyewitness identifications. First, the co-defendant's testimony entirely corroborated the eyewitnesses' identifications. Moreover, another witness, who heard but did not see the shooting, gave a description of the shooter's car that matched that given by the eyewitnesses and wrote down the car's license plate number. The car was stopped by the police within minutes, the license plate number matched that given by the witness, the driver of the car fit the eyewitnesses' description of the shooter, the passenger in the car fit the description of the person that an eye witness saw moving from the passenger seat to the driver's seat during the shooting, and a shirt was found in the back seat that matched the description of another eye witness of the shirt worn by the shooter. Because the eyewitness identifications were substantially corroborated, the trial court did not abuse its discretion in excluding the expert testimony.

### **Out-of-Time Appeal**

*Ingram v. State, A09A2013*

The trial court denied appellant an out-of-time appeal. He contended the trial court should have permitted him or his attorney to testify regarding who was at fault for failing to timely appeal from the convictions. Out-of-time appeals are permitted if the appellant was denied his right of appeal through counsel's negligence or ignorance, or if the appellant was not adequately informed of his appeal rights. An out-of-time appeal serves as the remedy for a frustrated right of appeal for a criminal defendant whose conviction has not been reviewed by an appellate court. If a timely direct appeal was not taken as the result of ineffective assistance of counsel, then an out-of-time appeal is appropriate. An out-of-time appeal is not authorized, however, if the loss of the right to appeal is not attributable to ineffective assistance of counsel but to the fact that the defendant himself "slept on his rights." Here, the trial court denied appellant an out-of-time appeal because appellant could not give the trial court a sufficient reason for why appellant waited five years before requesting an appeal. Although appellant's trial counsel was in the courtroom and stood ready to testify, the trial court heard only from appellant. The Court held that it was error for the trial court

to focus on the timing of the motion for an out-of-time appeal rather than on whether the initial failure to pursue a timely direct appeal was attributable to trial counsel or to the defendant himself. Because the trial court failed to conduct the requisite inquiry into whom ultimately bore responsibility for the failure to file a timely appeal —appellant or his attorney, the case was remanded for a hearing.

## **Sexual Battery; Apprendi**

*Hernandez v. State, A09A1462*

Appellant was convicted of sexual battery of a 5-year-old girl and the trial court sentenced him to five years in prison. Appellant argued under *Apprendi v. New Jersey*, 530 U. S. 466, 490, 120 SC 2348, 147 LE2d 435 (2000), that the trial court erred in sentencing him for felony sexual battery because the jury did not make a specific finding as to the victim's age. The Court held that *Apprendi* stands for the proposition that unless a criminal defendant waives his right to a jury trial, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. The dispositive question is one not of form, but of effect. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact no matter how the State labels it must be found by a jury beyond a reasonable doubt. However, the Court found, even if there was a constitutional error here under *Apprendi*, that error would be harmless, citing *Washington v. Recuenco*, 548 U. S. 212, 218-222, 126 SC 2546, 165 LE2d 466 (2006). Here, appellant did not contest the age of the victim at trial. There was unchallenged evidence from the victim's mother as to the date of the offense, the victim's age, and the victim's birth date. Further, the jury was allowed to view a videotaped interview of the victim made after the offense. Therefore, because the victim's age was uncontested and overwhelming evidence demonstrated that the victim was under the age of 16, any error was harmless.

## **Right to Remain Silent**

*Adams v. State, A09A1019*

Appellant was convicted of possession of cocaine. He contended that the trial court

erred in denying his motion for a mistrial after an officer commented upon his silence. The evidence showed that the officers noticed appellant walking in a parking lot. When appellant noticed the officers, he walked over to some bushes and made a throwing motion. The officers later recovered a baggie of cocaine from the area. During the trial, the prosecutor asked "When you approached Mr. Adams, what did you say to him?" The officer answered, "I asked him what did he throw in the bushes. He never would say when I asked what he threw in the bushes." Appellant's immediate motion for mistrial was denied.

In criminal cases, a comment upon a defendant's silence or failure to come forward is not allowed, even where the defendant had not received *Miranda* warnings. Here, the Court found that the officer's testimony was an improper comment upon his silence, but the trial court did not commit reversible error in denying the motion for mistrial. Where an instruction by the trial court would cure any unfair prejudice to the defendant, a mistrial is not essential to the preservation of the right to a fair trial. Appellant would have been entitled to a curative instruction but he failed to request one. Furthermore, the record revealed that after the court denied appellant's motion for mistrial, the prosecutor did not follow up on the complained-of testimony with either that officer or any other witness. Therefore, the Court found, since appellant did not request a curative instruction and sought only the declaration of a mistrial, the trial court did not abuse its discretion in denying appellant's motion because a mistrial was not essential to preserve appellant's right to a fair trial.

## **Double Jeopardy; Bond Restrictions**

*Strickland v. State, A09A0988*

Appellant appealed from the denial of her plea in bar following the amendment of conditions of her bond on a 5-count DUI accusation. The record showed that after appellant waived arraignment, the trial court granted the State's motion that showed appellant had been convicted in Georgia three times for driving under the influence, and after her most current arrest, she had a blood alcohol level of .326. The State's motion sought to restrict her driving privileges to going to work, going to the hospital for substance abuse treatment,

going to school, or going to court proceedings. The State further requested that appellant only operate a motor vehicle with an ignition interlock device and that she submit to a DUI court evaluation. The trial court granted the State's motion.

Double jeopardy protects against three types of abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. Here, the question was whether the conditions imposed constituted punishment for double jeopardy purposes. The Court held that trial courts are authorized to release a person on bail if the court finds that the person: (1) Poses no significant risk of fleeing from the jurisdiction of the court or failing to appear in court when required; (2) Poses no significant threat or danger to any person, to the community, or to any property in the community; (3) Poses no significant risk of committing any felony pending trial; and (4) Poses no significant risk of intimidating witnesses or otherwise obstructing the administration of justice. The Court held that considering appellant's three prior convictions for driving while under the influence, the measures were rationally related to an alternative purpose as they were designed to prevent appellant from being a danger to the community by committing future acts of driving under the influence while she was awaiting trial. The Court further held that suspending a driver's license or placing restrictions on it is the revocation of a voluntarily granted privilege, which is a traditional attribute of a remedial action. Therefore, the Court determined, conducting a hearing to modify appellant's bond conditions and placing limitations upon her driving privileges, predicated upon the necessity to protect the welfare and safety of the citizens of Georgia from a recidivist offender of driving under the influence, was not punishment, nor was the hearing prosecution, for the purposes of double jeopardy.

## **Enticing a Child for Indecent Purposes; Asportation**

*Kelley v. State, A09A2004*

Appellant was convicted of enticing a child for indecent purposes and solicitation of sodomy. The evidence showed that appellant sent text messages to a 15-year-old girl

suggesting that the two get together for sex. The police became involved and they set up a sting. The victim, at appellant's suggestion, agreed to meet at a designated time and place. The police accompanied the victim to the designated place and when appellant showed up, he was arrested. Appellant argued that his conviction must be reversed because the State did not present evidence of asportation at trial. Specifically, he contended that the State provided no evidence of a "taking" of the victim; rather, the evidence showed that the victim was not enticed but was acting on behalf of the police when she went to meet him.

Pursuant to OCGA § 16-6-5 (a), "[a] person commits the offense of enticing a child for indecent purposes when he or she solicits, entices, or takes any child under the age of 16 years to any place whatsoever for the purpose of child molestation or indecent acts." The offense also includes the element of "asportation," but asportation does not require proof of a physical taking. Instead, the element of asportation is satisfied whether the "taking" involves physical force, enticement, or persuasion. Here, the Court held, the asportation element was satisfied by ample evidence of enticement; appellant initiated contact with the victim, asked her to have sexual intercourse with him, offered her money to do so, and arranged a place to pick her up so that they could have sex at his home.

Appellant also argued that his conviction must be reversed because the trial court failed to charge the jury on asportation. The record showed that the trial court charged the jury using the language of OCGA § 16-6-5 (a). The Court noted that the trial court "waived" the requirement that appellant submit a written request to charge on asportation. The Court held that while the trial court has the authority to waive the requirements of Uniform Superior Court Rule 10.3 regarding written requests to charge, the trial court can not relieve defense counsel of his responsibility to preserve any alleged error for appeal. Here, defense counsel merely requested the court to give "a" charge on asportation but not which charge on asportation. The Court stated that it "must know precisely which words counsel wanted the court to say. Otherwise we cannot say whether the failure to say those words was erroneous.... If the defendant had orally specified precisely which words he wished spoken, the trial court's 'waiver' would have been effective and the er-

ror would have been preserved for appeal. But counsel can not expect a trial court to devise a jury instruction based on a non-specific request for a charge on a particular principle of law. The trial judge might choose words with which counsel would have been displeased. Then there would be an enumeration of error about the words chosen. The present enumeration of error presents nothing for review."

### **Speedy Trial**

*Gifford v. State, A09A2367*

Appellant appealed from the denial of his motion for discharge and acquittal, contending that the State violated his right to a speedy trial under OCGA § 17-7-170. The Court agreed and reversed. The record showed that appellant was indicted and that he filed a demand for speedy trial. He was not tried within that term of court or the next even though jurors were impaneled and sworn in each term. The State argued that appellant waived his demand because his counsel filed conflict letters and that appellant was not physically in court when his case was called.

First, the Court held that the filing of a notice of conflict letter does not constitute a waiver of the defendant's speedy trial demand, since the filing of the letter is mandatory under USCR 17.1 and in any event, the letters were filed in the terms succeeding the two terms of court at issue. Second, the Court held that the reason appellant was not physically present in court was that he remained in state custody and had not been returned from prison to the courtroom. The Court held that because a trial court has authority to compel an incarcerated defendant's presence for trial, such a defendant does not violate the requirements of OCGA § 17-7-170 by not being physically present due to his incarceration. Therefore, the trial court erred by denying appellant's motion for discharge and acquittal.

### **Probation Revocation**

*Bergen v. State, A09A2350*

Appellant appealed from the revocation of the balance of his 12-year sentence. OCGA § 42-8-34.1 (c) provides for the revocation of up to two years of probation for the violation of any general provision; subsection (d) authorizes the revocation of the balance of probation if the defendant is shown to have committed a

felony; and subsection (e) provides for revocation of the balance if the defendant is shown to have violated a special condition. OCGA § 42-8-34.1 (a) defines a "special condition" as "a condition of a probated or suspended sentence which: (1) Is expressly imposed as part of the sentence in addition to general conditions of probation and court ordered fines and fees; and (2) Is identified in writing in the sentence as a condition the violation of which authorizes the court to revoke the probation or suspension and require the defendant to serve up to the balance of the sentence in confinement." Here, the trial court found that appellant committed a misdemeanor and also violated unspecified "special conditions" of his probation. The Court found that the sentencing form at issue in this case was identical to that discussed in *Gamble v. State*, 290 Ga. App. 37 (2008) in that it failed to distinguish between general and special conditions of probation and failed to specify that a possible consequence of violating a special condition was the revocation of a probationer's entire probation. Therefore, since appellant was not found to have committed a felony and because the sentencing form did not specify that a violation of its conditions would result in the revocation of his entire probation, revocation of more than two years of appellant's probation was prohibited.

### **Search & Seizure**

*State v. Delvechio, A09A1571*

The State appealed from an order suppressing evidence found in a hotel room. The record showed that the defendants checked into the hotel by using a credit card issued to someone else. The police were called; they made a warrantless entry into the hotel room and discovered the evidence. The trial court ruled that defendants, as guests of the hotel, had a reasonable expectation of privacy in their room. The Court, however, agreed with the State that the defendants had no standing because they obtained the room through fraudulent means. The Court held that the hotel had the authority to evict the defendants from the room once it learned that they had checked into the hotel using a fraudulent credit card. Under Georgia law, a guest is one who pays a fee to the innkeeper. OCGA § 43-21-1 (1). As the defendants had obtained the room through a fraudulent credit card that would not be honored by the credit card company,

the defendants were not paying a fee for the room, and therefore were not guests within the meaning of OCGA § 43-21-1 (1). Thus, they could be evicted from the room for cause, and if they were being evicted from the hotel for cause, under OCGA § 43-21-3.1 (b) they were not entitled to notice of the eviction. Therefore, they lacked standing and the order suppressing the evidence was reversed.

### **Videotape; Business Records**

*Harper v. State, A09A0878, A09A1091, A09A1833*

Appellants, Harper, Williams, and Reed, were convicted of numerous crimes including armed robbery and aggravated assault. Williams was also convicted of kidnapping with bodily injury. They argued that the trial court erred in admitting a videotape showing the armed robbery of the jewelry store. Specifically they alleged that 1) the store manager who authenticated the videotape was lying face down on the floor during the robbery and thus could not see what was happening; and 2) there was a discrepancy with the time stamp. The Court noted that the store manager acknowledged that the time stamps displayed were incorrect and also that the videotapes pulled from the machines were not routinely checked, but viewed only when necessary. However, other than the clock not being correctly set, the manager testified, the surveillance camera system, including the recording machine, was operating properly on the date in question. He recalled further that he personally had loaded a blank tape into the recording machine that morning. The store manager further testified that he had viewed the videotape at issue and that various particulars captured thereon showed what he had seen that day, before and after he lay on the floor: Masked men rushing into the store; resulting damage to the store's display cases and other property; hammers haphazardly left behind in the store; and the loss of jewelry items. In addition, the store manager testified that other events shown on the videotape were consistent with what he heard while lying on the floor, namely, the sound of breaking glass. Given the store manager's testimony, the Court held that the trial court did not abuse its discretion in allowing the videotape in evidence.

Appellants contended that the trial court erred in admitting the evidence of certain

clothing marked as their respective property. The clothing, which each was wearing when arrested, was taken from them during their intake at the jail. The appellants argued that the property receipts were not properly admitted as business records because of a lack of foundation. The Court disagreed. The sheriff's chief investigator, whose duties included overseeing the operations of the jail, testified that when any suspect was booked, standard procedure required the collection of the suspect's personal clothing and the issuance of a uniform to the individual. The chief investigator further explained how the collected items were then stored and secured. Another investigator, who also was familiar with the procedure for booking individuals, testified that personal clothing was routinely collected from suspects during booking and then stored; that in the normal course of business, the jail created and maintained property receipts listing the personal clothing items collected from each booked suspect and further specifying the location of an inmate's stored items. Through this witness, the State introduced in evidence, pursuant to the business records exception, property receipts that itemized the personal property collected when appellants were booked. Appellants argued that the chief investigator admitted that he had not personally collected and stored the clothing of any of the five defendants and the other investigator admitted that it had never been his duty to take care of inmate's personal belongings and that he had not been present when their personal items were collected or stored away. The Court held that the investigators' admitted lack of personal knowledge, however, did not render the property receipts at issue inadmissible, but went only to the weight of that evidence. The investigators' testimony provided an adequate foundation for the admission of the property receipts, which were properly admitted under the business records exception.

### **Kidnapping; Severance**

*Harper v. State, A09A0878, A09A1091, A09A1833*

Appellants, Harper, Williams, and Reed, were convicted of numerous crimes including armed robbery and aggravated assault in connection with a jewelry store heist. Williams was also convicted of kidnapping with bodily injury. Williams contended that the evidence

of asportation was insufficient to convict him of the kidnapping charge. The Court agreed. Applying the four *Garza* factors, the Court held that the approximately fifteen-foot movement of the store employee to the safe, which was located in the same jewelry showroom, did not constitute the necessary asportation to support a kidnapping conviction. The movement was of minimal duration and occurred during the course of and incidental to the armed robbery and aggravated assault crimes. And it did not significantly increase the danger the employee already faced as a victim of armed robbery and aggravated assault. Accordingly, Williams's conviction for kidnapping with bodily harm was reversed.

Williams and Reed argued that the trial court erred in not granting them a severance from Harper whose defense was antagonistic to their own. The record showed that during opening statements, Harper's attorney stated that Harper was forced into the crimes by Williams and that just about everything the officers would say about the jewelry robbery was true and that Harper would take the stand in his own defense. Williams and Reed then moved for severance which was denied. However, Harper later announced he would not take the stand to testify. Given this departure from what Harper's lawyer had detailed to the jury during opening statement, the two moved for severance again, as well as mistrial, proposing that the trial should continue only as to Harper. They argued that with Harper exercising his right not to testify, they were without any way to rebut the claims detailed by Harper's lawyer during opening statement. They also complained that, in questioning the state's witnesses, Harper's lawyer had alluded to coercion, intimidation, and other such factors that he raised in opening statement. The motions were again denied. The Court held that under *Owen v. State*, 266 Ga. 312 (1996) and *Character v. State*, 285 Ga. 112 (2009), the trial court did not abuse its discretion in denying the motions. The statements of the lawyer for Harper were not evidence and the evidence was overwhelming against Williams and Reed.

### **Accident; Self-Representation**

*Davis v. State, A09A2057*

Appellant, a lawyer, was convicted of DUI and other related offenses. He argued

that the trial court erred by not giving his jury charge on accident and that the trial court erred by failing to warn him of the dangers of self-representation. The Court first held that the defense of accident applies only where it satisfactorily appears there was no criminal scheme or undertaking, intention, or criminal negligence. The defense does not apply to the charges of DUI, reckless driving, or failure to maintain lane, because those offenses concern the defendant's condition while driving and not to any traffic mishap that occurred while he was operating the motor vehicle. Appellant was therefore not entitled to a charge that the accident was unavoidable. Moreover, because accident is an affirmative defense, it is a defense that admits the doing of the act charged but seeks to justify, excuse, or mitigate it. Appellant did not admit to committing any act which constituted the offenses with which he was charged, so he was not entitled to an instruction on accident.

The Court also held that appellant was properly warned of the dangers of self-representation. The record showed that appellant was represented by other counsel, but fired that counsel before trial. Nevertheless, appellant had a young associate from his own law firm sitting with him at trial. The Court held that the determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. The record reflected that appellant was a longstanding member of the Georgia Bar with experience in trying DUI cases. At the hearing on his motion for new trial, appellant, who again represented himself, admitted that he had tried and won DUI cases. Moreover, appellant never denied that he is an experienced, competent trial lawyer and competence in the law evidenced by licensure as an attorney and years of experience in criminal litigation, obviously carries with it an awareness of the dangers of self-representation.

### **Expert Witnesses; Child Abuse**

*Pearce v. State, A09A1055*

Appellant was convicted of aggravated sexual battery, incest, child molestation, and statutory rape. He argued that a nurse practitioner's testimony regarding the "cycle

of abuse" was improperly admitted because she was not qualified as an expert in psychology. He further argued that the nurse practitioner's testimony expressed an impermissible opinion on the ultimate issue of whether the child was a victim of sexual abuse. A licensed registered nurse may be qualified to testify as an expert witness as to matters with the scope of her expertise. The Court found that the nurse practitioner testified extensively concerning her background, training and experience in the field. She was therefore properly qualified as an expert. Moreover, after being qualified as an expert, the nurse practitioner generally explained the child sexual abuse accommodation syndrome by stating that children who are sexually abused may exhibit certain behavioral characteristics, including secrecy, helplessness, fear, and confusion, which may cause them to delay disclosure of the abuse and recant their previous disclosures. She only testified generally about the characteristics of the syndrome, and offered no opinion as to whether the victim suffered from the syndrome. The nurse practitioner further testified that her physical findings during victim's examination were consistent with the sexual assault allegations. Her testimony did not directly address the victim's credibility or express a direct opinion that the child had been sexually abused. As such, the Court ruled, the testimony did not improperly bolster the credibility of the victim or address the ultimate issue before the jury and was properly admitted.

### **Similar Transactions; Jury Charges**

*Corbitt v. State, A09A1087*

Appellant was convicted of incest, rape, and four counts of child molestation. He contended that a similar transaction was improperly admitted because it was too remote in time and not sufficiently similar. The evidence showed that appellant had sexual intercourse with his 13-year-old granddaughter and molested the victim's twin sister. The similar transaction evidence showed that seventeen years earlier, appellant was convicted of indecent exposure after masturbating in the presence of his 13-year-old stepdaughter. The Court held that the evidence was sufficiently similar to allow its admission. The victim was the same age as the victims in this case, appellant was looking at her while he masturbated

in her presence, and he asked her to pull up the bottom of her dress so he could see her leg. The Court held that this evidence was sufficiently similar to demonstrate appellant's lustful disposition and state of mind.

Appellant also argued that the trial court erred by failing to determine that the State had satisfied the three standards set forth in *Williams v. State*, 261 Ga. 640, 642 (b) (1991), before allowing admission of the similar transaction evidence. Specifically, he contended that he was entitled to a new trial simply because the trial court made the specific findings under *Williams* only after the witness had testified. However, the Court found that no harmful error resulted from the trial court's failure to make the *Williams* findings on the record before the witness testified because the evidence presented by the State at the out-of-court hearing was sufficient for the trial court to have concluded affirmatively on the record that each of the requirements of *Williams* had been satisfied.

Finally, appellant argued that the trial court erred in giving essentially the following charge: "Before you may consider evidence of similar offenses or transactions for any purpose, it must be first made to appear and you must be satisfied that this defendant is the same person to whom the evidence of similar transactions pertains. If you believe that has been proven, however, you are strictly limited in your consideration of the evidence as to identity, state of mind or element of the offense charged in the indictment." The Court held that it determined in *Rivers v. State*, 236 Ga. App. 709 (1999), such a charge was erroneous on its face because the language in the charge inadvertently but substantially expanded the limited purposes for which similar transaction evidence can be used. Nevertheless, the Court held that because the evidence against appellant was overwhelming, the error was harmless.