

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 1, 2009

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THIS WEEK:

- **Closing Arguments**
- **Indictment**
- **Jury Charges; Lesser Included Offenses**
- **Evidence; Impeachment**
- **Similar Transactions**

Closing Arguments

Wingfield v. State, A09A0427

Appellant was convicted of trafficking in cocaine. He argued that the trial court should have rebuked the prosecutor, granted a mistrial, or allowed his counsel additional closing arguments after the prosecutor argued that the appellant was “in the business of dealing drugs.” The Court held that as a general rule, prosecutors are granted wide latitude in conducting closing argument, and defining the bounds of such argument is within the trial court’s discretion. This “wide latitude” encompasses the prosecutor’s ability to argue reasonable inferences raised by the evidence. Here, the evidence presented to the jury was that appellant possessed a trafficking amount of cocaine (31 grams) and over \$2,000 in cash in his pocket. The prosecutor’s statement, therefore, was a reasonable inference drawn from the evidence. Consequently, the trial court did not err in overruling appellant’s objection to the statement.

Indictment

State v. Austin, A09A0461

The State appealed the grant of a demurrer of an indictment against a defendant dentist

for aggravated assault. The indictment alleged as follows: “...did make an assault upon the person of Corey Beasley, with a metal object, to wit: a dental elevator, which, when used offensively against a person, is likely to result in serious bodily harm by striking Corey Beasley on the head with said dental elevator, contrary to the laws of the State of Georgia, the good order, peace and dignity thereof.” The Court reversed. First, it held that the trial court erred by concluding that the State failed to sufficiently allege intent because the indictment, which tracked the language of OCGA § 16-5-21 (a) (2), presented a technically correct allegation. Moreover, the offense defined by OCGA § 16-5-21 (a) (2) is a crime requiring general, rather than specific intent, and general intent need not be expressly alleged in an indictment. But, even if some intent allegation was necessary, the language in the indictment asserting that the defendant acted “contrary to state law and its good order, peace and dignity” made it clear the act was committed unlawfully. An allegation that the defendant acted unlawfully is sufficient to encompass both the general intent to commit aggravated assault and the knowledge essential to form that intent. Read as a whole, therefore, the indictment implicitly alleged general intent and met any pleading requirements.

Second, although the indictment deviated from the wording of OCGA § 16-5-21 (a) (2) by using the phrase “serious bodily harm,” instead of “serious bodily injury,” an indictment that is substantially in the language of the statute is sufficient in form and substance. The words “harm” and “injury” are commonly viewed as synonyms, and Black’s Law Dictionary defines “bodily harm” by cross-referencing “bodily injury.” Therefore, the indictment substantially tracked OCGA § 16-5-21 (1) (b),

using language that made the charged offense easily understood.

Finally, the defendant argued that because the aggravated assault charge involved one of his patients, the State was required to allege that he acted “outside of his professional relationship with” the patient, citing *D’Auria v. State*, 270 Ga. 499 (1999). The Court, however, distinguished *D’Auria*. It held that the indictment here identified the manner in which the aggravated assault allegedly occurred: by striking the patient in the head with a metal instrument on a particular date. Nothing in *D’Auria* undermined the sufficiency of this allegation or required additional pleadings simply because the case involves a doctor and patient. Rather, *D’Auria* reiterated the basic requirement that an indictment inform a defendant of the criminal acts he allegedly committed.

Jury Charges; Lesser Included Offenses

Lewis v. State, A09A0554

Appellant was convicted of aggravated assault. He contended that the trial court erred in failing to instruct the jury on the lesser included offense of pointing a pistol at another. The Court held that pointing a firearm at another is an offense included in aggravated assault. Nevertheless, it is not error to refuse a charge on it when the evidence does not reasonably raise the issue that the defendant may be guilty only of the lesser crime. Here, appellant testified that he “never placed a gun towards her, nowhere around her, pointed it at her never. That never happened.” Thus, his testimony reasonably failed to raise the issue that he was guilty of only the lesser offense. Moreover, the evidence showed that appellant used a gun to direct the victim to comply with his commands, and that she was frightened. This evidence showed that the greater crime was completed. Therefore, the trial court did not err in declining to instruct the jury on the lesser offense.

Evidence; Impeachment

Abercrombie v. State, A09A0707

Appellant was convicted of possession of methamphetamine. He argued that the trial court erred in allowing the state to impeach him with evidence of his 1998 conviction for

entering an automobile. The Court agreed and reversed his conviction. OCGA § 24-9-84.1 (a) (2) provides that evidence that a defendant has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment of one year or more under the law under which the defendant was convicted if the court determines that the probative value of admitting the evidence substantially outweighs its prejudicial effect to the defendant. In order to ensure that the trial court engaged in a “meaningful analysis of the relevant factors” to be considered in balancing the probative value of the proposed impeachment evidence against its prejudicial effect, the trial court’s findings must be made expressly. Factors to be considered include the kind of felony involved, the date of the conviction, and the importance of the witness’s credibility. Here, the Court found, the trial court did not list any of the factors it considered in allowing appellant to be impeached with evidence of the prior conviction. Moreover, although the trial court was required to admit the impeachment evidence only if the probative value of the evidence “substantially outweighs” its prejudicial effect, the trial court concluded that evidence of appellant’s conviction for entering an automobile could be used for impeachment merely because it “does have probative value.” The trial court was not authorized to admit evidence using a more liberal standard than that provided by OCGA § 24-9-84.1 (a) (2). Therefore, it erred in allowing the State to impeach appellant with evidence of the prior conviction.

Appellant also contended that the trial court erred in preventing him from introducing a certified copy of his co-defendant’s conviction for possession of methamphetamine. This conviction followed the co-defendant’s guilty plea and was in connection with the drugs discovered by the police officers during the traffic stop at issue in this case. Evidence of another person’s guilt in connection with the crimes for which a defendant is being tried are admissible where the evidence bears “persuasive assurances of trustworthiness and is critical to the defense.” Here, the co-defendant could not be located during trial for questioning by either appellant or the State. However, his guilty plea for methamphetamine possession was a declaration against his penal interest and therefore invested with inherent credibility. Moreover, his conviction supported

appellant’s sole defense, which was that the co-defendant threw the drugs in his lap during a traffic stop. Given that the conviction provided some evidence, the weight of which was to be determined by the jury, that appellant did not possess the drugs, the trial court abused its discretion in excluding it.

Similar Transactions

Tatum v. State, A09A0010

Appellant was convicted of burglary, aggravated assault, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a crime. He contended that the trial court erred in admitting into evidence a 1992 conviction because it was insufficiently similar and its prejudicial effect outweighed its probative value. The evidence showed that here, appellant broke into a home and threatened the victim with a semi-automatic pistol in an effort to scare him away from “messing” with one of appellant’s “homeboys”. In the similar case, appellant took a semi-automatic pistol he had borrowed from a friend and had “gone back looking” for a man known only as “Black” with whom he had had an altercation. He located Black standing in a vacant lot with others and opened fire “in an attempt to scare him,” striking a bystander in the head and severely wounding him. The Court held that while the two incidents were not identical, they demonstrated appellant’s propensity to take an earlier dispute to a more violent level by surprising and “trying to scare” his victims with a semi-automatic pistol. Appellant also presented an alibi defense, and similar transaction evidence is highly relevant when a criminal defendant presents an alibi defense because the evidence helps to prove the identity of the perpetrator. Thus, the similar transaction was not unduly prejudicial.