Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 11, 2008

THIS WEEK:

Search Warrant, Inter-spousal Communications

Reaves v. State, S08A0126

Appellant was charged with malice murder and related offences in connection with the death of her 11-year-old daughter. Appellant argues there was insufficient probable cause shown for the seizure of all items listed in the warrant, not just to evidence seized pursuant to the listed items of "notes" and "papers. Probable cause must be shown for each item named in a warrant. *Groh v. Rameriz*, 540 U.S. 551, 560 (2004). Determining whether probable cause was shown to believe that a certain crime was committed and that there is a fair probability that evidence of that crime will be located at the place specified is a separate determination from whether probable cause was shown for the search and seizure of the specific items of evidence for which were authorized in the warrant. Here, the list of specific items in the warrant included "notes" and "papers." These items, along with the rest of the items listed, provided guidelines for the officers conducting the search in Appellant's home for evidence of crimes of cruelty to children and murder. The trial court correctly ordered that items of evidence seized pursuant to the inclusion of "notes" and "papers" in the warrant be suppressed. It may seem that these items fall under the general phrase of "evidence" of the crimes of cruelty to children and murder. However, a showing of probable cause at to that general phrase does not obviate the need for a showing of probable cause as to the specific items of "notes" and "papers".

Appellant challenges the trial court's denial of a motion to exclude a printed e-mail under the privilege afforded inter-spousal communications. Communications between spouses are privileged and are generally inadmissible. The inter-spousal communications privilege is not available in a case where a spouse is charged with a crime against the person of a minor. In such a case, a non-defendant spouse may be compelled to give evidence against the defendant spouse only on the specific act for which the defendant is charged. OCGA § 24-9-23(b). Even so, here,

the printed email cannot be construed as evidence given under compulsion by Appellant's spouse since it was seized during the search of Appellant's home. The email is not subject to statutory marital privilege. The trial court did not err in declining to suppress it.

Photographs of the Victim

Boyd v. State, S08A0474

Appellant argues that the trial court erred in allowing State to introduce a photograph of the victim with his family at trial. The general rule is that when no photograph of the victim alone is available, the admission of a photograph of the victim with others is admissible. The trial court did not abuse its discretion. However, it should be emphasized that every effort should be made to proffer a photograph of the victim alone.

Intent, Insanity, Jury Charges, Murder

Smith v. State, S08A0256

Appellant contends the trial court erred in requiring him to present his claim that he shot his wife while sleepwalking pursuant to the defense of not guilty by reason of insanity instead of pursuant to the defense that he was unaware of his actions and lacked the intent to kill her. The Court has previously stated in dicta that, if a defendant commits an act that would otherwise be a crime while sleepwalking, he would not be criminally responsible because he would not satisfy Georgia's requirement that "there be a joint operation of act and intent to constitute a crime." *Lewis v. State*, 196 Ga. 755, 7763 (1943); OCGA § 16-2-1(a). Also, many other jurisdictions have considered this question. They have held that unconsciousness disorders, including sleep disorders, constitute a separate defense from insanity, and that people who commit potentially criminal acts because of such disorders should not be criminally responsible because they were not acting voluntarily and with criminal intent. In interpreting the mens rea requirement of a statute to contain only a general intent as opposed to a specific intent requirement, the Supreme Court stated that a general intent requirement would protect the "hypothetical person who engaged in forceful taking of money while sleepwalking (innocent, if aberrant activity)." *Carter v. United States*, 530 U.S. 255, 269 (2000). Not only was the trial court's decision error, but that error was also prejudicial to Appellant. The Appellant's own expert testified that Appellant did not meet the legal definition of insanity. The imposition of the insanity defense detracted from Appellant's primary defense that he did not commit the acts in question voluntarily and with criminal intent. The Appellant's conviction is reversed.

Right to Remain Silent and Prosecutorial Misconduct

Lampley v. State, S08A0284

Appellant contends his trial counsel was ineffective in failing to object and move for mistrial in response to certain remarks made by the State during it closing arguments. Appellant argues the remarks were an improper comment on he pre-arrest silence: "Does he go back to see if [the victim]…[is] okay? Does he call the police and say th[at] … an incident [occurred], this guy had my car. He wouldn't give it back to me, and this is what I had to do. I chased him down and I tried to get my car and it got out of hand. He doesn't do any of that." The Georgia Supreme Court found these comments did constitute an improper comment on Appellant's silence or failure to come forward. *Mallory v. State*, 261 Ga. 625 (5) (1991), overruled on other grounds. Appellant's attorney was deficient in failing to object. However, Appellant failed to show there was a reasonable probability the outcome of trial would have been different. The Supreme Court of Georgia affirmed.

Right to Counsel, Miranda Rights, Statements made by Defendant

State v. Darby, S08A0658

The State challenges the trial court's conclusion that not only was the defendant's first custodial statement inadmissible, but also his second statement made after the defendant requested a lawyer.

Initially, the defendant was arrested for his suspected involvement in a murder. The defendant asked for an attorney but then asked the officers why he was being charged with murder. The officers informed the defendant that he had to sign the Miranda waiver before making a statement to police. The officers incorrectly advised the defendant. The rule is that a suspect can always make a spontaneous, voluntary statement which would be admissible at trial. *Zubiadul v. State*, 193 Ga.App. 235, 236-237 (1989). The correct response by the officers would have been that the defendant could make a voluntary statement, but that he could not be interrogated by the officers, without signing the Miranda waiver. Defendant signed the waiver only after receiving the erroneous information that it was a precondition of telling his "side of the story." The trial court correctly found that the defendant did not, even by signing a Miranda waiver, knowingly and intelligently waive his Sixth Amendment right.

At the end of the first statement, defendant became upset when the officers would not let him see his parents and invoked his right to counsel again. After an officer initiated conversation with the defendant by telling him what to expect at the preliminary hearing, the defendant gave a second statement. In order to determine whether a suspect who has invoked their right to counsel has subsequently waived that right, the court must: (1) determine whether the defendant initiated further talks with the police and, (2) if so, whether his waiver was shown to be voluntary under the totality of the circumstances. *Sanders v. State*, 182 Ga.App. 581, 582 (1) (1987). Here, in starting the conversation with the defendant, though the officer did not initiate an interrogation into the murder, neither was he engaging in a "routine inquiry …having nothing to do with the criminal investigation…." *Hibbert v. State*, 195 Ga.App. 235, 236 (1990). Here, the officer picked the defendant up 90 minutes before his preliminary hearing, took him not to the courthouse but to police headquarters, placed him in an interrogation room, and began telling the defendant what to expect at the hearing. This action did not fall within the booking exception to *Miranda* nor did it fulfill an administrative function. *Edwards v. Arizona*. 451 U.S. 477 (1981) was violated. The trial court correctly concluded the only purpose of the officer's actions were to reestablish communication between the police and the defendant.

Sentencing and Separation of Powers

Terry v. Hamrick, S08A0170

Appellant appeals the denial of habeas corpus relief. In his sentence, Appellant was

banished from every county in the State of Georgia except for Toombs County. If he is seen in any other county during the term of his sentence, it would be a violation of his parole and probation. Appellant asserts that this provision of his sentence violates this State's constitutional provision regarding the separation of powers. The Board of Pardons and Paroles has executive power regarding the terms and conditions of paroles. See OCGA §§ 42-9-40, 42-9-44. On remand, the Georgia Supreme Court directed the habeas court to enter an order granting the writ of habeas corpus as to the "parole" part of Appellant's sentence.

Accusation Obstruction of Emergency Call

State v. Harris; A08A0310

Following a jury trial, defendant was convicted of obstructing/hindering an emergency telephone in violation of OCGA §16-10-24.3. Following trial, defendant filed a motion in arrest of judgment, contending that the State's accusation was legally defective in that it failed to allege the necessary element of intent for the offense. The trial court granted defendant's motion based upon the State's failure to allege intent as a material element of the offense. On appeal, the State contends that the requisite intent to cause or allow physical harm or injury to another person can be inferred based on other counts in the accusation. The record shows that the accusation charged defendant, "with the offense of obstructing/hindering emergency telephone call."

The Court of Appeals found that where intent is a material element of an offense, it must be alleged in the indictment. Here, the State's accusation omitted the statutory language setting forth the requisite intent, a material element of the offense. The failure to charge a necessary element of the crime is a defect that will render an accusation void. Judgment affirmed.

Evidence: Opinion, Character, Similar Transaction

Miller v. State; A08A0657

Appellant was convicted of aggravated assault. On appeal, appellant contends that the trial court erred: (i) in allowing a plastic surgeon to give his lay opinion regarding the injury; (ii) in becoming an advocate for the state by informing the prosecutor that he needed to call the doctor to testify about what caused the injury; (iii) in admitting his mug shot into evidence without giving the jury a limiting instruction after he objected that it put his character into evidence; (iv) in allowing one of the similar transaction evidence witnesses to give testimony about a crime other than the similar transaction without a limiting instruction; and (v) in admitting the similar transaction evidence for an improper purpose. Appellant further contends that his conviction must be reversed because no weapon was recovered and none of the witnesses actually saw a weapon or "sharp instrument" as alleged in the indictment. The record shows that appellant attacked the victim, hitting him in the face, causing him to bleed profusely. The victim was treated by a plastic surgeon who testified that the cut looked almost surgical, with very clean edges and no surrounding bruising. The doctor opined that the cut was consistent with a sharp instrument. The state also introduced evidence of two similar transactions. The first involved an incident where appellant allegedly cut a man with a box cutter; the second involved an incident where appellant allegedly cut a woman with a knife.

The Court of Appeals found: (i) a lay person may relate his opinion as to the existence of any fact so long as it is based upon his own experiences and observations, and so long as the matter referred to is within the scope of the average juror's knowledge; (ii) the trial judge's comment was made in direct response to a question asked by appellant's counsel; one cannot complain of an alleged error that his own conduct procured or aided in causing; (iii) mug shot evidence itself does not prejudice the defendant or place his character in issue; (iv) the trial court's admonishment of the witness in front of the jury and instruction for the jurors to ignore the statement was sufficient to prevent the improper testimony from having any prejudicial impact; (v) the similar transaction evidence was admissible to show appellant's bent of mind and course of conduct. Furthermore, the Court concluded that even in the absence of a description of the offensive weapon, evidence as to the nature, kind, and location of wounds inflicted was sufficient for the jury to infer the character of the weapon. Judgment affirmed.

Indictment, Expert Witnesses, Right to Public Trial

Mullis v. State; A08A0416

On appeal from his conviction for aggravated child molestation, appellant contends that the trial court made several errors including: denying his motion to quash the indictment because it did not specify the dates on which the charged offenses occurred; allowing a psychologist to testify about certain methods he used to assess and evaluate the victim, and to testify that the victim's symptoms and accounts were "highly consistent" with sexual abuse; allowing a psychologist's opinion that a person with the victim's level of intelligence would have difficulty fabricating a detailed account of abuse; and depriving him of his Sixth Amendment right to a public trial when it cleared the courtroom during the victim's testimony. The record shows that the victim, then a 9-year-old child, lived at home with his mother, and appellant, his mother's boyfriend. Appellant forced the victim to give and receive anal penetration, hit the victim and threatened to kill his mother if he told anyone of the abuse. These assaults continued until the victim was 13 years old. An examining physician found that the victim lacked virtually all "anal tone," a condition consistent with multiple episodes of anal intercourse.

The Court of Appeals concluded that where the evidence does not permit the state to identify a single date on which an offense occurred, the indictment instead may allege that the offense occurred between two particular dates. The Court found that appellant was not prejudiced by the indictment's range of dates concerning the charges. The Court further concluded that the trial court did not error when it allowed the psychologist to explain his conclusions based on tests developed in the scientific community or from his own clinical experience, and that it was authorized to conclude that one's ability to manufacture stories of abuse based upon his IQ level fell beyond the ken of the average juror and that the challenged testimony was admissible. Finally, the Court found that the trial court was authorized to close the courtroom. In Walker v. Georgia, 467 U.S. 39 (1984), the Supreme Court held that in order to obtain closure of an otherwise public proceeding, "the party seeking to close the hearing must advance an overriding inter-

est that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives for closing the proceeding, and it must make findings adequate to support the closure." Here, the trial court considered the Walker factors and found that in light of the victim's fragile emotional and psychological history, the victim might be subjected to unnecessary harm–beyond mere shame–if required to testify in front of a full courtroom. Under these circumstances, the temporary and limited closure of the courtroom was authorized. Judgment affirmed.

Double Jeopardy

Tanks v. State; A08A1019

Appellant appeals the denial of his motion to dismiss an indictment which alleges he committed aggravated stalking by surveilling his child's mother in violation of a protective order. Specifically, appellant contends that the prosecution of the indictment, which followed a contempt proceeding based on the same alleged acts, violates the constitutional bar against double jeopardy. The record shows in March 2006, a Fulton County grand jury indicted appellant with aggravated stalking for an alleged incident of surveillance on December 24, 2005. In April 2006, the mother moved for contempt in DeKalb County based on the December 24, 2005 incident, as well as other violations. In May 2006, a hearing was begun on the DeKalb County contempt proceeding, but the proceeding was stayed pending the outcome of the Fulton County prosecution. In September 2007, appellant moved to dismiss the indictment in Fulton County, arguing that double jeopardy prevented prosecution for the same December 24 incident at issue in the DeKalb County contempt proceeding.

The Court of Appeals found that when applying Double Jeopardy Clause in the context of a nonsummary criminal contempt proceeding, where, as here, the contemporaneous act was allegedly committed outside the presence of the court, the protection of the Double Jeopardy Clauses attaches. Judgment vacated and case remanded.

Evidence: Rape Shield Statute, Hearsay Exception, Res Gestae

Jennings v. State; A08A1292

Following a bench trial, appellant appeals his conviction on two counts of false imprisonment and on single counts of aggravated assault, aggravated sodomy, rape, armed robbery, and possession of a firearm during the commission of a felony. Appellant contends that the trial court erred in refusing to admit his proffered evidence that on several prior occasions, the victim had voluntarily engaged in sex with him, allowing an officer to testify as to what one of the victim's told him regarding an earlier incident, allowing an officer to testify to what an unidentified female said, allowing an officer to testify that an adult female in the apartment said when he arrived at the crime scene within minutes of the emergency call. Appellant asserts that the admission of this testimony violated his confrontational right to confront the witness, although appellant initially objected on hearsay grounds, and then some time later, on his "right to confront". The record shows that appellant and a compatriot entered an apartment of someone appellant believed owed him money. When they entered, an adult female was in the kitchen of the apartment and was forced to leave. The two then entered the apartment's bedroom where appellant found the man he believed owed him money and his girlfriend. Appellant demanded that the girlfriend submit to sex acts or else he would shoot her boyfriend. Appellant first instructed the victim to perform oral sex on his compatriot, and then forced her to perform oral sex on him and in engage in sexual intercourse.

The Court of Appeals found that OCGA § 24-2-3 prohibits admitting the past sexual behavior of an alleged rape victim unless the trial court finds that the behavior directly involved the participation of the defendant and further finds that the behavior supports an inference that the defendant reasonably could have believed that the victim consented to the conduct at issue. Here, the evidence supported the trial court's determination that appellant could not have reasonably believed that the victim consented to the sodomy and intercourse at issue; appellant brandished a gun and threatened to shoot the victim and her boyfriend if she did not comply with his demands for sex. The Court further found that: (i) the officer's testimony concerning what one of the victim's said was cumulative because the victim took the stand and testified to the same facts; (ii) the officer's testimony concerning what both unidentified females said was admissible as res gestae; and (iii) because no testimony regarding the conversation was given after the confrontational objection, there was no harmful error to be considered on appeal. Judgment affirmed.

Indictment, Violating Oath of Office, Prosecutorial Misconduct, Speedy Trial

Brandenburg v. State; A08A0162

A grand jury indicted appellant for theft by taking while serving as an employee of the Loganville Police Department and two counts of violation of oath by a public officer. Appellant contends that the trial court erred in: (i) not sustaining his demurrer and plea in abatement on the basis that the State failed to name a specific victim in the indictment for theft by taking; (ii) not sustaining his demurrer to the two counts alleging violations of his oath of office because there was no connection between his taking possession of the weapons and his duties as a police officer; (iii) not sustaining his demurrer and motion to quash the indictment due to misconduct by the prosecutor in not changing the proposed indictment to a misdemeanor charge of theft by taking after the grand jury requested the change; (iv) refusing to grant his motion to dismiss the indictment on the basis of prosecutorial vindictiveness after the State increased the severity of the charges against him after he refused to plea guilty; and (v) refusing his motion to dismiss based upon a violation of his constitutional right to a speedy trial. The record shows appellant was on duty, in uniform, and driving a marked police car when he went to a towing company lot and removed weapons from the trunk of a car that had been impounded and placed the items in his patrol car. An investigation was conducted and appellant was indicted.

The Court of Appeals found: (i) where the identity of a person related to the crime is not a material part of the crime charged, the State is not required to name the person in the accusation; (ii) it is for the jury to determine whether appellant intended to steal the weapons or simply removed suspected contraband from a lawfully impounded car as part of his official duties; (iii) if the grand jury disapproved of charging appellant with felony theft by taking it could have refused to indict him pursuant to

the proposed indictment, but it did not; (iv) the State could have indicted appellant on felony charges in the original indictment, but decided to pursue a negotiated plea on a lesser charge did not preclude it form re-indicting him on the felony charges after the plea negotiations failed; and (v) appellant presented no evidence that the State deliberately delayed the trial to hamper his defense. Judgment affirmed.

Piercing the Body of a Person Under the Age of 18

Sparks v. State; A08A0918

A jury found appellant guilty of piercing the body of a person under the age of eighteen. On appeal, appellant contends the trial court erred when it denied his motion for a directed verdict of acquittal because the State did not prove the piercing was done without having the prior written consent of a custodial parent. The record shows that at the time of the piercing, the victim was 17 years old but told appellant that she was eighteen years old and had left her identification at home. During the signing of the contract/consent form, appellant told the victim to write on the form that she had shown him a copy of her driver's license, when in fact she did not have her driver's license and did not show it to him. Appellant did not produce any evidence at trial.

The Court of Appeals found that because the victim indicated that she was 18 years old, no parental consent was necessary given the circumstances. However, it is the duty of the person providing the piercing to request identification and verify that the person requesting the piercing is 18 years of age or older. Judgment affirmed.

Rule of Lenity, Jury Charges

Armstrong v. State; A08A1105

Following a jury trial, appellant appeals his conviction of aggravated assault against his wife. Appellant contends that the trial court erred in (i) denying his motion in arrest of the judgment, because the rule of lenity required him to be sentenced for simple battery based on the facts; and (ii) failing to charge the jury on battery as a lesser included offense in aggravated assault. The record shows appellant became angry with his wife, pushed her down to the floor, choked her and hit her in the head with his fist. Appellant's wife obtained a protective order but later had it removed. Once back in the home, appellant again attacked his wife and was arrested and charged with multiple counts related to the attacks.

The Court of Appeals found that: (i) where a single act may as a factual matter be prosecuted under different penal statutes, the rule of lenity does not apply; here, the evidence supported both the charge and the conviction; (ii) because there was no written request for a lesser included charge on battery made at or before the close of evidence, the failure to so charge is not error. A party may not complain about the alleged errors that he helped induce. Judgment affirmed.

Search & Seizure, Batson, Experts

Darden v. State; A08A0332

Appellant appeals following the denial of his motion for new trial after he was convicted of one count of trafficking in cocaine and one count of possession of marijuana with intent to distribute. Appellant contends that the trial court erred in: (i) denying his motion to suppress because he never consented to the search of his apartment; (ii) in denying his Batson motion because the State exercised its peremptory strikes in a racially discriminatory manner, and; (iii) in allowing a forensic chemist to testify regarding testing done by another analyst who was unavailable to testify at trial. The record shows that appellant was pulled over, arrested, and read his Miranda rights. Police drove appellant back to his apartment to conduct a search. During the search police found marijuana and cocaine in plain view on a counter, a loaded shotgun, cash, handguns, and a safe. When the police asked appellant for the combination of the safe, appellant refused to give the combination but opened the safe. Inside, police found a substance that appeared to be methamphetamine.

The Court of Appeals found that: (i) no illegality existed to taint appellant's consent to the search of his apartment; (ii) the State offered appropriate race-neutral reasons for the strikes; and (iii) when an expert's testimony is based on hearsay, the lack of personal knowledge on the part of the expert does not mandate the exclusion of the opinion but, rather, presents a jury question as to the weight which should be assigned the opinion. Judgment affirmed.

Search & Seizure

Macias v. State; A08A0475

Appellant appeals the trial court's order denying his motion to suppress evidence discovered in the search of his car and his residence. Appellant contends that the trial court erred in: (i) finding that the search of his car was valid because his consent was coerced, and that the officer improperly extended the traffic stop by asking a series of questions unrelated to the original purpose of the stop; and (ii) concluding that the information contained within the affidavit for the search warrant of his residence was insufficient to show probable cause because there was no nexus between the items sought by the warrant and his residence. The record shows that an officer initiated a traffic stop after noticing that appellant was not wearing his safety belt, and that the frame around the car's tag obscured the date and month of expiration. The officer smelled marijuana coming from the vehicle and asked for consent to search the car. Appellant consented, and the search revealed almost $3,700 in cash and 17.5 grams of suspected methamphetamine.

The Court of Appeals found: (i) appellant's consent to search was freely and voluntarily given, and that there is no Fourth Amendment violation when an officer asks the driver to consent to a search during the course of a valid traffic stop; and (ii) based on the amount of money and drugs, and because the affidavit showed that appellant was coming from his residence when the officer initiated the traffic stop, the magistrate had a substantial basis for concluding that appellant did not possess the drugs for personal use but was dealing in methamphetamine. Thus, there was probable cause to search appellant's residence. Judgment affirmed.

Snider v. State; A08A1040

Appellant appeals from the judgment of conviction entered on the trial court's verdict in a bench trial finding him guilty of possession of methamphetamine. Appellant contends the trial court erred by denying his pre-trial motion to suppress evidence found by police during warrantless searches conducted in a hotel room occupied by appellant and a third party. Appellant asserts that the officers' entry into the hotel room was illegal under the Fourth Amendment, and that any subsequent

consent to search was tainted by the illegal entry. The record shows appellant stayed overnight, and was still occupying a hotel room registered under a third-party's name. Officers entered the hotel room for the purpose of investigating suspicion of illegal drug activity after a hotel clerk called the police to report that an occupant of the room was heard talking about methamphetamines. Appellant was ordered out of the shower at gunpoint and immediately consented to have his clothes searched. Methamphetamine was found in his pockets. After arresting appellant, the officers testified that they also obtained his consent to search his luggage, which was located in the room, and found small plastic baggies and razors. At some unspecified point and place after the above searches were completed, the officers met with the other occupant of the room and obtained his consent to search the room.

The Court of Appeals found that the police entry into the hotel room without consent or a warrant violated appellant's Fourth Amendment rights because there were no exigent circumstances and the officers did not have probable cause for an arrest. Further, appellant occupied the hotel room as an overnight guest; as such, he had a constitutionally protected reasonable expectation of privacy. The Court further found that even without a search warrant or probable cause to obtain one, police officer's may conduct a search based on an individual's voluntary consent to search. However, when consent to search follows an illegal entry, the totality of the circumstances must be examined to determine whether the consent was voluntary. Here the officers illegally entered the hotel room, ordered appellant out of the shower at gun point, and immediately obtained his consent to search his clothes as he stood before the officers wrapped in a towel. Under these circumstances, appellant's consent to search was invalid because it was the product of and tainted by the illegal entry. Judgment reversed.

McClary v. State; A08A1185

Appellant challenges the trial court's denial of his motion to suppress evidence supporting an indictment for obstruction of an officer and for attempted removal of a weapon from a peace officer. Appellant contends the trial court erred in allowing evidence of his resistance to the arrest because the officer had no basis for pursuing or arresting him. The record shows that a uniformed state university police officer patrolled an area known to have vehicle break-ins in a nearby parking lot. When the officer saw appellant walking in an area known to have access to the parking lot, he approached and asked for identification, which appellant did not have. The officer then asked appellant where he was coming from and where he was going. When appellant responded that he "got mad at his girl," and was going to another location, the officer radioed to dispatch, requesting to see if there were any domestic violence reports in the area within the last hour. At that point appellant fled. The officer ordered him to stop and then pursued, eventually tackling appellant from behind. Appellant physically struggled with the officer, yanking at the officer's holstered handgun and grabbing the officer's privates.

The Court of Appeals found that appellant's headlong flight was a circumstance sufficient to give an articulable suspicion of illegal activity, justifying a brief investigatory stop. The Court further found that the when appellant fled despite the officer's order to stop, the officer was authorized to chase and briefly detain appellant to complete his investigation. Judgment affirmed.

Terroristic Threats, Double Jeopardy

Mazza v. State; A08A0749

After his first trial ended in a mistrial upon the motion of his counsel, appellant was convicted of battery, cruelty to children in the second degree, and terroristic threats in a second trial. On appeal, appellant enumerates the following errors: (1) that the judgment against him violates the Georgia constitution and is a nullity because the trial judge presiding over his case was not properly designated to sit as a superior court judge; and (2) the second trial was barred by the constitutional principle of double jeopardy. The record shows appellant physically attacked and injured the mother of his child, threatened to kill her and her oldest son. During the first trial, the victim's oldest son testified that appellant was in jail in response to a prosecution question asking if appellant was living with the victim at the time immediately before the incident.

The Court of Appeals found that appellant's challenge to the authority of the trial judge who presided over his case must be made in the trial court at the time of the appointment or it is waived. Appellant failed to object to the appointment of the magistrate to sit as a superior court judge prior to the commencement if the trial, and thus, failed to preserve the issue for appeal. The Court further found that when a mistrial is granted based on a defendant's motion he waives any claim of double jeopardy unless a prosecutor has goaded the defense into making a motion for mistrial to avoid a reversal of conviction because of prosecutorial misconduct. Here, there was no prosecutorial misconduct and no showing of any intent to goad the defense into making a motion for a mistrial; the prosecutor's question to the witness was phrased as to elicit a simple yes or no answer. Judgment affirmed.

Evidence: Statement

Dickerson v. State; A08A0287

Appellant appeals his conviction on two counts of armed robbery and one count of possession of a firearm during the commission of a felony. Appellant was 15 years old at the time the crimes were committed. On appeal, appellant contends that the trial court erred in admitting two unredacted audio/video DVDs showing conversations that occurred between himself and his mother in a police station interview room that were recorded without his knowledge. Appellant asserts that the admission of the DVDs infringed upon his right to have his mother present during questioning by the police and his reasonable expectation of privacy. The record shows after his arrest, appellant was transported to the police department and seated in an interview room monitored by a concealed camera. The first DVD shows appellant calling his mother and informing her that a robbery had been committed by two acquaintances while he was at home. The second DVD shows appellant's mother entering the interview room and berating him for leaving the house and for allowing himself to get in trouble.

The Court of Appeals concluded that although the juvenile code requires a person talking to a child in custody to promptly give notice to a parent, guardian, or other custodian, there is no provision requiring that a parent be present during questioning. The Court held that whether the juvenile is held incommunicado or allowed to consult with

a parent is a factor in determining whether the statement was voluntary and knowingly given. The Court further found that under the circumstances, appellant had no reasonable expectation of privacy in the conversation with his mother because no subjective expectation of privacy was exhibited: (i) although the officer left the minor in the interrogation room alone with his mother, no representations or inquiries were made as to privacy or confidentiality; and (ii) appellant had been arrested for crimes under investigation and put in a place containing no guarantees that communications taking place therein would remain confidential. Judgment affirmed.