

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JUNE 14, 2013

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## THIS WEEK:

- Search & Seizure
- Challenges to the Poll; Pretrial Publicity
- Child Molestation; Accident Defense
- Rape; Jury Charges
- Severance
- Similar Transaction

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### Search & Seizure

*State v. Carr, A13A065 (6/4/13)*

Carr was indicted on a single count of possession of a firearm by a convicted felon. Carr moved to suppress the evidence seized during a police search of the automobile in which he had been riding, arguing that the search resulted from his illegal detention or arrest. The trial court granted that motion and the State appealed from that order. The Court affirmed.

The record showed that on March 30, 2012, a woman placed a 911 call to report an act of domestic violence committed against her by her boyfriend. She remained on the phone with dispatch as she waited for police, and gave the 911 operator a description of the suspect and the clothes he was wearing. Dispatch informed the responding officers that the victim had reported the suspect was riding in a blue Impala, and the officers saw a blue Impala driving towards them and, based on the information they had just received, they stopped the vehicle. There were two men in the Impala, with Carr being the passenger. One officer acknowledged that he had been given a description of the suspect and his clothing,

and that neither man in the car “fit the description of the suspect [police] were looking for.” The officers nevertheless asked Carr and the driver of the Impala for their identification, and each man produced a driver’s license. Each license eventually returned with no outstanding warrants.

While one officer was running the license check, the other officer opened the passenger door of the Impala. When she did so, the driver of the Impala exited the car and fled from the scene. One officer chased him but was unable to apprehend him. By the time the officer returned to the Impala, the other officer had removed Carr from the automobile, handcuffed him, and placed him in the back of the patrol car. She informed the first officer that she had found two guns in the Impala, one in the pocket on the driver’s door and one in the pocket on the passenger’s door. The officers ran the identification numbers on the weapons and learned that the gun found on the passenger side of the car was stolen. At that point, Carr was formally placed under arrest for theft by receiving.

The female domestic violence victim, who witnessed the encounter between Carr and the police, testified at the motion to suppress hearing. She stated that she was outside in the parking lot of the apartment complex during the time she was on the phone with 911. She saw the blue Impala, thought her boyfriend had gotten into the vehicle, and reported that fact to the 911 operator. Shortly thereafter, however, the blue Impala pulled up next to her and she saw that her boyfriend was not in the car. According to the victim, she also relayed this information to dispatch. The victim saw the police arrive at the apartment complex and stop the Impala, and she went to the scene of the traffic stop. She testified that as soon as the

driver fled the scene with one officer in pursuit, the other officer drew her gun, pulled Carr out of the Impala and onto the ground, telling him she would shoot him in the head if he moved. The officer then handcuffed Carr and placed him in the back of the patrol vehicle. According to victim, the officer seized the guns from the Impala after she had removed Carr from the vehicle. The victim also testified that she tried to tell the police that the suspect was not in the Impala, but the officers “didn’t want to talk.” The officers never took a statement from her and she had to place a second 911 call to file a police report with respect to the domestic violence incident.

The trial court granted Carr’s motion to suppress the evidence seized during the police search of the Impala. The court found that the officers had a reasonable basis to stop the automobile and conduct a brief investigative inquiry. Noting that Carr did not match the description of the suspect and had cooperated fully with police, and that there were no outstanding warrants on him, the court further found that police unjustifiably escalated their encounter with Carr into an unconstitutional arrest.

The Court stated that it is well established that police officers may conduct a brief stop of a vehicle and its occupants for the purpose of investigating suspected criminal activity, provided that the officers’ suspicions are based on specific information. Similarly, an investigatory stop escalates into a *de facto* arrest whenever the person stopped is restrained to a degree associated with a formal arrest. For such an arrest to be constitutional, it must be based on probable cause, *i.e.*, police must possess knowledge of objective facts and circumstances that would lead a reasonable officer to believe that the suspect has committed or is committing a crime.

Based upon the information available to them, there was no dispute that the police were justified in stopping the Impala and questioning its occupants. Given this fact, the State argued that during an investigatory traffic stop officers may take reasonable steps to insure their own safety. The State argued that by handcuffing Carr, the officer was acting only to protect officer safety and that this conduct must therefore be viewed as part of the constitutional investigatory stop, rather than an arrest. The Court disagreed. First, the Court noted that the State’s argument did not

address the subject of the motion to suppress, which was the illegal search of the Impala. The officer’s concerns for her safety should have dissipated once she had Carr handcuffed and in the back of the patrol vehicle. The Court did not see how her subsequent search of the Impala, during which she found the weapon at issue, was motivated by concern for officer safety.

Moreover, the Court noted, since the officer did not testify, there was no evidence in the record that she had a concern for her safety. Accordingly, the Court found that, under the circumstances and the evidence contained in the record, the officer’s decision to place Carr in handcuffs resulted in an unconstitutional seizure of his person. When analyzing whether a defendant has been seized in violation of the Fourth Amendment, the touchstone of the inquiry is the reasonableness of the officer’s conduct, which is measured in objective terms by examining the totality of the circumstances. The evidence that was presented failed to demonstrate that either officer had a reasonable basis for believing that Carr was armed, dangerous, or otherwise a threat to the officers’ personal safety. There was no report that the perpetrator in the domestic violence incident was armed; Carr had cooperated fully with police; and Carr had no outstanding warrants. Moreover, Carr did not match the description of the suspect given to police and the citizen who had telephoned for police assistance was on the scene, and she attempted to tell officers that neither of the men in the Impala was her assailant. Given the evidence, the Court held that the officer’s decision to remove Carr from the Impala forcibly, handcuff him, and place him in the patrol car escalated the investigatory stop into a custodial arrest. Accordingly, the search of the vehicle was improper and the trial court properly granted the motion to suppress.

## **Challenges to the Poll; Pretrial Publicity**

*Clay v. State, A13A0173 (6/3/13)*

Appellant was convicted for aggravated assault and serious injury by vehicle. He was initially charged in a 17-count indictment, but the court granted a motion to sever certain counts for purposes of trial. The record showed that after a jury had been impaneled, court

proceedings ended for the day and the jury was excused until the following Monday, when court proceedings in the case resumed, and the following occurred. Outside the presence of the jury, defense counsel notified the court that the day after the jury had been impaneled, an article about the case was published in a local newspaper; defense counsel asked the trial court to give a general voir dire of the jury and ask them if they had heard or read anything about the defendant since jury selection. When the trial court did so, five jurors raised their hands. The trial court excused all the jurors from the courtroom and individually called into the courtroom each of the five jurors who had raised his or her hand. Two of the jurors said they had noticed the article but had not read it; one juror said he had not read the article but had read the headline and had seen that there were more charges than the two that were mentioned during jury selection; another juror said that her mother had read the article and told her that the defendant had been charged with 19 counts; and another juror said that she had read the article. Defense counsel moved for a mistrial, asserting that the article had undone the severance. The trial court denied the motion. Thereafter, the jury entered the courtroom and was sworn.

The Court stated that the time for making a motion for mistrial is not ripe until the case has begun, and the trial does not begin until the jury has been impaneled and sworn. Therefore, the trial court correctly refused to declare a mistrial. However, the Court noted, even though counsel failed to follow the correct procedure or to use the proper procedural tool, it would not rely upon his inaccurate nomenclature, where the relief sought in a motion is clear.” Because appellant’s motion for mistrial came after each exposed juror had been individually examined, the Court viewed the motion as a challenge to the poll, which is directed solely to an objection in an individual juror.

Challenges to the poll are either peremptory or for cause. Challenges for cause are made in one of two forms—for principal cause or for favor. Principal cause is disqualification based on the grounds enumerated in O.C.G.A. § 15-12-163 (*i.e.*, the juror is not a citizen, is under 18 years of age, is incompetent because of mental illness, retardation or intoxication, or is so near in kinship to the prosecutor or accused as to disqualify him). Challenges for favor, in

a criminal case, are based on admission by the juror that he is biased for or against one of the parties, in response to questions authorized by O.C.G.A. § 15-12-164 (i.e., whether the juror has formed and expressed an opinion as to the guilt or innocence of the accused, has prejudice or bias for or against the accused, is perfectly impartial between the state and the accused, and in capital felony cases is not conscientiously opposed to capital punishment). The Court explained that the situation here was one of challenges for favor.

For a juror to be excused for cause, it must be shown that he or she holds an opinion of the guilt or innocence of the defendant that is so fixed and definite that the juror will be unable to set the opinion aside and decide the case based upon the evidence and the court's charge upon the evidence. A conclusion on an issue of juror bias is based on findings of demeanor and credibility which are peculiarly in the trial court's province, and those findings are to be given deference. The trial court questioned the five jurors individually to ascertain whether any of them had been prejudiced by their exposure to the newspaper article. The record showed that none of these five jurors had fixed opinions about appellant's guilt or any other issue in the trial. None of the five jurors had formed, nor had any of them expressed, an opinion as to appellant's guilt or innocence. Based on the jurors' responses, the jurors were not disqualified, and the trial court did not abuse its discretion in failing to strike any of the five jurors.

## **Child Molestation; Accident Defense**

*Ogletree v. State, A13A0373 (6/3/13)*

Appellant was indicted for committing six sexual offenses against his seven-year-old granddaughter, K. O.; a six-year-old girl, C. B., whose father lived next door to him; and a mentally disabled seventeen-year-old female, D. C., who also lived next door to him. Appellant contended that the trial court committed reversible error by failing to instruct the jury regarding the defense of accident. The effect of accident on guilt is set forth in O.C.G.A. § 16-2-2: "A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking, intention,

or criminal negligence." To authorize a jury instruction on a subject, there need only be produced at trial slight evidence supporting the theory of the charge. Whether the evidence presented is sufficient to authorize the giving of a charge is a question of law.

Appellant argued that his testimony authorized a charge on accident, which he claimed was his sole defense as to three counts of the indictment. But, the Court noted, appellant's trial counsel did not request a charge on accident, nor did he object to the court's failure to include such a charge before the jury retired to deliberate. Accordingly, pursuant to O.C.G.A. § 17-8-58(b), the Court reviewed this enumeration of error only to determine whether, under the four part test, the court's failure to include a specific instruction constituted plain error. First, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the trial court proceedings. Fourth and finally, if the above three prongs are satisfied, the appellate court has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Upon application of the test, the Court concluded that it had not been satisfied. First, appellant claimed that he was entitled to an instruction on accident as a defense to the charge of child molestation committed against K. O., by showing the child photographs depicting nude persons and persons performing sexual acts. A person commits the offense of child molestation when such person does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person. Appellant claimed that an instruction on accident was authorized by his testimony that he never showed any pornographic magazines or images to K. O., although he had once discovered the child looking at such materials and taken the materials from her. But by that testimony, appellant *denied* having done the acts that formed

the basis of the charged crime. To establish an evidentiary foundation for an instruction on the defense of accident, the defendant must admit to having committed an act that would constitute the crime charged, but claim that the act was done unintentionally. Since appellant denied doing the acts that formed the basis of the charge against him, his testimony could not form the basis for the requested jury instruction on accident. Hence, with respect to that count of the indictment, the court's failure to include a specific instruction on accident did not constitute plain error.

The remaining two counts that appellant cited were: (i) child molestation committed against K. O., by placing his hand on the child's vaginal area; and (ii) sexual battery committed against D. C., by touching her breast. Regarding the first of those two counts, Appellant claimed that a charge on accident was authorized by his testimony about assisting K. O. climb the ladder of a deer stand: "I went up behind her and put my hand on her butt and pushed her up the steps to make her go up. That's as far as it went. I did take my hand, and I might have touched her in the wrong direction. But it's never intentional." Regarding the second of those two counts, Appellant claimed that a charge on accident was authorized by his testimony that he had never touched D. C. inappropriately, although he had been "picking at her" and "joking her on her arms and on her sides." The Court stated that the defense of accident applies where the evidence negates the defendant's criminal intent, whatever that intent element is for the crime at issue, the Court viewed the trial court's jury charges as a whole to determine whether the jury was fully and fairly instructed on the law of the case. Here, to the extent that the omission of a specific instruction on accident was error, there was no likelihood that it affected the outcome of the trial, as the court instructed the jury on the law regarding criminal intent, including that it is an element of all crimes charged; and the State's burden to prove all elements of the crimes charged beyond a reasonable doubt. Because the court's charge, when considered as a whole, fully and fairly instructed the jury that it had the duty to acquit appellant if it determined that the state had failed to prove his guilt beyond a reasonable doubt, it was not plain error not to give a specific charge on accident.

## Rape; Jury Charges

*Pyes v. State, A13A0518 (6/4/13)*

Appellant was found guilty of rape and other crimes. Appellant contended that the trial court erred in charging the jury that “a victim’s testimony in a case involving rape is sufficient, even without more, to sustain a conviction,” because the trial court failed to buttress the charge with an additional charge regarding the State’s required burden of proof. Appellant argued that without the additional “burden of proof” charge, the instruction given effectively reduced the State’s burden of proof by providing a lower standard based solely on the victim’s testimony, thereby allowing the jury to focus solely on the court’s charge directed at the victim’s testimony, and convict him based on the victim’s testimony alone. Contrary to his contention, the Court found no error.

The Court noted that pursuant to the mandate of O.C.G.A. § 17-8-58(b), it would review the charge to determine whether it constituted plain error. Plain error is determined by a four-prong test: First, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant’s substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the trial court proceedings. Fourth and finally, if the above three prongs are satisfied, the appellate court has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. The Court stated that it is well established that a victim’s testimony, without more, is sufficient to sustain a conviction for rape. Thus, the Court held, the principle contained in the charge was a correct statement of the relevant law. Therefore, appellant could not satisfy the first two prongs of the plain error test—that a clear or obvious legal error occurred. Accordingly, the Court found no error, much less any plain error pursuant to O.C.G.A. § 17-8-58(b).

To the extent that appellant argued that the trial court was required to “buttress” the charge complained of by immediately follow-

ing said charge with an instruction concerning the requirement of “sufficient proof of evidence beyond a reasonable doubt,” the Court disagreed. In assessing an assertion of an erroneous jury instruction, including claims that a charge is misleading to the jury, the instruction must be evaluated in the context of the trial court’s jury instructions as a whole. The only requirement regarding jury charges is that the charges, as given, were correct statements of the law and, as a whole, would not mislead a jury of ordinary intelligence. There is no error where it is unlikely that the instructions considered as a whole would mislead a jury of ordinary intelligence.

Here, appellant’s defense at trial was that the sexual intercourse was consensual. In charging the jury on the crime of rape, the trial court provided the statutory definition of the crime and stated, “The State must prove each of these elements beyond a reasonable doubt.” The trial court further pertinently charged as follows: “the lack of consent on the part of the alleged victim is an essential element of the crime of rape and the burden of proof is on the State to show a lack of consent on the part of the alleged female victim beyond a reasonable doubt. If the State fails to prove such beyond a reasonable doubt, then you should acquit the Defendant. However, consent induced by force, fear, or intimidation does not amount to consent in law and does not prevent the intercourse from being rape. Consent to sexual intercourse obtained through present or immediate fear or serious—of serious bodily injury to the female involved is equivalent to no consent at all. The necessary penetration need only be slight and may be proved by indirect or circumstantial evidence. A victim’s testimony in a case involving rape is sufficient even without more to sustain a conviction.”

The trial court had earlier charged the jury on the presumption of innocence, including that the presumption “remains with the Defendant until it is overcome by the State with evidence that is sufficient to convince you beyond a reasonable doubt that the Defendant is guilty of the offenses charged.” The trial court had also earlier charged the jury extensively on the State’s burden of proof to prove each element of the crimes charged beyond a reasonable doubt. The trial court had charged the jury on determining the credibility of witnesses and resolving any conflicts in the evidence. The Court stated that there is no requirement in

the Georgia Code as to the particular form and order in which a judge should give applicable principles of law in charges to the jury. Of paramount importance is that the jury be given the controlling issues and the law applicable thereto. Here, the charge was not misleading. Nor, in the absence of a special request to charge, did the court err in omitting to state to the jury, in connection with such charge, the standard of the burden of proof. The Court did not find from the charge as given that the jury would have been misled to the point that it would have applied a standard below the reasonable doubt standard as the State’s burden of proof. Further, the Court did not find that the charge at issue overemphasized the option of finding appellant guilty. The portion of the trial court’s charge alleged to be erroneous must be viewed in the context of the charge in its entirety, and the charge given, considered in its entirety, was correct. Therefore, appellant had failed to show plain error in the charge.

## Severance

*Harrell v. State, A13A0293 (6/11/13)*

Appellant and his co-defendant were convicted of armed robbery and possession of a firearm during the commission of a crime. The evidence showed that two masked men held up a gas station, making off with a substantial amount of cash. As a similar transaction to show the co-defendant’s bent of mind and course of conduct, the State presented evidence of an armed robbery that had occurred at a sandwich shop three days before the armed robbery at the gas station.

Appellant contended that the trial court erred by not granting his motion to sever his trial from that of his co-defendant. In determining whether to grant a motion to sever, the trial court must consider the following three factors: (1) Will the number of defendants create confusion as to the law and evidence applicable to each; (2) is there a danger that admissible evidence against one defendant will be considered against the other despite the court’s instructions; and (3) are the defenses antagonistic to each other or to each other’s rights. Appellant claimed that his convictions resulted from a prejudicial spillover effect of the similar transaction evidence admitted only against his co-defendant.

The Court found that there was no showing that any confusion was engendered by the

number of defendants or by the applicable law. The record reflected that the trial court aptly instructed the jury that evidence of other acts or occurrences of the co-defendant that were sufficiently similar or connected, and therefore purportedly related to the offenses for which he was on trial, could be considered for the limited purpose of showing, if it did, the bent of mind and course of conduct of the co-defendant in the crimes charged. The trial court provided ample instructions on principles of parties to a crime, explaining further that the defendants were on trial for the offenses charged in the indictment only and not for any other acts or occurrences, even though such acts or occurrences may incidentally be criminal, and that the conviction of one defendant did not necessarily require conviction of another. The jury was instructed to determine guilt or innocence of each defendant separately.

The Court further found that the defenses of appellant and his co-defendant were not shown as antagonistic; neither attempted to point the blame at the other. Instead, they simply argued that the prosecution had failed to meet its burden of proof. And although appellant asserted that the joint trial harmed him because the evidence against his co-defendant was stronger than the evidence against him, it is not enough for a defendant to show that he would have a better chance of acquittal at a separate trial or that the evidence against a co-defendant is stronger. A defendant must show clearly that a joint trial prejudiced his defense, resulting in a denial of due process. The Court concluded that appellant had made no such showing. Accordingly, he had not demonstrated that the trial court abused its discretion in denying his motion for a separate trial.

## **Similar Transaction**

*Stover v. State*, A13A0524 (6/6/13)

Appellant was convicted of trafficking in cocaine and possession of a drug related object (digital scales). The evidence showed that appellant and his co-defendant passenger were stopped for a traffic violation on February 27, 2007. The officer was issuing a warning ticket when he noticed a brown sack under the passenger seat. He asked appellant if he could search the vehicle and appellant gave permission. The officer obtained the brown sack and found a large amount of crack cocaine, a large

amount of powder cocaine, and a digital scale. Another officer who had arrived as backup also found a smaller amount of cocaine between the front seats. The cocaine seized weighed 260.90 grams. The co-defendant testified that appellant picked up the cocaine from his cousin in Atlanta and then handed it to him and he placed it under his seat in the vehicle.

In addition to being involved in the pertinent incident, the co-defendant further testified that in 1999, he was with appellant in Alabama when appellant was driving and the co-defendant was trying to obtain cocaine from appellant. An officer conducted a traffic stop and removed two bags containing cocaine from the car. Appellant pled guilty to unlawful possession of a controlled substance for this incident.

The State also produced similar transaction evidence that in 2003, Alabama officers executed a search warrant on appellant's residence in Birmingham. During the search, officers found marijuana. The officers also found packaged cocaine in a wall socket and in a television set. Appellant stated at that time that he normally went to Atlanta to pick up his drugs and that his cousin would arrange the deal for him. Appellant pled guilty to possession of a controlled substance arising from this search.

Appellant contended that the trial court erred in allowing into evidence the 2003 incident as a similar transaction. The Court disagreed. Before evidence of another crime may be admitted as a similar transaction, the State must show that it seeks to introduce the evidence for an appropriate purpose; that there is sufficient evidence to establish that the accused committed the independent act; and that there is a sufficient connection or similarity between the independent act and the crime charged so that proof of the former tends to prove the latter. Appellant argued that five differences between the 2003 and 2007 incidents rendered admission of the 2003 incident error: (1) different venues, as the 2003 incident occurred in appellant's home in Birmingham while the 2007 incident occurred in a rental car on a Georgia highway; (2) the contraband was stashed in different places, as he hid the drugs behind a loose wall socket and in a television set in 2003, while in 2007, the drugs were in a brown bag under the seat of the car; (3) the amount of drugs found were very dissimilar and gave rise to

different crimes—the 2003 incident involved mere possession of contraband, while the 2007 incident involved a trafficking amount; (4) different kinds of drugs, marijuana and cocaine in 2003, but only cocaine in 2007; and (5) the parties involved were different because there was a passenger under whose seat the drugs were found in 2007.

The Court noted that a prior crime need not be identical in character to the charged offense if there is a sufficient connection between them. Further, when considering the admissibility of similar transaction evidence, the proper focus is on the similarities, not the differences, between the separate crimes and the crimes in question. Here, both the 2003 and the 2007 incidents involved the possession and concealment of cocaine. More importantly, during both incidents, appellant described the process by which he obtained his drugs, i.e., he drove to Atlanta to meet his cousin who then arranged to provide him with the drugs. Moreover, the Court noted, since appellant did not allege error in the admission of the 1999 similar transaction, any error in admission of the 2003 incident was harmless. Therefore, the Court found that the trial court did not abuse its discretion in allowing the State to introduce evidence of appellant's 2003 drug possession.