

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 17, 2009

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THIS WEEK:

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- **Right to be Present at Trial; Statements**
- **Kidnapping; Identification**
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Venue

Williams v. State, A08A2035

Appellant was convicted of nine counts of felony theft by taking and one count of criminal attempt to commit theft by taking. She argued that the State failed to prove venue. The evidence shows that appellant was involved with a man named Sparks in a scheme to take money from the bank account of his grandfather. Sparks would telephonically transfer funds from his grandfather's account to appellant's account. Appellant would then withdraw the money and give some of it to

Sparks, retaining some for herself. Appellant argued that the testimony showed that on two counts, she, in person, withdrew funds from her account at a bank located in Banks County, but she was accused of theft and tried in Jackson County. She argued that venue, therefore, was not proper in Jackson County because she exerted no meaningful control over the funds until she withdrew them in Banks County. The Court, however, held that this argument confused control with possession, and our law only requires that a defendant control the property, not possess it. Thus, because the evidence showed that the money was subject to her control after it entered her account in Jackson County, venue was proper in Jackson County.

Jones v. State, A09A0246

Appellant was convicted in probate court for DUI. He contended that the trial court erred in not dismissing the probate court accusation for lack of venue. Under Georgia law, venue is a material element of a crime, and it must be alleged in an accusation or indictment. A charging instrument that does not meet the venue requirement is subject to a general demurrer. Here, the state's probate court accusation charged appellant with driving under the influence of alcohol "in the State of Georgia and in the County of Meriwether." Appellant argued that the venue allegation was insufficient because under OCGA § 40-13-29, a probate court only has jurisdiction over misdemeanor traffic offenses that occur "in the county outside of municipal corporations." The Court held that a probate court accusation meets the venue requirement if it alleges that the crime occurred in a particular county. Such an allegation may not conclu-

sively establish the probate court's jurisdiction over a case, but the issues of venue and jurisdiction are separate concepts. A county allegation sufficiently sets forth the material element of venue. The probate court, therefore, properly denied appellant's venue-based motion to quash.

Right to be Present at Trial; Statements

Wells v. State, A08A2043

Appellant was convicted of numerous charges, including serious injury by vehicle and DUI. He contended that the trial court erred in answering a jury question outside of his presence and in admitting a statement made by him to a jail intake officer. The record showed that while the parties were out of the courtroom, the trial court received a communication from the jury that they had reached a unanimous decision on three counts and that they were eleven to one on the other three and asked for advice. The court on its own accord sent them a written instruction to continue to deliberate and try to reach a unanimous verdict, which the jury did shortly thereafter. The Court held that this was reversible error. The communication at issue was not "relating to the comfort and convenience of the jury," but was instructive to the jurors who sought guidance in light of their inability to reach a unanimous decision on several counts. The response by the court constituted a substantive communication at a critical stage in appellant's criminal prosecution and as such, should have been made in his and his attorney's presence.

Appellant also contended that the statement made to the intake officer was a *Miranda* violation. The evidence showed that as appellant was being brought into the jail, the intake officer asked him "something like, what are you doing back, or why are you here?" Appellant responded that "I was trying to operate my vehicle with my bad leg after I'd been drinking and I was involved in an accident." The Court held that this was not a "booking" exception to *Miranda* because the question did not ask for basic biographical data, such as the suspect's name, age, address, educational background, marital status, and other information required to complete an arrest form. The Court also rejected the trial court's finding that it was mere a "general greeting" to appellant. Instead, the Court found that it was custodial inter-

rogation and that the statement should have been suppressed.

Kidnapping; Identification

Crawford v. State, A09A0094

Appellant was convicted of armed robbery and kidnapping. He challenged the sufficiency of the evidence as to the kidnapping charge and the evidence concerning his identification. The Court held that as to the kidnapping charge, the evidence was insufficient. Relying on *Garza*, the Court found that the victim's movement was brief, occurred during and incidental to the armed robbery, and did not enhance the risk she already faced during the robbery. Thus, under *Garza*, the movement did not meet the asportation requirement, and appellant's kidnapping conviction was reversed.

Appellant also argued that the trial court erred in refusing to suppress the identification testimony stemming from his one-on-one showup with the victim. Although conventional lineups are generally preferred, "prompt, on-the-scene confrontations and identifications, though inherently suggestive because of the presentation of a single suspect, are permissible in aiding a speedy police investigation." In considering the likelihood of misidentification, a court must consider four factors: (1) the witness' opportunity to view the criminal during the crime; (2) the witness' degree of attention; (3) the accuracy of any prior description given by the witness; and (4) the length of time between the crime and the showup confrontation. Under the totality of the circumstances, the Court held that the trial court did not abuse its discretion in admitting the identification testimony over appellant's objection.

Search & Seizure

Johnson v. State, A09A0083

Appellant was convicted of possession of cocaine with intent to distribute. He contended that the trial court erred in denying his motion to suppress. The evidence showed that appellant was stopped for a headlight violation. The officer ran appellant's name through dispatch and was told that appellant had a suspended license for failure to appear, but that he had not been served with such notification. The officer then served appellant with notification of his suspended license and then arrested him on the suspended license and

searched the vehicle incident to arrest. The cocaine was subsequently discovered. Appellant argued that the officer lacked probable cause to arrest him in view of the fact that he had not been served with notice of the suspension of his license. The Court disagreed. OCGA § 40-5-60 provides that "[a]ll revocations and suspensions provided for in this chapter shall be effective on the day the driver receives actual knowledge or legal notice thereof, whichever occurs first. Notice of suspension by operation of law shall be considered legal notice." Thus, the Court held, contrary to the appellant's argument, dispatch's report that appellant had not been served with notice of suspension did not affirmatively establish that he had no actual or legal notice of the suspension and that the license suspension therefore was not effective.

Lord v. State, A09A0276

Appellant was convicted of two counts of aggravated assault. He contended that the trial court erred in denying his motion to suppress. Specifically, he alleged that the trial court erred in not suppressing 18 photographs taken inside his residence shortly after the crime occurred but prior to the issuance of a search warrant for the home. The evidence showed that officers entered appellant's home with his consent. But, even after that consent was revoked, the police had probable cause to believe that appellant had committed a battery upon the victim, who was not present when the police arrived. Thus, the police were authorized to walk through the house looking for the victim under the exigent circumstances exception to the warrant requirement. During the course of this brief sweep of the house, the police saw blood evidence in plain view in the rooms they walked through and were entitled to seize it. Shortly after arresting appellant and sending the victim (who was subsequently located outside in the parking lot) to the hospital, the police, while examining and securing the crime scene, retraced their steps through the house, photographing items of potential evidentiary significance that were in plain view. "Additional investigators or officials may enter a citizen's property after one official has already intruded legally. Later arrivals may join their colleagues even though the exigent circumstances justifying the initial entry no longer exist." Here, the officers moved noth-

ing, opened no drawers, removed nothing from the premises, and did not exceed the scope of their initial search for the victim. Rather, they photographed only those items that were visible during the scope of the initial welfare search. Consequently, the photographs were legally seized and, thus, admissible.

Appellant also alleged that the photographs taken of the interior of his car were also seized illegally because they were taken prior to the issuance of a warrant. First, the Court noted that the police had reports from the victim and an eyewitness that appellant first began beating the victim in the car, and held that the officers saw, in plain view, blood and hair evidence throughout the car's interior. Second, to the extent that the opening of the door and photographing of the blood and hair constituted a warrantless search and/or seizure, this was justified by the exigencies of the case. Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office. Officers conducting such a search must have reasonable or probable cause to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search. Under the facts, the Court held, the officers photographing the blood and hair in the appellant's car had reasonable cause to believe that they would find evidence pertaining to the battery.

Restitution

Wimpey v. State, A08A2283

Appellant pled guilty to a single count of theft by taking and was ordered to pay \$120,163.40 in restitution. She argued that the trial court failed under OCGA § 17-14-7 to consider her financial situation in ordering her to pay \$700.00 per month. After the State has borne its burden of showing the amount of the victim's loss, OCGA § 17-14-7 (b) places the burden of showing the defendant's resources and expenses on the defendant. Here, the trial court asked the defense on multiple occasions during the sentencing and restitution hearing if appellant wished to be heard on this matter. The only thing appellant stated was that she wished to make payments over time. Finding that "the court could not have been more patient and solicitous in allowing appellant the opportunity to present evidence

on her expenses," the Court affirmed the restitution order.

Kidnapping; Venue

Epps v. State, A08A2264

Appellant was convicted of kidnapping with bodily injury, robbery, and aggravated assault. He argued that under *Garza*, the evidence was insufficient to support his conviction and that the state failed to prove venue. The evidence showed that appellant tricked or forced the intoxicated victim into the backseat of a car in Douglas County. Appellant's girlfriend and another woman occupied the front seats. Appellant then immediately beat the victim with his fists and took his wallet, watch and cash. They then drove to ATMs in Cobb County where appellant forced the victim to withdraw money. Eventually, the victim sobered up enough to get away. Under *Garza*, a finding of asportation requires an assessment of the following four factors: (1) the duration of the movement; (2) whether the movement occurred during the commission of a separate offense; (3) whether such movement was an inherent part of that separate offense; and (4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense. Here, the Court found that movement occurred over a period of almost three hours; the evidence showed that appellant held the victim for a significant period after the initial assault and robbery were completed; and the detention subjected the victim to a danger separate and apart from the dangers inherent in the robbery and assault. Specifically, the victim's detention in the car make it easier for appellant to commit the assault and robbery, and it also placed the victim at risk of physical harm from the driver's intoxicated state, a danger independent of the assault or robbery. The evidence was therefore sufficient under *Garza*.

The Court also held that the State did not fail to establish that Douglas County was the proper venue for the prosecution for the kidnapping. Under OCGA § 17-2-2(e) where, as here, a crime is committed in a moving vehicle, "and it cannot readily be determined in which county the crime was committed, the crime shall be considered as having been committed in any county in which the crime could have been committed through which the . . . vehicle, . . . has traveled." Although the

precise moment when the victim's abduction became kidnapping under the *Garza* analysis could not be determined with certainty, the evidence was sufficient to support a finding that the kidnapping might have been committed in Douglas County.

Immunity; Jury Charges

Lightening v. State, A08A2053

Appellants, who are brothers, were convicted of aggravated assault and simple battery. Appellants argued that the trial court erred by denying their motion for a hearing under OCGA § 16-3-24.2 seeking a grant of immunity. The evidence showed that the victim was at the appellants' house. An argument ensued between one of the appellants and the victim over a loud radio in the victim's car. The argument became a fight and escalated into the charges against the appellants. The record showed that appellants filed a motion for immunity two days before trial and requested a hearing. However, they did not seek a ruling on the motion prior to trial. Instead, they stated to the trial court that they were ready for trial "subject to two motions in limine." Without holding a hearing, the trial court found no basis for the granting them immunity but stated that it would charge on self-defense if the evidence warranted it. Appellants agreed to this. The Court held that by focusing upon receiving a jury instruction on self-defense rather than obtaining a ruling from the trial judge on their motion, appellants acquiesced in the trial court's ruling which deprived them of the right to assert error.

Appellants also asserted that the trial court erred in not charging the jury on OCGA § 16-3-24.2. The Court held that whether they were entitled to immunity from prosecution was an issue of law for the trial court to decide, not the jury. Moreover, even if it were a jury question, the code section provides no information necessary for the jury to determine whether the appellants were guilty of the crimes alleged.

Identification; Jury Charges

Robinson v. State, A08A1900

Appellant was convicted of burglary, kidnapping, armed robbery, possession of a firearm during the commission of a crime, and giving a false name. The crimes occurred in

1999 and appellant was convicted in 2000. A motion for new trial hearing was held in 2004 and then another hearing held on an amended motion for new trial in 2007. Appellant contended that the trial court erred in charging the jury to evaluate the “level of certainty” of the witnesses’ identification. The Court found that the Georgia Supreme Court in *Brodes v. State*, 279 Ga. 435 (2005), held that it could “no longer endorse” the pattern jury instruction on the witness’s “level of certainty.” The Court of Appeals further found that like the defendant in *Brodes*, appellant was linked to the crime only by the witnesses’ identification made one week after the crime and from photographs in a newspaper article identifying appellant as the perpetrator of another robbery. Further, there was no evidence that on the night of the robbery the victims provided the police with a description of the perpetrators, such as age, height, or clothing. Nor was there any other identification, such as a photo array, before trial. Therefore, the “level of certainty” instruction was not harmless and the case was reversed and remanded for a new trial.

Right to a Fair Trial

Council v. State, A09A0290

Appellant was convicted of armed robbery, making terroristic threats, possessing a knife during the commission of a crime, fleeing or attempting to elude a police officer, and several traffic offenses. He contended that the trial court denied him the right to a fair trial by not allowing his leg shackles to be removed during trial because the state failed to present any evidence showing that he had threatened or struggled with guards, court officials, or jurors or that he had been disruptive during trial or attempted to escape after being taken into custody. The Court found no error. Although a defendant is entitled to a trial free of partiality which the presence of excessive security measures may create, the use of extraordinary security measures to prevent dangerous or disruptive behavior which threatens the conduct of a fair and safe trial is within the discretion of the trial court. The burden is on the defendant to show that any extraordinary security measures have violated his constitutional rights. Here, the trial court took steps to ensure that the shackles could not be seen by the jury during any part of the trial. The trial court also allowed appellant to walk to and

from the witness stand while no jurors were present in the courtroom in order to prevent them from being aware of the leg shackles. As a result, the Court held, pretermitted whether the trial court correctly determined that the use of leg shackles was warranted by the threat that appellant posed, appellant failed to show that the shackles interfered with his ability to receive a fair trial.

Motion to Withdraw Guilty Plea

Robertson v. State, A09A0282

Appellant pled guilty to armed robbery and possession of a firearm during the commission of a crime. He was 17 years old when he committed the crime. He contended that the plea was the result of coercion by his attorney and was invalid, because he did not have the opportunity to speak to his mother before he entered his plea and because she was not present in the courtroom when he pled guilty. His mother testified that she visited her son on the Monday evening before the plea hearing on Wednesday morning; and that she was not in the courtroom when her son entered his plea, “because [she] had already left the courtroom, because [she] had to speak with someone.” The guilty plea hearing was delayed because appellant’s mother was not present, but eventually the judge began the hearing without her. The mother did not reappear until the hearing was concluded and appellant had already entered his plea. The trial court made careful inquiry showing that appellant fully understood the nature of the charges against him and the rights he was relinquishing in making the plea. Thus, the state has met its burden of demonstrating that the plea was intelligently, knowingly, and voluntarily entered. Moreover, the Court noted, appellant cited no authority for his contention, and the court found none. Whether appellant suffered coercion or duress was a question of fact for resolution by the trial court. The trial court having found no coercion or duress, its denial of appellant’s motion was not an abuse of discretion.

Aggravated Stalking

Burke v. State, A08A1855

Appellant was convicted of aggravated stalking. Appellant contended that the evidence was insufficient to support his conviction.

In September of 2004, appellant pled guilty to stalking the victim. The trial court issued a permanent protective order forbidding any contact with the victim. Thereafter, in November, 2005, appellant sent the victim correspondence through the mail consisting of card, a letter and a handwritten poem in one envelope. Based on this correspondence, appellant was convicted of aggravated stalking. The Court stated that in order to establish the offense of aggravated stalking, the State was required to prove (1) that the defendant violated a protective order; (2) that prohibited contact with victim; (3) without the victim’s consent and (4) for the purpose of harassing and intimidating the victim. The Georgia Code defines “harassing and intimidating” in this context as involving four factors of its own: (1) a knowing and willful course of conduct directed at the victim; (2) which causes emotional distress by placing the victim in reasonable fear for his or her safety; (3) by establishing a pattern of harassing and intimidating behavior; and (4) which serves no legitimate purpose. The Court found that the evidence was insufficient to support appellant’s conviction because the State failed to prove the requisite pattern or course of conduct. Here, the State based the charge against him on one contact with the victim, the November 2005 correspondence.

Evidence; Business Records

Hamilton v. State, A08A2045

Appellant was convicted of voluntary manslaughter. The evidence showed that he killed the victim in a motel room. He argued on appeal that the trial court erred in admitting copies of the motel’s lock interrogation log. At trial, the State called the housekeeping supervisor, who testified that the motel kept lock interrogation logs in the regular course of its business. She said that each time someone used a key card to enter a guest room, the motel computer made a record of the card used and the time. The lock interrogation logs reflected these computerized entries, tracking when employees and guests enter a particular room. Appellant contended this witness was not the proper person to lay the foundation because she was the housekeeping supervisor, not the custodian of record. The Court disagreed. It held that a witness does not have to personally maintain the records

in order to lay a proper foundation for the admission of business records. Rather, the business records exception does not require that the person laying the foundation for the admission of business records be the custodian of the records. Instead, it requires that the record offered to prove an act or transaction be made in the regular course of business and that it is the regular course of business to make the record at the time of the act or transaction. The witness's lack of personal knowledge regarding how the records were created does not render them inadmissible, but merely affects the weight given to the evidence. The supervisor's testimony, therefore, was sufficient to lay a proper foundation, and the logs were properly admitted.

Evidence; Hearsay

Troutman v. State, A09A0149

Appellant was convicted of armed robbery. The evidence showed that appellant and a co-defendant called for a taxi and when the taxi picked them up, they then robbed the taxi driver. During the trial, one of the investigating officers testified that after confiscating the co-defendant's cell phone, he used the "recently called" function and discovered that the phone had been used to call the taxi service on the night of the robbery. When he was asked how he learned that the number on the phone was the number for the taxi service, he responded, "You can call it. They have the same number as of today." The officer also testified that he verified the number by going to the business office of the taxi service. Appellant argued that the trial court erred in admitting the officer's testimony regarding the phone number because it was hearsay. OCGA § 24-3-1 defines hearsay as evidence that "does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons." Here, the Court held, the officer's statement that the phone number was for the taxi service was not hearsay, but a statement of undisputed fact. The officer learned about the taxi service's phone number based on his own investigation, and appellant had the opportunity to question him about the quality of that investigation. Therefore, the value of the officer's testimony rested on his own veracity and competence, the testimony was not hearsay, and the trial court did not abuse its discretion in admitting it.

Cross-Examination

Latty v. State, A09A0365

Appellant was convicted of possession of methamphetamine. He argued that the trial court erred by allowing the prosecutor to cross-examine him about his failure to produce a witness to support his defense. The evidence showed that appellant and a co-defendant (who pled out and testified against him at trial) were stopped for a traffic violation. Appellant was driving his own vehicle and the methamphetamine was found in a bag in the trunk of the vehicle. His co-defendant testified that appellant and he drove to Atlanta to purchase the methamphetamine. Appellant took the stand in his own defense. He stated that his visit to Atlanta was to drop off his co-defendant's girlfriend and her friend, Nichelle. He said the trip had nothing to do with purchasing methamphetamine. He assumed that the bag he saw his co-defendant put in the trunk when they departed on the trip belonged to the girlfriend. He argued that the trial court erred by allowing the prosecutor to question him about whether or not he intended to produce Nichelle as a witness to verify his story. Appellant argued that the question improperly shifted to him the State's burden to produce evidence of guilt.

The Court held that when a defendant testifies about a witness who could corroborate his defense, but does not call the witness, it is reasonable for the prosecutor to infer that there exists no such favorable witness. Here, appellant advanced his defense by testifying that his sole purpose was to give a ride to his co-defendant's girlfriend and to Nichelle, and that he had no knowledge of the methamphetamine in the car. Even though appellant claimed on cross-examination that he did not know how to locate Nichelle, the prosecutor was entitled to cast doubt on his story by questioning him about why he had not produced Nichelle as a witness to support his defense. Therefore, the trial court did not err by overruling his objection.

Evidence; Crime Committed by Another

Hughes v. State, A09A0346

Appellant was convicted of child molestation. The evidence showed that he molested his stepdaughter. He contended that the trial

court erred in not permitting him to inquire into the circumstances of another man's possibly molesting the victim. In order for a criminal defendant to introduce evidence implicating a third party in the commission of the crime for which the defendant is being tried, the proffered evidence must raise a reasonable inference of the defendant's innocence and it must directly connect the other person with the corpus delicti or show that the other person has recently committed a crime of the same or similar nature. A reasonable inference of the defendant's innocence may be raised by evidence that renders the desired inference more probable than the inference would be without the evidence. Evidence that merely casts a bare suspicion on another or raises a conjectural inference as to the commission of the crime by another is not admissible. Here, the Court found, the trial court could have reasonably concluded that the evidence of another man's committing the molestation was conjectural for at least two reasons. First, the "evidence" was very thin: the mother simply told police they should investigate this other man also. There was no evidence that in fact this other man molested the victim. Second, the victim consistently identified appellant and only appellant as the perpetrator.

Expert Testimony; Juror Misconduct

Hubert v. State, A08A2318

Appellant was convicted of incest and child molestation. The evidence showed that he molested his two daughters. Appellant argued that the trial court erred when it admitted the interviewing detective as an expert in forensic child interviews, and specifically challenged the trial court's admission of the detective's opinion that during the interview, one victim appeared to be emotionally traumatized. The Court stated that an expert witness is anyone who, through training, education, skill, or experience, has particular knowledge that the average juror would not possess concerning questions of science, skill, trade, or the like. The determination of whether to accept or reject an expert witness rests within the sound discretion of the trial judge, and will not be disturbed absent a manifest abuse of that discretion. Here, based on the training, education and experience testified to by the detective, the Court held that the detective

possessed a greater knowledge and experience in the area of forensic child interviews than that of the average juror and therefore, the trial court did not err in qualifying the detective as an expert witness. The Court further found that the testimony regarding the victim's demeanor was properly admitted because it did not express an impermissible opinion on an ultimate issue of whether the victim was sexually abused.

Appellant also argued that he was denied his sixth amendment right to a fair trial when extrajudicial evidence was allegedly introduced to the jury through juror misconduct. The alleged evidence concerned a teacher's duty to report sexual abuse. Under OCGA § 17-9-41, Georgia law prohibits jurors from impeaching their verdict once it has been rendered. The public policy considerations underlying this rule include the need to preserve the sanctity of juror deliberations, promote the finality of jury verdicts, and protect jurors from post-trial harassment. A very narrow exception to this rule exists when a juror intentionally gathers extrajudicial evidence, highly prejudicial to the accused, and communicates that information to the other jurors in the closed jury room. But to set aside a jury verdict solely because of irregular jury conduct, the conduct must be so prejudicial that the verdict is inherently lacking in due process. Here, the Court found that the circumstances presented did not meet this test because the only juror who arguably alleged improper conduct admitted that he could barely hear the statement in question and could not remember what it was. Furthermore, defense counsel questioned the state's witnesses at length about the disclosure requirements, rendering any information that the juror offered from his extrajudicial source cumulative at best.