Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 26, 2009

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THIS WEEK:

In Personam Forfeitures; Due Process

Cisco v. State of Ga., S09A0371; S09A0375

Appellants contended that the in personam forfeiture provision of Georgia's RICO statute, O.C.G.A. § 16-14-7 (m) violated their constitutional rights because it failed to afford them certain due process rights afforded to criminal defendants. The Supreme Court agreed. The Court held that the test for determining whether a forfeiture statute imposes a valid civil remedial sanction or whether it imposes a criminal sanction is found in *United States v. Ursery*, 518 U.S. 267, 278, 116 SC 2135, 135 LE2d 549 (1996) and *Hudson v. United States*, 522 U.S. 93, 118 SC 488, 139 LE2d 450 (1997). The Court distinguished civil in rem forfeitures from in personam forfeitures. It determined that unlike in rem forfeitures, "the overwhelming weight of this country's jurisprudence establishes by the clearest proof that in personam forfeitures of assets are criminal proceedings grounded upon the culpability of the owner of the property and instituted for the purpose of punishing the owner for an offense." Thus, the Court found that the in personam RICO forfeiture provision in OCGA § 16-14-7 (m) is, by its nature, necessarily criminal and punitive. The Court therefore held that, by the clearest proof, OCGA § 16-14-7 (m) imposes a sanction on appellants that is so punitive in form and effect as to render that proceeding criminal despite the Legislature's language to the contrary. And, because OCGA § 16-14-7 (m) is in reality a criminal penalty, its enforcement must conform to the constitutional safeguards that accompany criminal proceedings.

Child Molestation; Consent

Chase v. State, S09G0139

Appellant, a school teacher, was convicted of child molestation under OCGA § 16-6-5.1 (b). The victim, a 16 year old junior at the school in which appellant taught, testified on cross-examination that she initiated the relationship with appellant because she "had feelings for her" and that she was the one who "pushed" the relationship. The State objected on grounds of relevance, arguing that consent of the alleged victim was no defense to a charge of sexual assault of a person enrolled in school under OCGA § 16-6-5.1 (b). The trial court sustained the State's objections to all further attempts by appellant to present a consent defense. Appellant contended that her conviction should be reversed because she should have been allowed to pursue a consent defense at trial.

The Supreme Court agreed. The Court stated that the age of consent in Georgia is 16 and generally speaking, it is a crime to have physical sexual contact with a person 15 years of age or younger. But, the Court stated, the converse is also true. Thus, generally speaking, it is not a crime in Georgia to have physical sexual contact with a willing participant who is 16 years of age or older.

OCGA § 16-6-5.1 (b) reads as follows: "A probation or parole officer or other custodian or supervisor of another person referred to in this Code section commits sexual assault when he or she engages in sexual contact with another person . . . who is enrolled in a school . . . and such actor has supervisory or disciplinary authority over such other person." The Court found that "[t]he plain language of the statute does not in any way indicate that the General Assembly intended to remove consent as a defense to a charge of violating subsection (b). The General Assembly knows full well how to eliminate the consent defense when it wishes to do so." In fact, the Court noted, the Legislature eliminated consent from crimes committed under OCGA § 16-6-5.1 (c). Finally, the Court rejected the District Attorney's defense of the trial court's actions on public policy grounds. The Court found that while the District Attorney's passion for protecting school-age children was admirable, to accept the arguments "would be to legislate by judicial fiat, and to do so ex post facto to boot. We will not usurp the General Assembly's legislative role by engrafting onto subsection (b) of OCGA § 16-6-5.1 language the General Assembly placed in subsection (c) and specifically limited to that subsection only."

Statements; Ultimate Issue

Mangrum v. State, S09A0525

Appellant was convicted of felony murder, aggravated child molestation, rape and other offenses. He contended that his statements to law enforcement were improperly admitted at trial. Under OCGA § 24-3-50, in order for an incriminatory statement to be admissible, "it must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury." The "hope of benefit" that will render a statement involuntary must relate to the charges facing the suspect, and generally refers to the reward of a lighter sentence for confessing. Here, the statements to appellant from law enforcement that admonished him to tell the truth, or else face arrest for felony hindering of the investigation were merely exhortations to tell the truth and were not a hope of benefit that renders a confession inadmissible under OCGA § 24-3-50.

The Court also held that appellant was not induced to make incriminating statements by the "remotest fear of injury." The evidence showed that although the police did not threaten appellant with any physical or mental harm, appellant contended that a detective violated the "fear of injury" prohibition by saying, "If you lie to us and we put you back out there on the street and they, then you're dead. How's your mama going to feel? We can't help you." The Court held that contrary to appellant's contention, the suggestion by the detective that he might be safer remaining in police custody did not render the custodial statements involuntary.

Appellant contended that the trial court erred in denying his motion for a mistrial after an expert in forensic pathology opined about the ultimate issue in the case by testifying that the manner of death was a homicide. A witness generally is not permitted to express his or her opinion regarding an ultimate issue in the case because to do so would invade the fact-finding province of the jury. However, the Court held, whether the death here was a homicide was not the ultimate issue for the jury to decide. Rather, the ultimate issue was whether appellant, who presented an alibi defense and attempted to implicate other suspects, was culpable for the killing of the victim. Therefore, the expert's testimony did not go to the ultimate issue and did not invade the province of the jury.

Motion for New Trial; Jury Charges

Mangrum v. State, S09A0525

Appellant was convicted of felony murder, aggravated child molestation, rape and other offenses. He contended that the trial court erred in denying his motion for new trial without a hearing. A defendant has a due process right to a hearing on his motion for a new trial if he requests one, but the trial court has no duty to initiate such hearing. Rather, the party seeking a hearing must take affirmative steps to request one, and failure to do so results in a waiver of the right. Here, the Court held, because the record reflected no request by appellant for a hearing on his motion for a new trial, the trial court did not err in failing to hold such a hearing.

Appellant argued that the trial court improperly charged the jury that the "against her will" element of forcible rape was supplied by the victim's age of 15. The Court held that the term "against her will" means without consent. The fact that a victim is under the age of consent may supply the "against her will" element in a forcible rape case since it shows that the victim is incapable of giving legal consent. Accordingly, the trial court correctly charged that the element of "against her will" was automatically shown by he victim's age.

Appellant also argued that although he was indicted for felony murder, with rape as the underlying felony, the jury could have found that the victim died during the commission of the lesser offense of statutory rape, which was a misdemeanor due to his age (17) and that of the victim (15). Thus, he argued, the trial court erred in failing to give his requested jury charge on involuntary manslaughter, with statutory rape as the underlying misdemeanor. The Court, however, found that such a charge would not have been appropriate because statutory rape is not a lesser included offense of forcible rape. Thus, the involuntary manslaughter alleged by appellant was not a lesser included offense of the felony murder as charged in the indictment, and therefore the trial court did not err in refusing to give such a jury instruction.

Search & Seizure

Agnew v. State, A09A0248

Appellant was convicted of possession of marijuana with intent to distribute. He argued that the trial court erred in denying his motion to suppress. The evidence showed that an officer stopped a van for speeding. Appellant, the owner of the van, was a passenger at the time of the stop. The officer placed the driver under arrest for driving with a suspended license and handcuffed him. He then returned to the van and searched the driver's seat area over the objections of appellant. During his initial search, the officer found a marijuana cigarette inside an open pack of cigarettes. He then removed appellant and another passenger from the van before searching the entire van more thoroughly. The officer found 10 one-gal-

lon size plastic bags of marijuana, digital scales, and a box of plastic sandwich bags.

The Court noted that all of the briefs in this case were due before the United States Supreme Court issued its decision in *Arizona v. Gant*, __ U.S. __, 129 SC 1710, 173 LE2d 485 (2009), and the search at issue in this case falls squarely within the scope of the Supreme Court's holding in *Gant*. As a result, the Court vacated the trial court's order denying appellant's motion to suppress and remanded the case to the trial court to conduct a hearing and consider the Supreme Court's holding in *Gant*.

Adkins v. State, A09A0342

Appellant was convicted of possession of methamphetamine. She contended that the trial court erred in denying her motion to suppress. The evidence showed that appellant's vehicle was stopped solely on a "suspicious car in neighborhood" call. Upon learning that appellant was on probation, the officers asked for, and were given consent to search her vehicle based on appellant's probation status. The State conceded that the stop was illegal, but argued that the trial court correctly held that the officers could properly search pursuant to the "search and specimen" condition in appellant's probation, which attenuated any connection between the illegal stop and the subsequent search of her car.

The Court reversed. It held that there must be some conduct reasonably suggestive of criminal activity to trigger the search. It can be prompted by a good-faith suspicion, arising from routine police investigative work. As a general rule, the police can search a probationer, who is subject to such a special condition of probation, at any time, day or night, and with or without a warrant, provided there exists a reasonable or good-faith suspicion for the search, that is, the police must not merely be acting in bad faith or in an arbitrary and capricious manner. Here, the encounter began with an anonymous call reporting two people parked in a car in an area that usually had little or no traffic. There was no evidence, however, that the neighborhood in which appellant was parked was a high crime area, that it was illegal to park in that area or that appellant was engaged in any other criminal activity. The caller reported two people in the car, but appellant was alone when the police stopped her thus supporting her claim that she was in the neighborhood to drop off her boyfriend. The only other factor cited to support appellant's detention was her extreme nervousness, but it is well-settled that nervousness alone is not enough to justify a detention or search and police observations of appellant's nervousness arose directly from the illegal stop.

The Court further held that appellant's consent was invalid because it was tainted by the illegal stop. The police had no valid basis for initiating a stop of appellant's car. As a result of the illegal stop, they determined that she was on probation, and without any evidence of criminal activity, they illegally detained her while requesting consent to search. Therefore, the Court determined, considering the totality of these circumstances, the taint of the unreasonable stop was not sufficiently attenuated.

Chambliss v. State, A09A0754

Appellant was convicted of possession of methamphetamine. He contended that the affidavit in support of the search warrant lacked articulable probable cause and that the information was stale. The Court disagreed. The record showed that DFACS received a telephone call from an anonymous individual who had been in the home and seen "all of the materials" used for the manufacture of methamphetamine. The informant also stated that the parents allowed the child to play unattended near the road. DFACS informed law enforcement. A sheriff's investigator went out to check on the house but no one was home. He returned to his office and was told from his lieutenant that appellant was being investigated by the feds as an alleged member of a meth ring. He was also told that appellant was known as a methamphetamine dealer, user, and manufacturer. This information was consistent with "numerous" anonymous tips received by the sheriff's office that appellant was manufacturing methamphetamine at his residence. The investigator then took this information and obtained a warrant to search appellant's home.

The Court held that the report to DFACS was not made to police and was not a typical "drug tip," as the tipster's primary concern appeared to be the neglect of the six-year-old child, who was also reportedly allowed to play alone near a busy road. The investigator who sought the warrant testified that his initial and primary concern was the welfare of the child. Although appellant asserted this was meaningless because the child was taken into protective custody before the warrant was issued, the Court held that this did not affect the relative reliability of the initial complaint to DFACS. In addition, a magistrate may properly consider a police officer's knowledge of a suspect's reputation when deciding whether to issue a search warrant. Further, multiple tips from confidential informants which are consistent with each other and with police investigation may constitute corroboration and the investigator's own investigation corroborated the information supplied by the informants

Appellant also argued that the information in the affidavit was stale. However, the Court found otherwise because the initial information was given to DFACS on a Friday and transmitted to the sheriff's office on the following Wednesday, the same day that the search warrant was obtained. The mere passage of time does not equate with staleness. Moreover, this was not a case of mere possession or sale of drugs, where it could be anticipated that the product would be used or sold within a short period of time. Here, the information received from multiple sources indicated a long-term involvement in the manufacture of the drug and therefore a likelihood that the equipment for its production would remain in place over time. Under the totality of the circumstances presented here, the magistrate was authorized to make a pragmatic, commonsense judgment that there was a fair probability that a search of appellant's residence would produce evidence of the manufacture of methamphetamine. The trial court therefore did not err in denying the motion to suppress.

Warner v. State, A09A1014

Appellant was convicted of armed robbery and possession of a weapon during the commission of a crime. He contended that the trial court erred in denying his motion to suppress. The evidence showed that appellant was apparently home from college and living with his parents. The officers went to appellant's house and asked to search appellant's bedroom. The parents consented. Appellant contended that he was a renter from his parents and therefore his parents lacked authority to consent to the search. The Court held that if the parents were not appellant's landlords but instead were

the heads of the household in which he lived, their consent to the search of his bedroom was valid. This was a question of fact for the trial court. The trial court found that the parents were not appellant's landlord and the evidence supported its determination. First, appellant he paid sporadic payments to his parents, this did not establish a landlord-tenant relationship. Second, his performance of some household chores also did not establish such a relationship. His parents also had access to his bedroom which remained unlocked. Finally, even if the parents in fact did not have the authority to consent to a search of Warner's bedroom, the circumstances led the police to reasonably believe that the parents had that authority, and therefore the search was valid.

Appellant also contended that the trial court erred in denying his motion to suppress the AK-47 found in the trunk of his car. The evidence showed that the vehicle was owned by appellant's mother and was located in the parking lot of an apartment complex in which one of his co-conspirators lived. The officers seized and towed the vehicle to an impound lot where they searched it after obtaining a warrant. The Court held that the trial court's admission of the evidence was correct for two reasons. First, whether the warrantless seizure of the car was illegal or not, the seizure itself resulted in the discovery of no items in the trunk, for the vehicle was not searched at that time. Rather, the items were discovered during a later search performed pursuant to a search warrant. Accordingly, the purportedly illegal seizure resulted in no items to be suppressed nor in any items admitted at trial, justifying the court's denial of the motion to suppress on this ground alone. Second, exigent circumstances existed justifying the warrantless seizure. Thus, the vehicle was parked in an unprotected parking lot of the apartment complex in the wee hours of the morning. Appellant and his co-conspirator had just been arrested for the attempted robbery, but a third man involved in an earlier armed robbery had not. The parents had told the police that appellant kept a long rifle in the trunk of the vehicle. Concerned that, in light of appellant's arrest, this third man might now seek out the vehicle to destroy the evidence contained therein, police properly sought to secure the vehicle by having it towed to a secure police parking lot until they could obtain a search warrant some hours later.

Sentencing; RICO

Borison v. State, A09A0534

Appellant pleaded guilty in a lengthy, written plea agreement to one count of racketeering under RICO, 18 counts of theft by taking, 10 counts of theft of services, and 7 counts of false statements. He was sentenced to 15 years in prison followed by 15 years probation. Appellant then moved to correct a void sentence. He contended that the trial court erred by imposing punishment on the RICO charge as well as the predicate acts. He argued that the sentence was void in that it constituted double jeopardy. The Court held that "[w]hen a criminal defendant pleads guilty to counts of an indictment alleging multiple criminal acts, and willingly and knowingly accepts the specified sentences as to such charged counts, the defendant waives any claim that there was in fact only one act and that the resulting sentences are void on double jeopardy grounds." Here, the Court stated, appellant knowingly entered into the plea agreement, and having accepted the benefit of such bargain with the State, he attempted to renege. Public policy and the ends of justice require that he not be allowed to do so.

Voir Dire

Green v. State, A09A0621

Appellant was convicted of kidnapping, armed robbery, aggravated sodomy, and possession of a knife during the commission of a crime. He argued that the trial court erred by dismissing a juror after the close of evidence and after jury deliberations had commenced. The record showed that during voir dire, the State asked potential jurors if they ever had been arrested on a felony charge. The juror in question failed to divulge that he had been arrested for rape in 1997. The State did not learn about this omission until after deliberations had begun. The trial court questioned the juror outside the presence of the other jury members, and the juror first denied that he had been arrested for a felony, but later admitted that he had been arrested for rape. Based on the juror's answers, the trial court removed him from the jury.

The Court held that OCGA § 15-12-172 gives the trial court discretion to discharge a juror and replace him or her with an alternate at any time. In this case, the trial court did not abuse its discretion by dismissing the juror after deliberations had begun because the juror's "failure to respond truthfully during voir dire" constituted legal cause to remove him. Although there had been no allegation that the juror refused to deliberate with his fellow jurors, and although the juror contended that his failure to answer was an honest mistake, his removal was proper because the trial court was faced with a juror whose veracity was clearly in question.

Little v. State, A09A0101

Appellant was convicted of aggravated assault on a police officer, obstruction and DUI. He contended that the trial court erred in not granting his motion for mistrial after a potential juror tainted the jury pool during voir dire. The record showed that the potential juror stated "I have never known [the victim law enforcement officier] to lie[,] and I don't think I could hear anything else that would make a difference[,] and it would be hard for me to be impartial." Appellant moved for a mistrial on the ground that the jury array had been tainted by the potential juror's statement about the officer's credibility, but the trial court denied the motion and struck the juror for cause.

The Court held that appellant's motion for mistrial was premature, having been made before the jury had been impaneled and sworn. In any event, assuming that the trial court should have construed the motion for mistrial as a challenge to the impartiality of the remaining jurors, the Court further found that there was no error on the part of the trial court for denying the motion. The comment made by the potential juror was not inherently prejudicial because she did not comment on the guilt or innocence of appellant, but merely expressed the reason why she could not impartially view the evidence presented at trial. Accordingly, there was no error on the part of the trial court.

Aggravated Assault; Jury Oaths

Fedd v. State, A09A0641

Appellant was convicted of aggravated assault upon a police officer and obstruction of an officer. He contended that the trial court erred by failing to timely administer the jurors' oath and by failing to instruct the jury that knowledge that the victim is a police

officer is an essential element of the crime of aggravated assault upon a police officer. The record showed that following the close of the evidence, the trial court realized that it had failed to administer the jury oath. The trial court then administered the oath to the jurors and instructed them to "apply this oath" to the "evidence that [had been] heard" throughout the trial and that the oath applied "to all of [the] proceedings in this case." The Court held that there is a distinction between a delay in administering the oath and a total failure to administer any oath before deliberations and the verdict. Only a verdict of a totally unsworn jury is a nullity. In other words, when the statutory requirements for administering an oath to a jury trying a criminal case have been utterly ignored, prejudice is presumed. But, where, as here, there has been a mere irregularity in the administration of the jury oath, the irregularity is subject to a harmless error analysis. The Court concluded that appellant failed to show any harm as a result of the delayed oath.

Appellant also argued that the trial court erred in alleging the essential allegations of his aggravated assault on a police officer conviction. The Court agreed. The evidence showed that the victim was a uniformed deputy driving a patrol car. The trial court instructed the jury, in relevant part, by reading the indictment charging appellant with the offense of aggravated assault upon a police officer and defining the offense under the terms of the statute. However, the indictment did not contain a specific allegation that appellant knew that the victim was a police officer and, the use of language such as "knowingly commits" or "knowingly assaults" in defining the offense is insufficient to meet the requirement for this jury instruction. Moreover, the error was not harmless because the rest of the jury instructions failed to properly apprise the jury of this element of the crime and appellant's entire defense was based upon his alleged lack of knowledge that his assault victim was a police officer. The Court remanded for sentencing on the lesser included offense of aggravated assault.

Reciprocal Discovery; Alibi

Ware v. State, A09A0343

Appellant was convicted of armed robbery and possession of a firearm during the commission of a felony. He argued that absent a finding of bad faith and prejudice, the trial court erroneously excluded the testimony of his alibi witness based upon his failure to give the State the statutory ten day notice. The Court agreed and reversed. The Court held that Georgia law is clear that, upon a demand by the State, a defendant is required to disclose in writing an intention to rely upon an alibi defense under OCGA § 17-16-5 (a). By the plain terms of the statute, however, the sanction of exclusion is reserved for instances in which the trial court finds prejudice to the State and bad faith by the defense. Here, the trial court expressly found that its exclusion of the witness was not based upon a finding of bad faith. Therefore, the trial court erred. Moreover, the error was not harmless because appellant's sole defense was that he was misidentified by the victim and he intended to call the witness to corroborate his testimony that he was with her at the time of the crime.

Search & Seizure; Implied Consent

Daniel v. State, A09A0226

Appellant was convicted of three counts of first degree homicide by vehicle and two counts of DUI. She contended that the trial court erred in admitting the results of the blood test given to her at the hospital after the accident. A document of the results of such a test is admissible at trial under the routine business record exception to hearsay, provided the proponent lays the proper foundation. A proper foundation includes testimony of a witness familiar with the method of record keeping, stating that it was the regular course of business to keep such records, that this record was kept in the regular course of business, and that it was made at or within a reasonable amount of time after the event it records. Writings may be admitted into evidence under this exception if they contain routine facts whose accuracy is not affected by bias, judgment or memory of the author. There is no requirement that the testifying witness have personal knowledge of the specific document's creation.

Here, the Court held, the State laid a proper foundation. Thus the evidence showed that the test was completed in the regular course of business, a record was kept in the regular course of business, the test results showed only factual data, and blood test records are usually made at or within a reasonable amount of time after the blood was tested. Although the evidence did not show that appellant's test was recorded within a reasonable time after the results were generated, it was the usual practice of the hospital to make the record contemporaneously to generating a printed blood test result, and the printed result was time stamped only ten minutes after the blood test was ordered.

Appellant also contended that the trial court erred in denying her motion to suppress on the ground that the State failed to show that the officer had probable cause to believe appellant had been driving under the influence of an intoxicating substance at the time he requested the test. The evidence showed that the officer who read appellant her implied consent rights had died prior to the hearing. At the suppression hearing, the State presented another officer's testimony that the deceased officer had told him over the phone that he had detected the odor of alcohol on appellant at the hospital. The Court held that this testimony was not inadmissible hearsay violating her right of confrontation because hearsay is admissible during a suppression hearing when determining the existence of probable cause.

Jury Charges; Right of Allocution

Pilkington v. State, A09A0782

Appellant was convicted under OCGA § 16-5-21 (a) (1) of three counts of aggravated assault with intent to rob. He argued that the trial court erred in refusing to give his requested jury charge of attempted armed robbery. An attempt to commit a crime may be found as a lesser included offense even though the greater crime was actually committed. But where an attempt to commit one crime can only be proved by proof of another, greater, consummated crime, the attempt of the former cannot possibly be "included" or "lesser" than the latter. Here, appellant was not entitled to a charge or verdict of attempted armed robbery when that offense could *only* be proved by showing that he brandished a weapon in the faces of his victims with the intent to rob them, that is, that he actually committed the greater offense, a completed aggravated assault with the intent to rob. In this case, the evidence that proved that appel-

lant committed an attempted armed robbery necessarily proved that he committed the greater, completed crime of aggravated assault with intent to rob. There was therefore no evidence that appellant committed *only* the offense of attempted armed robbery and he was not entitled to a charge on this lesser included offense.

Appellant also contended the trial court erred in refusing to allow him to speak and to offer evidence in mitigation of his punishment at sentencing, pursuant to OCGA § 17-10-2. However, the Court found, the record revealed that the trial court heard evidence in mitigation from appellant's sister and mother and heard the arguments of defense counsel. When the court asked appellant directly if he had anything to say, he said "no." But, after the court began to pronounce sentence, appellant interrupted, indicating a desire to make a statement. The trial court refused to hear him. The Court held that the requirements of OCGA § 17-10-2 were met by defense counsel arguing on appellant's behalf and presenting evidence in mitigation at the sentencing hearing. Therefore, the trial court did not violate appellant's right of allocution when it instructed him not to interrupt its pronouncement of sentence.

Rape Shield; Mistrial

Birdsong v. State, A09A0963

Appellant was charged with kidnapping, rape, aggravated assault, aggravated battery and other offenses against his estranged wife. During trial, defense counsel sought to elicit testimony from the victim that after the alleged attack, she had sex with other men. The State moved for a mistrial and the court granted it. Appellant contended that the trial court erred in denying his plea of former jeopardy, arguing that the mistrial was improperly granted because his cross-examination of the victim did not violate the Rape Shield Statute. The Court held that the Rape Shield Statute, OCGA § 24-2-3, prohibits admitting the past sexual behavior of an alleged rape victim unless the trial court finds that the past behavior directly involved the participation of the defendant and further finds that the behavior supports an inference that the defendant could have reasonably believed that the victim consented to the conduct at issue. Such evidence may also be admitted on a finding that it is so highly material that it will substantially support a conclusion that the accused reasonably believed that the complaining witness consented to the conduct complained of and that justice mandates admission of such evidence. Here, the Court found, appellant specifically cross-examined his wife as to how often she had engaged in sexual intercourse after the alleged rape. This question undisputedly concerned his wife's past sexual behavior and was therefore subject to the restrictions of the Rape Shield Statute because the questioned sexual behavior did not directly involved the participation of appellant and did not support an inference that he could have reasonably believed that his wife consented to the sexual intercourse for which he was being prosecuted. Moreover, appellant's argument that the Rape Shield Statute was not applicable in this matter whatsoever because his question was intended to show that the wife was engaging in behavior that was not indicative of having been traumatized as she claimed was also without merit. The res gestae rule, impeachment techniques and other traditional means for introducing evidence which is otherwise inadmissible can have no effect in this situation. Furthermore, appellant's contention that the Rape Shield Statute was not applicable because the questions about sex with other men were more focused on impeaching the wife as to whether the aggravated battery actually occurred is equally without merit. The Rape Shield Statute applies to aggravated assault charges that are being prosecuted in conjunction with a rape charge arising from the same attack. The Court found "no logical reason or authority" for the proposition that OCGA § 24-2-3 should not apply to a related aggravated battery count in a rape case.

Appellant also contended that the trial court erred in denying his plea of former jeopardy because there was no manifest necessity for declaring a mistrial. However, the Court found that "this Court, the Georgia Supreme Court, and the United States Court of Appeals for the Eleventh Circuit have held that the introduction of evidence prohibited by the Rape Shield Statute gives a court grounds to find manifest necessity for a mistrial." Thus, the trial court did not err because the prejudice was created by the deliberate and improper questioning by defense counsel of appellant's estranged wife.

Closing Arguments; Character

Warner v. State, A09A1014

Appellant was convicted of armed robbery and possession of a weapon during the commission of a crime. Appellant contended that the trial court erred by failing to give a curative instruction or admonishment to combat the adverse effect of improper remarks made during the State's closing argument. The record showed that the prosecutor argued that defense counsel's "only allegiance is to his client and the only thing that's in this case was money in order to come up here and spend as much smoke and as enough distraction from the evidence in the case." After closing arguments and the charge to the jury, and after the jury had retired, appellant moved the court to admonish the prosecutor in front of the jury for this improper remark, which motion the court denied. The Court found that the remark was an improper argument. However, appellant made no contemporaneous objection or motion. Rather, he waited until after closing arguments were concluded, until after the court had charged the jury, and until after the jury had retired to deliberate, before making any objection, and even then, he merely moved the court for a curative instruction in which the court would admonish the prosecutor in front of the jury. Thus there was no error because such motions or objections, when made after the offending closing argument has concluded (and particularly when made after the court's subsequent jury charge and after the jury has retired) are untimely and are therefore waived.

Appellant also argued that the trial court erred in striking from the record a character witness's testimony who sought to establish appellant's good character in the school community. The evidence showed that when the witness, a high school football coach, equivocated as to the extent of his familiarity with appellant, the court asked him directly whether he was familiar with appellant's reputation in the community in which Warner lived, to which the witness responded, "I'm not." Thereupon, the State asked the court to strike the witness's testimony, which the court granted by instructing the jury to disregard the testimony. The Court held that the direct examination to prove the character of the accused must be limited to questions concerning his general

reputation in the community in which he lives. Reputation in the business community or in the school community is not the correct test. Because the witness expressly denied having knowledge of appellant's reputation in the community in which appellant lived, the trial court did not abuse its discretion in striking the testimony.