

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 8, 2013

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Chuck Olson
General Counsel

Joe Burford
State Prosecution Support Director

Laura Murphree
Capital Litigation Director

Gary Bergman
State Prosecutor

Clara Bucci
State Prosecutor

Fay Eshleman
State Prosecutor

Al Martinez
State Prosecutor

Todd Hayes
Traffic Safety Resource Prosecutor

THIS WEEK:

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Identification

Thompson v. State, A12A2405 (3/4/13)

Appellant was convicted of burglary. Appellant argued that the trial court erred when it admitted identification evidence because the pretrial photographic lineup was impermissibly suggestive and it tainted the later in-court identification. The record showed that on the night of the burglary, the victim awoke to find two men in her house and her grandson's game console disconnected and placed on the floor near a door leading to her garage. She testified at trial that she got a clear view of the two men and recognized them as neighbors and acquaintances of her daughter. They had spent time at the victim's house and she had seen them around the neighborhood over a period of eight to ten years. She knew one of the men by his name, but did not know the second man's name. The victim subsequently described the second man to her daughter, who told the victim that she knew him by his initials. The

victim gave this information to the police, who determined that appellant was an acquaintance of the first man. An officer showed the victim a photographic lineup containing appellant's picture. From the lineup, she immediately identified appellant as the second man involved in the burglary. Appellant moved to suppress this pretrial identification and any subsequent identification of him by the victim at trial. After a hearing, the trial court denied the motion on the grounds that the photographic lineup had not been impermissibly suggestive and that the victim knew appellant and had recognized him at the time of the burglary. At trial, the State introduced evidence of the pretrial identification, to which appellant's counsel stated that she had no objection. Also at trial, the victim identified appellant as one of the burglars.

Appellant argued that the victim's in-court identification of him was inadmissible because it was tainted by a pretrial identification based upon an impermissibly suggestive photographic lineup, and he advocated for the Court to adopt stricter requirements for pretrial identification procedures. The Court explained that even if the pretrial identification was tainted, the victim's later in-court identification of appellant as the second burglar was not inadmissible, because it did not depend upon the prior identification but had an independent origin. The victim testified that her identification of appellant was based on her familiarity with him as a neighbor and friend of her daughter over a period of years. Consequently, the Court held that her identification of appellant in court was admissible even if the pretrial identification procedures were impermissibly suggestive.

Appellant also argued that the trial court erred in denying his motion to suppress evidence of the victim's pretrial identification of him. But, the Court noted, when the State sought at trial to admit evidence of the photo-

graphic lineup and the victim's identification of appellant from that lineup, appellant's counsel stated: "No objection." In doing so, the Court held, counsel waived any objection, including those raised in his motion to suppress.

Child Molestation; Past Sexual History

Hall v. State, A12A2546 (3/4/13)

Appellant was convicted of child molestation, enticing a child for indecent purposes, statutory rape, and sexual battery, involving two children. Appellant contended that the trial court erred in excluding evidence which showed that one of the children had engaged in sexual intercourse with a man other than appellant approximately thirty minutes before her alleged molestation by appellant. The record showed that appellant offered two girls under the age of sixteen money for sex. He then engaged in sexual intercourse with and performed oral sex on one of the girls (the victim), while in the presence of the other girl. Before the presentation of evidence, the State informed the court that it would not introduce any medical testimony (of injury that could have been attributed to sexual intercourse with the other individual) and indeed, at trial, the State presented no testimony from medical experts.

Appellant contended that the State had elicited what amounted to medical testimony warranting the introduction of evidence that the victim had previously engaged in sexual intercourse with another individual. Appellant pointed to a colloquy in which the prosecutor elicited testimony from the victim that she sought counseling as a result of the incident. Defense counsel argued at trial that by this colloquy, the State had opened the door to the introduction of the victim's prior sexual involvement with another individual. The trial court disagreed and ruled that the introduction of the victim's alleged prior sexual involvement with another individual was not relevant.

Relevant evidence is that which logically tends to prove or to disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or to throw light upon a material issue. Absent a showing of relevance, evidence of a child's past sexual history, including acts committed by persons other than the accused, is inadmissible. Moreover, evidence of a prior molestation or previous sexual activity on the part of the victim is not relevant in a child molestation case to show

either the victim's reputation for nonchastity or her preoccupation with sex. However, the Court stated, where the State introduces medical testimony indicating that the child has been sexually abused or evidence of child abuse accommodation syndrome and connects the child's behavior to that syndrome, evidence that the victim may have been molested by someone other than the accused may be admissible to establish other possible causes for the behavioral and medical symptoms exhibited by the child. Here, appellant conceded that no evidence of child abuse accommodation syndrome was presented. Appellant contended that the State elicited testimony that the victim received "psychological injuries of embarrassment, shame, and a need for counseling," which could have been related to not just the sexual acts involving appellant, but the "combination of sexual acts during the course of the evening."

The Court disagreed with appellant that the victim's testimony that she sought counseling after the incident with him constituted medical testimony indicating that she had been sexually abused. Nor did appellant show that the victim's testimony that she felt embarrassed and ashamed amount to medical testimony, or that feelings of embarrassment and shame were psychological injuries, as he contended. Instead, the Court noted, it has found medical testimony indicating that a child has been sexually abused in cases where medical doctors testified as to their findings after they examined intimate body parts. Accordingly, the Court held that the trial court did not abuse its discretion in excluding evidence of prior sexual abuse committed by a person other than appellant on the ground that such evidence was irrelevant.

Voir Dire; Juror Qualification

Simon v. State, A12A2171 (3/4/13)

Appellant was tried together with two co-defendants and convicted of attempted armed robbery, burglary, and false imprisonment. Appellant contended that the trial court erred in excusing for cause a juror whose daughter had been prosecuted by one of the assistant district attorneys ("ADAs") who was prosecuting the instant case and had been represented by the attorney who was representing appellant's co-defendant in the instant case. The record showed that during voir dire, the panel was asked if any juror knew a defense attorney on the case (the attorney of a co-defendant) or had

a family member or close friend prosecuted by the prosecuting office. One juror gave an affirmative response and revealed that one of the ADAs prosecuting the instant case had prosecuted her daughter in a prior case, and that the attorney representing a co-defendant of appellant in the instant case had represented her daughter in that earlier case. The co-defendant's attorney asked the juror: "Based on the fact of our previous dealings, do you feel that there is anything that would prevent you from being fair and impartial to both sides here today?" The juror replied: "I don't think there is anything that would keep me from being fair and impartial to both sides, but considering that you were my daughter's attorney and the ADA was the prosecutor, then I would feel uncomfortable sitting in on this case." No further inquiry was made of the juror regarding possible bias and the State moved to excuse the juror for cause, stating that the juror's answers indicated she wouldn't be able to sit and be fair in the case. The court then granted the State's motion to excuse the juror for cause.

Appellant maintained that it was error for the trial court to excuse the juror in question for cause. O.C.G.A. § 15-12-164(a) provides the test for juror disqualification for cause in felony cases. The court shall excuse for cause any juror who from the totality of her answers on voir dire is determined by the court to be substantially impaired in her ability to be fair and impartial. For a juror in a criminal case to be excused for cause on the statutory ground that her ability to be fair and impartial is substantially impaired, it must be shown that she holds an opinion of the guilt or innocence of the defendant that is so fixed and definite that the juror will not be able to set it aside and decide the case on the evidence or the court's charge on the evidence. A juror's knowledge of, or relationship with, a witness, attorney, or party is a basis for disqualification only if it has created in the juror a fixed opinion of guilt or innocence or a bias for or against the accused. In the present case, when the juror was asked the questions required by statute, she indicated that she had not formed an opinion regarding the guilt or innocence of the accused, that she had no prejudice or bias either for or against the accused, and that her mind was perfectly impartial between the State and the accused. Thus, the Court concluded that pursuant to O.C.G.A. § 15-12-164(a)(3), she was a competent juror.

The Court held that the juror's relationships with counsel did not necessarily or categorically require her exclusion from the jury. Instead, the relationships were bases for disqualification *only* if they had created in the juror a fixed opinion of guilt or innocence or a bias for or against the accused. Although the circumstances presented here *could* affect a juror's impartiality, in this case there was no showing that they had. The Court noted that trial courts have extremely broad discretion in deciding whether to exclude a juror for cause once an adequate inquiry has been conducted, but no adequate inquiry was conducted in this case, and no bias was shown on the record. Thus, an abuse of discretion resulted. Accordingly, the Court reversed appellant's convictions. But, because the evidence met the standard of *Jackson v. Virginia*, the case may be retried.

Search & Seizure

Bohlen v. State, A12A1793 (3/5/13)

Appellant was convicted of possession of marijuana, obstruction, and failure to have lights on a bicycle. He contended the trial court erred by denying his motion to suppress. The record showed that on the evening in question, two officers were riding in their marked patrol car when they saw appellant riding a bicycle on the street without any headlights. The officers stopped and approached appellant from behind when they saw appellant look back and then start to shove something into a bag that was attached to the front handlebars, leaving part of the object protruding from the bag. One officer then told appellant that he had stopped him because his bicycle did not have headlights. The officer asked for permission to search appellant's person, to which appellant consented. Nothing illegal was found. The officer next asked if he could look in the bag on the handlebars. Appellant said no but got nervous and started shaking, and he started trying to stuff the protruding object further into the bicycle bag. As appellant did so, one of the officers reached for appellant's hand for both officers' safety, and at that point, with the aid of a flashlight that the officer was holding with his other hand, both officers saw a green, leafy substance inside a plastic bag that was inside the bag attached to the handlebars, which they believed to be, and later proved to be marijuana. On the ground next to the bicycle, the officers found a cigarette box containing marijuana. Appellant's testimony at the hearing on the

motion conflicted with the officers' in several ways, but appellant admitted possession of the marijuana found in the bag attached to the handlebars, as well as the marijuana found in the cigarette box.

The Court stated that there are at least three types of police-citizen encounters: verbal communications that involve no coercion or detention; brief stops or seizures that must be accompanied by a reasonable suspicion; and arrests, which can be supported only by probable cause. For a brief stop or seizure to be valid, an officer must identify specific and articulable facts that provide a reasonable suspicion that the individual being stopped is engaged in criminal activity. Here, the officers testified that they saw appellant riding his bicycle after dark without a headlight. Thus, the officers had articulable suspicion to believe that appellant was operating his bicycle in violation of O.C.G.A. § 40-6-296(a), which requires that bicycles "in use at nighttime shall be equipped with a light on the front." Thus, the Court held that the stop itself was proper. At that point, the officers were permitted to expand the detention into unrelated offenses. An officer may question the motorist about anything and may ask for consent to search, as long as the questioning does not unreasonably prolong the detention.

Next, there was an issue of fact as to whether the officer asked for consent to search the bag and whether appellant's own actions revealed the marijuana in the bicycle bag to the officers. At the conclusion of the bench trial, the trial court denied the motion to suppress without explanation, which the Court construed as resolving the facts in favor of the officers. The Court therefore concluded that the trial court found that the officer asked for consent to search and that appellant reached into the bag and thereby exposed the contents to the officers, for which finding there was evidentiary support. At that point, the marijuana was in plain view. Accordingly, the officers were authorized to seize it and arrest appellant.

Statute of Limitations

State v. Boykin, A12A2233 (3/5/13)

The State appealed from a trial court order granting Boykin's plea in bar and dismissing charges due to expiration of the applicable statute of limitations. The State argued that the statute of limitations had been tolled by the "person unknown" exception. The record

showed that in July 1994, a woman reported to the police that a man had broken into her house, raped her and then fled. Police went to the scene and learned that Boykin had recently been seen in the immediate area of the house, as had another man, Avery. Investigators observed that a trail of footprints in the dew on the ground led almost directly to appellant's house. The police interviewed appellant later that morning and discovered grass clippings in his underwear. Based on the alleged victim's identification of Avery's voice as similar to that of her attacker, the State initially charged Avery with the crimes. But in May 1995, Avery was eliminated as a suspect because his DNA did not match that from semen and spermatozoa found on the victim's panties. Around that same time in 1995, appellant pled guilty to crimes arising from another similar incident, during which he committed a sexual assault. Appellant had been incarcerated since that time. But he was not indicted for any crimes arising from the July 1994 incident until 2011, when the State discovered a putative match between his DNA and that found on the alleged victim's underwear. In 2011, appellant was indicted for aggravated assault and rape for the July 1994 incident.

The trial court dismissed all the charges, ruling that the four-year statute of limitation for aggravated assault and burglary, the seven-year statute of limitation for armed robbery, and the fifteen-year statute of limitation for rape had all expired. In criminal cases, the period of limitation runs from the commission of the offense to the date of the indictment. The Court explained that as the trial court ruled, since the alleged offenses were committed in July 1994, the respective four-year, seven-year and fifteen-year statutes of limitations had all expired well before the 2011 indictment. Thus, in order to avoid dismissal, the State bore the burden of proving that the case fell within an exception to the statute.

The Court noted that the State did not claim that the DNA exception, as set forth in former O.C.G.A. § 17-3-1(c.1), applied to this case. Rather, at the plea in bar hearing and in its appellate brief, the State acknowledged that the physical evidence allegedly containing DNA evidence was destroyed, and the parties' stipulation of facts indicated that no portion of that evidence was retained for further testing. Accordingly, the State conceded that it could not rely on the provisions of former O.C.G.A.

§ 17-3-1(c.1) to avoid the expiration of the applicable statute of limitations. The State relied on O.C.G.A. § 17-3-2(2), which provided in pertinent part that “[t]he period within which a prosecution must be commenced under O.C.G.A. § 17-3-1 or other applicable statute does not include any period in which . . . [t]he person committing the crime is unknown.” The State reasoned that it did not have actual knowledge that appellant was the perpetrator until it obtained the DNA results in 2011, and thus the statute was tolled until that time. However, the General Assembly intended for the “person unknown” tolling exception to apply to a situation where there is no identified suspect among the universe of all potential suspects. The tolling exception cannot be based upon the subjective opinion of the district attorney as to whether there was enough evidence to file charges against a particular person. Such a broad interpretation of the tolling period, the Court stated, would permit the exception to swallow the rule.

This case, the Court found, was not one in which there was no identified suspect. On the contrary, the evidence unequivocally showed that the State had actual knowledge of appellant’s identity as one of two suspects almost immediately after the crime occurred in 1994. Indeed, according to the testimony of the former Chief of Police, at the time of the initial investigation, appellant was the prime suspect for the incident. And in 1995, after the other suspect, Avery, had been eliminated by DNA results as the perpetrator, appellant was again the State’s prime suspect. Accordingly, the Court held that the “person unknown” exception did not apply and affirmed the trial court’s ruling on the dismissal of the charges due to the expiration of the statute of limitations.

Search & Seizure; *Miranda*

Durrance v. State, A12A1898 (3/5/13)

Appellant was convicted of DUI (per se). He contended that the trial court erred in denying his motion to suppress the results of the breath test and the field sobriety examination. The evidence showed that on the night in question, appellant’s wife called the police to report a domestic disturbance with appellant. The officers were dispatched to a neighbor’s house where appellant’s wife had fled. The officers were informed that appellant may have had a weapon, and that they needed to park their vehicles a safe distance from the house in

order to assess the situation. Since there was no shoulder on the road, the officers parked their vehicles in the roadway. Several minutes after appellant noticed the officers congregating in front of the neighbor’s residence, he drove to the officers’ location to determine why they were there. When appellant stopped at the patrol vehicles, one officer explained to appellant that they were responding to a call, and that they would move their vehicles as soon as they could to allow appellant to pass. Appellant responded that his wife probably made the call. When the officer determined that appellant was the suspect, he asked appellant to shut off the vehicle’s engine, keep his hands in plain view, and exit the vehicle. As soon as appellant exited his vehicle, an officer detected a strong odor of alcohol coming from appellant and the vehicle. The officer also noticed that appellant was sluggish and off-balance, his eyes were bloodshot and watery, and his speech was slurred. Appellant admitted that he been drinking beer and vodka that night. Appellant failed some of the field sobriety tests administered to him, and he registered a positive alco-sensor test result. Appellant was then arrested for DUI.

Appellant contended that the trial court erred in denying his motion to suppress and argued that the Court’s review of the trial court’s ruling should be limited to evidence adduced at the suppression hearing. The Court disagreed. Notwithstanding appellant’s claim to the contrary, it is well settled that in reviewing a trial court’s decision on a motion to suppress, the Court may consider all relevant evidence of record, including evidence introduced at trial.

Appellant argued that the trial court should have granted his motion to suppress because the police instituted an unauthorized roadblock. The Court disagreed. A roadblock is a checkpoint designed to stop drivers on a road for various purposes, including screening for impaired drivers and checking drivers’ licenses. Here, there was no evidence the police officers were conducting a roadblock. Rather, the officers were responding to an emergency call made by appellant’s wife. Since the officers were advised that appellant had a weapon, they parked their vehicles a safe distance away from the house in which the call was made. Although this required the officers to park their vehicles in the road, there was no evidence that the officers were purposefully stopping vehicles in order to screen drivers. In fact, approaching drivers could move around the patrol vehicles

if they wished to continue down the road. In addition, when appellant came upon the parked patrol vehicles, there was no evidence that the officers commanded him to stop or otherwise indicated that he was not free to pass. As a result, appellant failed to demonstrate that the officers were conducting a roadblock.

Appellant also contended that when he was asked to exit the vehicle and was questioned, the officers were required to provide him *Miranda* warnings because he was restrained to a degree associated with a formal arrest. The Court again disagreed. An individual must be advised of his *Miranda* rights, including his right against self-incrimination, only after being taken into custody or otherwise deprived of his freedom of action in any significant way. A person is in custody for *Miranda* purposes if he has been formally arrested or restrained to the degree associated with a formal arrest. The test for determining whether a detainee is in custody for *Miranda* purposes is whether a reasonable person in the detainee’s position would have thought the detention would not be temporary. As a general rule, although a motorist is deprived of his freedom of action during a traffic stop, such detention is insufficient to trigger the rights set forth in *Miranda*.

Here, appellant was asked to exit the vehicle, keep his hands visible, and allow himself to be patted down for weapons after he identified himself as a suspect in the domestic violence investigation. These actions did not amount to a formal arrest. While appellant correctly noted that he was not free to leave the scene at this point, he was not handcuffed or placed in the patrol car when questioned about the domestic disturbance or his consumption of alcohol. Under these circumstances, the trial court was authorized to find that a reasonable person would believe that his freedom of action was only temporarily curtailed pending further investigation. Therefore, officers were not required to provide him *Miranda* warnings during the preliminary investigation.

Photographs; Relevancy

Hamlin v. State, A12A2209 (3/6/13)

Appellant was convicted of armed robbery and aggravated assault. He contended that the trial court erred in its admission of a photograph. The evidence showed appellant used a knife to rob a store specializing in vitamins. Appellant then left through the store’s back

door. An employee of a nearby beauty supply store, who was in the back alley, saw appellant running away. The victim came out the door after him and told her he had just been robbed. The police arrived quickly. The beauty store clerk described appellant to police as a light-complexioned, heavy-set black man about five feet ten inches tall, wearing sunglasses, a black wool cap, and all-black clothing. A police officer patrolling the area received a radio dispatch with this description. While driving on a road behind the vitamin store, the officer saw appellant, whose appearance matched the description, coming out of the woods. The officer stopped to talk with appellant, but appellant took off running. The officer caught appellant and arrested him. The officer drove appellant back to the vitamin store, where both the victim and the beauty store employee identified him.

Appellant argued that the trial court erred in admitting into evidence a photograph showing him standing next to a police car after his arrest. Appellant's hands were not visible in the photo, and he argued that this made him appear to be handcuffed. Appellant contended that any probative value the photo has was outweighed by the photograph's prejudicial effect. The Court stated that photographs that are relevant to any issue in the case are admissible even though they may have an effect upon the jury. In this case, the State showed the victim the photograph so that he could testify as to whether the photograph fairly and accurately showed appellant as he appeared on the date of the robbery. Prior to the admission of the photograph and without objection, the victim testified that when he identified appellant as the man who robbed him, that appellant was seated in the back of a police car.

Although booking photographs are admissible to show how a defendant appeared at the time of the crime, the probative value of these photographs generally stem from the fact that the defendant's appearance has changed between the time of booking and the time of trial. Here, the Court saw no evidence indicating that appellant's appearance had changed. In general, however, mug shots of a defendant taken after arrest with regard to the crime for which the defendant is currently being prosecuted do not prejudice the defendant. Thus, the Court found, at the time the photograph was admitted, the jury already knew that appellant had been arrested. Further, most jurors likely would assume that the police usually handcuff a person

arrested for armed robbery. The jury also heard, without objection, the victim's testimony that when he identified appellant as the person who robbed him, appellant was sitting in a police car. Given this testimony and the trial court's proper charge to the jury on the presumption of innocence, the Court concluded that appellant failed to show any likelihood that he was prejudiced by the photograph, much less that the probative value of the photograph was substantially outweighed by the danger of unfair prejudice. Accordingly, any error was harmless in light of the overwhelming evidence of appellant's guilt.

Sentencing

Blake v. State, S12A1852 (3/7/13)

Appellant was convicted of felony murder and related charges. Appellant asserted error in the trial court's instructions to the jury and in his sentence. The record revealed that appellant went to a bar and approached the victim about purchasing some marijuana. When appellant received his purchase, he believed that the victim had "shorted" him, informed the victim of this, and left the bar to retrieve his scale. Appellant returned to the bar with his scale, the victim added some marijuana to the bag, and appellant again left. Appellant soon reentered the bar and threw the bag of marijuana on a pool table near where the victim and three of his friends were standing, claiming that the quantity was still insufficient and asking for his money back. The victim refused, saying words to the effect that if appellant wanted his money back, he should get his pistol. Appellant pulled out a gun, fired two shots, fatally striking the victim.

Appellant contended that the trial court erred in refusing his request to give a jury charge on voluntary manslaughter. The Court first noted that appellant did properly preserve this issue for appeal by restating his objection after the court gave its instructions. When instructing the jury in a murder case, a trial court is required to grant the defendant's request for a charge on the lesser included offense of voluntary manslaughter if there is any evidence, however slight, to support such a charge. Whether such slight evidence exists is a question of law. The crime of voluntary manslaughter is committed when one kills "solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite

such passion in a reasonable person." O.C.G.A. § 16-5-2(a). The distinguishing characteristic between voluntary manslaughter and justifiable homicide is whether the accused was so influenced and excited that he reacted passionately rather than simply to defend himself.

Accordingly, the Court stated, the question here was whether there was slight evidence that appellant shot the victim as the result of a provocation that triggered in appellant some "irresistible passion." Appellant testified unequivocally that he shot the victim in self-defense, out of fear for his life. He testified that during the incident he was not upset and never became hostile; that he asked the victim for his money back in a "simple, respectful manner;" and that, once the dispute began, he "wanted to just leave." Though appellant also testified that he believed the victim was drawing a gun and that he was intimidated by the presence of the victim's three friends, whom he suspected might also be armed, the Court found that there was no evidence that this fear, whether reasonable or not, rose to the level of "irresistible passion" necessary to support a charge on voluntary manslaughter. Thus, because there was no evidence whatsoever of any passion on appellant's part, the trial court did not err in refusing to give the requested instruction.

Appellant challenged his sentence and asserted that he was not eligible for life imprisonment without the possibility of parole. The State conceded this point and the Court agreed. Appellant's crimes were committed in December 2008, prior to the effective date of the amendment to the murder sentencing statute, which added life without parole as an available sentence in all murder cases. Though the record reflected that appellant was eligible for recidivist treatment due to two previous drug-related felonies, such prior offenses were not a sufficient basis for a recidivist sentence of life without parole. In addition, because there was only a single victim, the trial court also erred in sentencing appellant on both felony murder convictions. Due to these errors, the Court vacated appellant's sentence in its entirety and remanded to the trial court for resentencing.

Statements; Bruton

Colton v. State, S12A1761 (3/7/13)

Following a jury trial, appellant was found guilty of malice murder, felony murder, aggravated assault, and aggravated battery. Appellant contended that the trial court erred in admit-

ting at trial evidence of appellant's confession without first finding that the confession had been made voluntarily. The record showed that on the night of the killing, the victim left a party with appellant and two other men. According to statements from appellant's co-defendant, the victim got into a car with appellant and the other men, and, within an hour of leaving the party, appellant beat the victim with a folding chair, choked him, kicked him in the head and chest while the victim was on the ground, smashed the victim's head with a rock, and left him bloodied and beaten on the ground. An intoxicated appellant left the scene and crashed his car, leaving him bleeding from his face and hands. By chance, the same ambulance that picked up the beaten victim from the crime scene also picked up appellant at the scene of his car accident, as the car accident was on the way to the hospital. The victim later died from his injuries while in the hospital.

Appellant contended that the trial court erred by allowing police officers to testify regarding two separate statements made to them by a non-testifying co-defendant that incriminated appellant. With respect to the co-defendant's custodial statement made to police several months after the murder, the co-defendant neither named appellant in this statement nor implied that it was appellant who was involved in the crime. The record revealed that the co-defendant claimed only that "someone" or a "certain person" was involved in the crime, and that the co-defendant never named or described that other person. The co-defendant also admitted that he was one of the assailants who had kicked the victim (although he was also allegedly trying to render aid to the victim). Additionally, the trial court specifically instructed the jury that it could not consider any custodial statements by the co-defendant that incriminated appellant. Under such circumstances, the co-defendant's statement was not rendered inadmissible. A co-defendant's statement meets the Confrontation Clause's standard for admissibility when it does not refer to the existence of the defendant and is accompanied by instructions limiting its use to the case against the confessing co-defendant. The fact that the jury might infer from the contents of the co-defendant's statement in conjunction with other evidence, that the defendant was involved does not make the admission of the

co-defendant's statement a violation of the Confrontation Clause.

The Court found error, however, with regard to the trial court's admission of testimony relating to the co-defendant's initial, non-custodial statement to police on the day of the murder. In arguing that this testimony was properly admitted, the State relied on the Court's decision in *Johnson v. State*, 275 Ga. 650, 651 (2002), in which the Court held that "*Bruton* is not applicable to a statement which is not the *custodial* confession of a non-testifying accomplice which details the criminal participation of a co-defendant." However, since the Court's decision in *Johnson*, the United States Supreme Court decided the case of *Crawford v. Washington*, 541 U. S. 36 (2004), in which the *Crawford* Court made clear that the confrontation clause imposes an absolute bar to admitting out-of-court statements in evidence when they are testimonial in nature, and when the defendant does not have an opportunity to cross-examine the declarant. In this connection, statements made to police officers during an investigation, such as the one at issue here, qualify as testimonial. Thus, in light of the U. S. Supreme Court's decision in *Crawford*, because the co-defendant's initial statement to police was testimonial in nature, the statement was inadmissible in light of appellant having had no opportunity to cross-examine the co-defendant. The fact that the co-defendant's initial statement was non-custodial was irrelevant, as such a factor would not remove the statement from the scope of *Bruton* and its progeny. Accordingly, that portion of the Court's decision in *Johnson* stating otherwise was overruled.

However, even though the trial court erred in admitting the aforementioned evidence, any error in the admission of such evidence may have been rendered harmless in light of appellant's own statement to police and the other properly admitted evidence of appellant's guilt. The Court could not yet address that issue, however, as the record was not yet sufficiently developed for the Court to engage in a proper harmless error analysis and the Court declined, in the first instance, to engage in such an analysis. Therefore, the matter was remanded to the trial court.

The Court further held that, as the State correctly conceded, the trial court erred by admitting into evidence appellant's custodial

statement to police without first making a conclusive finding that the statement was made voluntarily. Indeed, the record was clear that there was no actual ruling or finding showing that the trial judge determined the voluntariness of appellant's confession. Although the trial judge admitted it into evidence, it appeared that the judge may have decided only that it was a question for the jury to determine on conflicting evidence whether the alleged confession was freely and voluntarily made. Under such circumstances, it also was necessary to remand the case for clarification as to the admissibility of any statements or confessions by appellant.