

DEVELOPMENTS IN GEORGIA EVIDENCE LAW

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FOREWORD

Georgia's new Evidence Code went into effect on January 1, 2013 and applies to any motion made, or any hearing or trial commenced on or after that date. The new evidence code is the product of years of debate, compromise, and vetting from legislators, the judiciary, academia, and members and groups of the practicing bar.¹ Although the new code is largely derived from the Federal Rules of Evidence, they retain some of the older Georgia statutes to fill gaps in the Federal Rules and to reflect specific Georgia policies.² There also are a few changes to the language from the Federal Rules that are intended to customize the rules for Georgia and to clarify some issues that have arisen under the Federal Rules.³

Georgia's new Evidence Code is housed in Title 24 of the Georgia Code and contains approximately 208 statutes among 14 chapters. The new code combines similar sections in Title 24 that were previously disbursed throughout the Georgia Code.⁴ The rules that generally correspond to the Federal Rules of Evidence reflect the numbering of the Federal Rules. The rules that reflect Georgia-specific principles have new or different numbers than those in the Federal Rules.

As we described in last year's paper, evidence cases decided over the last year show that Georgia courts are continuing to interpret the new code differently based on the origin of the rule. For rules that mirror the Federal Rules of Evidence, courts are looking to federal cases for guidance. For rules that were carried over from the old Evidence Code, the courts are relying on Georgia cases decided under the old code. For rules that are original creations under the new Evidence Code, courts are applying the standard principles of statutory meaning.

The following summaries reflect the common law development of Georgia's evidence rules over the last year. Although most of the cases reflect how the Courts of Appeal are applying and interpreting the new Evidence Code, some of the cases applied the old evidence code and reflect the recent developments that will apply to appeals of cases that were tried before the new rules went into effect.

As we have found throughout the years of conducting this survey, the appellate courts provide the trial courts with wide discretion. In the vast majority of the cases reviewed, approximately 67% of the cases, the appellate court found no error and affirmed the ruling of the court below. Of the cases examined, harmless error was noted in approximately 12% of the cases, and approximately 12% of the cases examined were reversed on evidence grounds.

¹ David N. Dreyer, F. Beau Howard, Amy M. Leitch, *Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence*, 63 MERCER L. REV. 1, 2 (2011).

² See REPORT OF THE EVIDENCE STUDY COMMITTEE OF THE STATE BAR OF GEORGIA, PROPOSED NEW RULES OF EVIDENCE 130 (Jun. 6, 2005), available at http://www.gabar.org/public/pdf/news/proposed_new_evidence_rules.pdf (summarizing amendments).

³ *Id.*

⁴ David N. Dreyer, F. Beau Howard, Amy M. Leitch, *Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence*, 63 MERCER L. REV. 1, 19 (2011).

I. CHARACTER EVIDENCE

A. In General

1. CENTRAL GEORGIA WOMEN'S HEALTH CENTER, LLC v. DEAN, No. A17A0243, 342 Ga. App. 127 (2017)

Following a jury trial, defendants were found liable for medical malpractice. Defendant appealed, arguing that the trial court erred in denying their motion for a new trial because the plaintiffs should not have been permitted to cross-examine defendant about an entry he made in the victim's hospital chart that the plaintiffs alleged was probative of his untruthfulness. Namely, that defendant striking through a chart entry and writing "patient not seen" demonstrated deliberate deception. The court found that under Rule 608(b) of Georgia's Evidence Code, questioning about a specific instance of conduct by a witness on cross-examination is admissible if the conduct is probative of the witness's character for truthfulness or untruthfulness. The Court of Appeals affirmed the judgment.

2. AGUILAR v. STATE, No. A16A1893, 340 Ga. App. 522 (2017)

Following a jury trial, defendant was convicted of one count of cruelty to a child in the first degree and two counts of sexual battery as lesser included charges of aggravated child molestation. Defendant appealed, *inter alia*, for the following three reasons. First, defendant argued that the trial court wholly failed to charge the essential element of the crime of sexual battery -- lack of consent to the touching. On this ground, the Court of Appeals reversed defendant's conviction as to the two counts of sexual battery. Second, defendant argued that the trial court improperly prohibited defendant from presenting good character evidence in defense of the maliciousness element of the charge of cruelty to a child. The Court of Appeals affirmed the trial court on this ground because defendant failed to proffer specific evidence defendant was prevented from presenting to the jury or how any testimony as to general good parenting would have countered the underlying allegations of sexual abuse of the victim that were the predicate acts supporting that count. Third, defendant argued that the trial court erred by permitting the State to present cumulative bolstering evidence from expert witnesses. The Court of Appeals held that this argument lacked merit as defendant conceded that such testimony was permitted, defendant failed to identify any specific expert testimony that should have been excluded, defendant presented no citation to authority supporting a claim that the sheer number of experts results in error, and the testimony was not cumulative because the various experts were called to testify as to the different roles they played in diagnosing or treating the victim. The Court of Appeals affirmed defendant's conviction as to the count of cruelty to a child in the first degree but reversed defendant's conviction as to the two counts of sexual battery.

3. REVERE v. STATE, No. S17A0806, 2017 Ga. LEXIS 778 (2017)

Following a jury trial, defendant was found guilty of murder and other offenses. Defendant argued that he received ineffective assistance of counsel because his attorney failed to (1) object to the State's witnesses improperly bringing the victim's character into

issue, and (2) introduce evidence of the victim's prior felony convictions to rebut or impeach the State's improper character evidence. Although the Supreme Court agreed with defendant that the victim's character was improperly admitted for the above reasons, the Supreme Court failed to find that had the attorney acted properly then the outcome of the case would have been different. Judgment was affirmed.

4. WRIGHT v. STATE, No. S16A1035, 300 Ga. 185 (2016)

Defendant was convicted of malice murder and other crimes. Defendant appealed, arguing that (1) the trial counsel failed to provide effective assistance because the counsel failed to object to the State's cross-examination of defendant about his pre-arrest silence, (2) the trial court erred in prohibiting him from introducing evidence of specific violent acts by the victim against third parties, and (3) the trial court erred in denying his request to charge the jury on the lesser included offense of voluntary manslaughter. First, the Supreme Court noted that although questions about defendant's failure to contact police following a confrontation and shooting ordinarily would constitute improper comments by the State on defendant's pre-arrest silence, the prosecution had every right to pursue a thorough and sifting examination after defense counsel opened the door to that line of questioning on direct examination. Thus, the Court held that the counsel's failure to make a meritless objection could not constitute ineffective assistance. Second, the Supreme Court recognized that under Georgia's former Evidence Code, a defendant claiming self-defense justification could introduce evidence of specific violent acts by the victim against third parties. However, the defendant was required to make a prima facie showing of justification—that the victim was the aggressor, the victim assaulted the defendant, and the defendant was honestly trying to defend himself. The Court found that testimony was not sufficient to show that the victim assaulted defendant, especially as there was no evidence presented at trial that the victim was armed at the time of the confrontation, and thus, the trial court did not err when it prohibited defendant from introducing evidence of specific acts of violence committed by the victim against third parties. Finally, to support a charge on voluntary manslaughter, there must be evidence that the accused acted solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. Because there was no evidence presented that defendant shot the victim due to an irresistible passion, there was no evidence to support a voluntary manslaughter charge and no error in the trial court's refusal to give such a charge. Judgment affirmed.

5. SHEPARD v. STATE, No. S16A0884, 300 Ga. 167 (2016)

Defendant was convicted of murder and unlawful possession of a firearm during the commission of a crime. Defendant appealed, arguing that (1) the trial court erred in denying his motion to suppress a statement he made to detectives after he was arrested, and that (2) he was denied effective assistance of counsel because the trial counsel failed to object and moved for a mistrial when the State elicited improper character evidence. Former O.C.G.A. § 24-3-50 provides that confession is inadmissible if it was "induced by another by the slightest hope of benefit." The Supreme Court has held that "the slightest hope of benefit" means promises of reduced criminal punishment -- a shorter sentence, lesser charges, or no charges at all. Here, the detectives merely acknowledged that defendant wanted a deal, that defendant perhaps could get some arrangement, and that

they would talk with the district attorney, but that any agreement would require the assent of the district attorney. Defendant's personal belief that talking to detectives would gain him favor from the State did not render his statements involuntary. The Court found that there was no "the slightest hope of benefit," and thus, the trial court properly denied defendant's motion to suppress. Further, the testimony defendant sought to object was relevant to show the pretext that defendant and an accomplice planned to use to draw the victim out of the house as part of their common purpose to assault and murder the victim. Consequently, the Court held that the testimony was admissible as evidence of an integral part of the res gestae of the crime even though it placed defendant's character in evidence. Judgment affirmed.

6. CAPPS v. STATE, No. S16A1071, 300 Ga. 6 (2016)

Defendant, who is Caucasian, was convicted of malice murder of an African-American victim. Defendant appealed, arguing that his trial counsel was ineffective for not objecting to the employee's testimony of a similar transaction and the detective's testimony of defendant's racist comments. The testimony at issue was the employee's recounting of defendant's statements regarding defendant's family's history of killing African-Americans and that defendant had himself killed an African-American and was ready to kill again. The Supreme Court noted that in the trial of an individual charged with murder, evidence of motive for the homicide is relevant and, therefore, admissible. This is so even if the evidence incidentally places the defendant's character in evidence. Therefore, the Court found that the testimony was properly admitted as evidence of defendant's racial animus toward African-Americans as a possible motive for his killing of the African-American victim in this case. The detective's testimony at issue was about remarks defendant made to the detective about an African-American detective investigating the case. Similarly, the Supreme Court found that such evidence was plainly relevant to establishing a possible motive for the seemingly unprovoked killing. Thus, the Court held that the trial counsel's failure to object to the testimony did not lead to ineffective assistance. Judgment affirmed.

B. Other Acts, Prior Crimes, Bad Acts, Similar Transactions and Prior Difficulties

1. SANCHEZ-VILLA v. STATE, No. A17A0459, 341 Ga. App. 264 (2017)

Defendant was convicted of one count of trafficking in cocaine. On appeal, defendant contended the trial court violated O.C.G.A. § 24-4-404(b) by permitting the State to introduce evidence from a United States Drug Enforcement Administration (DEA) investigation of him without pre-trial notice from the State. The evidence included testimony from a DEA agent regarding the agency's surveillance of defendant for over a year prior to his arrest and a recording of a conversation involving defendant that occurred almost a month prior to his arrest on the cocaine trafficking charge. The court agreed that the trial court abused its discretion as the evidence lacked any demonstrated connection to the events on the night of defendant's arrest, and was thus not intrinsic to the charged trafficking offense. Indeed, the testimony was in regard to "other acts" by defendant, and was offered by the State to prove knowledge without providing defendant

notice, thus violating O.C.G.A. § 24-4-404(b). The Court of Appeals vacated the judgment and remanded the case.

2. DIXON v. STATE, No. A17A0233, 341 Ga. App. 255 (2017)

Defendant was convicted of one count of aggravated child molestation and four counts of child molestation. On appeal, defendant argued that the trial court erred in admitting evidence qualifying as “another offense of sexual assault” under O.C.G.A. § 24-4-413 or “another offense of child molestation” under O.C.G.A. § 24-4-412. The court disagreed, finding that the State could admit the evidence under these provisions for any relevant purpose, including propensity. Further, the probative value substantially outweighed any unfair prejudice given the similarity of the acts. The Court of Appeals affirmed the conviction.

3. GIBBS v. STATE, No. A17A0422, 341 Ga. App. 316 (2017)

Defendant was convicted of a DUI less safe and failure to maintain lane. On appeal, defendant argued that the trial court erred by admitting evidence of his prior DUI conviction. The Court disagreed. Evidence of defendant’s prior DUI conviction was properly admitted under O.C.G.A. § 24-4-417 because the word “shall” suggests a presumption in favor of admission of such evidence; proof of defendant’s prior DUI could allow the factfinder to infer that defendant was aware of the effects of an intoxicant on driving; and such awareness might help explain defendant’s refusal to submit to the breath test. The Court of Appeals affirmed the conviction.

4. STATE v. McPHERSON, No. A17A0364, 341 Ga. App. 871 (2017)

In a child molestation case, the State appealed, arguing that the trial court improperly excluded similar transaction evidence of prior acts of child molestation allegedly committed by the defendant. The court agreed. Under O.C.G.A. § 24-4-414, in a criminal child molestation case, evidence of the accused’s commission of another offense of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant, including a propensity to commit certain sexual offenses. In light of the strong statutory presumption of admissibility and the close similarities between the crimes at issue, there was no basis for excluding the evidence. Further, there was no showing that the evidence would confuse the issues, mislead the jury, waste time, or be cumulative of other evidence, or that the probative value of the evidence would otherwise be substantially outweighed by its prejudicial impact. The fact that the prior acts allegedly committed by defendant were committed about 35 years earlier did not automatically require their exclusion, as there was no showing that the potential witness’s memory about the alleged incidents was either impaired or patently unreliable. The Court of Appeals reversed.

5. DIMAURO v. STATE, No. A17A0180, 341 Ga. App. 710 (2017)

Following a jury trial, defendant, a former police officer, was convicted of aggravated assault, aggravated battery, and two counts of violating his oath of office. Defendant appealed the convictions, arguing that the trial court erred in admitting evidence of a

similar transaction under O.C.G.A. § 24-4-404. Specifically, an assault against another detainee. The court disagreed as such evidence was relevant to show that defendant committed a similar act against the victim with a similar intent. Indeed, the probative value of the assault video was not substantially outweighed by any undue prejudice. Defendant also argued that the trial court erred in admitting evidence that defendant and other police officers harassed a witness. The court disagreed, finding this evidence relevant as a defendant's attempt to intimidate a witness can serve as circumstantial evidence of guilt. Further, defendant argued that the trial court improperly admitted opinion evidence from various police officials. The court disagreed. Officers' testimony that defendant had been administered an oath of office and that defendant's use of force violated police policy was relevant to whether defendant violated the oath. Defendant also argued that the trial court erred in admitting a witness' prior consistent statements. The trial court did not abuse its discretion as defendant's cross-examination of the witness strongly implied that the witness's direct testimony was a recent fabrication and the prior consistent statement was made to an investigator before the allegedly fabricated trial testimony. Additionally, defendant argued the trial court erred by excluding impeachment evidence regarding the victim. Specifically, one of the victim's prior burglary convictions. The court found no reversible error as the conviction was more than ten years old, and, the probative value of the conviction did not outweigh its prejudicial impact. Finally, defendant argued the trial court erred by failing to dismiss the indictment on the ground that he was prohibited from presenting evidence to the grand jury. The court disagreed. While former O.C.G.A. § 45-11-4(g) entitles a police officer charged with a crime occurring in the course of his duties to notice of grand jury proceedings and an opportunity to make a sworn statement, the phrase "sworn statement" does not contemplate presenting documentary evidence. The Court of Appeals affirmed defendant's conviction.

6. HUGHES v. STATE, No A17A0868, 341 Ga. App. 594 (2017)

Following a jury trial, defendant was convicted of child molestation and statutory rape. Defendant appealed, arguing that the trial court erred in admitting prior act evidence. In particular, defendant's prior statutory rape conviction. The court disagreed. Such evidence was admissible to prove defendant's intent and to show that defendant engaged in a common scheme or plan in the prior and charged acts. Here, that defendant engaged in a common scheme of befriending young girls from families, by giving them rides, and engaging in sexual relations with them in defendant's vehicle. In light of the prior act's relevance and the trial court's multiple limiting instructions, the court found that the danger of unfair prejudice did not substantially outweigh the probative value of the challenged evidence. The Court of Appeals affirmed defendant's conviction.

7. REID v. STATE, No. A17A0481, 341 Ga. App. 604 (2017)

Following a jury trial, defendant was convicted of rape, aggravated sodomy, kidnapping, false imprisonment, aggravated assault, and possession of a firearm during the commission of a felony. Defendant appealed, arguing that the trial court improperly admitted bad character evidence. Specifically, that an officer's reference to him as a "violent felon" was false, irrelevant, and prejudicial. The court disagreed. Evidence presented prior to the officer's testimony showed that defendant had in fact committed

several violent crimes against the victim, and, the same officer testified that his primary role is apprehending people that are wanted for violent crimes. Further, there was no evidence that defendant had been previously convicted of other violent crimes. As a result, the jury could have reasonably inferred that “violent felons” referred to defendant’s instant crimes, rendering the reference to “violent felons” not false, irrelevant or unfairly prejudicial. Further, defendant argued that a witness for the State improperly commented on his right to remain silent. However, the arresting officer’s statement indicating that defendant did not speak to him was not prejudicial as it was made during a narrative describing the circumstances of the arrest, the comment did not point at the substance of defendant’s defense, and the comment did not speak to defendant’s guilt or innocence. Additionally, defendant argued that the trial court violated former O.C.G.A. § 17-8-57 when it invited a hearsay objection to defendant’s testimony about what the witnesses said to the defendant and to each other. The court found no error, however, as the trial judge did not express an opinion on defendant’s guilt, or favor the State. Finally, the defendant argued that the trial court erred by failing to include a coercion charge in the jury instruction, but the court disagreed as there was no evidence to show that a risk of immediate violence forced the defendant to commit the offenses. The Court of Appeals affirmed defendant’s conviction.

8. LATA v. STATE, No. A17A0562, 341 Ga. App. 696 (2017)

After a jury trial, defendant was convicted of child molestation. Defendant appealed, arguing that the trial court erred in admitting other acts evidence. Testimony that defendant previously intentionally touched a student’s buttocks, without consent, was admissible under O.C.G.A. § 24-4-413(a) as evidence of an “offense of sexual assault.” O.C.G.A. § 24-4-413 provides that in a criminal proceeding in which the accused is accused of an offense of sexual assault, evidence of the accused’s commission of another offense of sexual assault is admissible. An “offense of sexual assault” includes any crime that involves contact between any part of the accused’s body and the genitals of another person without consent. It also includes conduct that would constitute sexual battery in violation of O.C.G.A. § 16-6-22.1. Admission of the defendant’s previous conduct did not abuse discretion because defendant’s touching constituted an “offense of sexual assault.” On appeal, defendant also argued that the trial court erred in admitting evidence of his victim’s out-of-court outcry statements to four witnesses. Testimony about these statements was admissible under Georgia’s Child Hearsay Statute, O.C.G.A. § 24-8-820. Under this statute, a statement made by a child younger than 16 years of age describing sexual contact or physical abuse by another is admissible by the person to whom the statement was made, so long as notice is provided to the adverse party, the child testifies at trial, and the person to whom the statement was made is subject to cross-examination. The statute does not require a showing that these statements have an indicia of reliability, nor do the statements need to meet the admissibility requirements for prior consistent statements. The Court of Appeals affirmed the defendant’s conviction.

9. GIBBS v. STATE, No. A16A2229, 340 Ga. App. 723 (2017)

Defendant was convicted of one count of aggravated assault on a peace officer, two counts of fleeing or attempting to elude a police officer, and one count of reckless driving. On appeal, defendant argued that the nurse’s testimony concerning what defendant had told

the nurse (that defendant had smoked marijuana earlier that day) was subject to an objection under O.C.G.A. § 24-4-404(b). The court disagreed because such testimony was intrinsic evidence. Defendant also argued that the trial court erred in allowing a police expert witness to testify that the officer's use of force was proper and within policy. The court disagreed. The trial court properly admitted the testimony because the witness qualified as an expert and the testimony concerned something with which the jurors ordinarily would not be familiar. Expert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves. The Court of Appeals affirmed in part and vacated in part, and remanded for resentencing.

10. HARRIS v. STATE, No. A16A2041, 340 Ga. App. 865 (2017)

Following a jury trial, defendant was convicted of six counts of child molestation. Defendant appealed, arguing that the trial court erred in admitting similar transaction evidence. The court disagreed. Under O.C.G.A. § 24-4-414, in a criminal proceeding where the accused is accused of an offense of child molestation, evidence of the accused's commission of another offense of child molestation is admissible for any relevant purpose. Although defendant's sister's testimony about a similar transaction that occurred about 44 years earlier was remote in time, the trial court did not clearly abuse its discretion in allowing the testimony as it was relevant to show defendant's lustful disposition with respect to preteen or teenaged girls, and defendant's pattern of molesting young girls with whom defendant was living. Testimony from defendant's niece, neighbor, and mother was similarly relevant. Defendant also argued that the trial court erred in allowing a detective to bolster the testimony of one of the victims. The court disagreed. After being qualified as an expert in the field of forensic interviewing of children, the detective testified that it was not unusual to find out that a child had been abused even though she had denied it. The court found no error as the detective did not directly address the victim's credibility or express an opinion as to whether the child had actually been sexually abused. The Court of Appeals affirmed the conviction.

11. WILLIAMS v. STATE, No. S16A1116, 299 Ga. 834 (2016)

Defendant was convicted of murder, aggravated assault and other related offenses. On appeal, defendant asserted that the trial court erroneously allowed evidence of his prior convictions relating to his terroristic threats convictions. The Court of Appeals agreed, granting the defendant a new trial. For evidence of the defendant's conviction for terroristic threats to be admissible pursuant to former O.C.G.A. § 24-9-84.1(a)(2), the trial court was required to make an on the record finding that the probative value of admitting that conviction "substantially" outweighed the prejudicial effect of its admission. The trial transcript showed the court did not make the required findings. The State in this case did not seek to admit the challenged evidence for the purpose of impeaching the defendant's credibility. Instead, the State initially argued at trial that evidence of defendant's prior conviction for terroristic threats made it more likely that he committed the crimes with which he was charged in this case. Thus, the court could not say the admission was harmless error. Accordingly, the defendant was entitled to a new trial. Judgment reversed.

12. DANLEY v. STATE, No. A17A0634, 342 Ga. App. 61 (2017)

Defendant appealed his conviction for driving under the influence. The defendant argued that the trial court erred when it admitted his December 2011 DUI conviction into evidence. O.C.G.A. § 24-4-417(a) (Rule 417) provides, in relevant part, that evidence of the commission of another DUI violation on a different occasion by the same accused shall be admissible when the accused refused in the current case to take the state administered test required by Code Section 40-5-55 and such evidence is relevant to prove knowledge, plan, or absence of mistake or accident. Here, defendant did in fact refuse the state-administered blood test and the trial court specifically found that the State offered evidence concerning the December 2011 DUI for the valid purpose of proving the defendant knowledge and intent. Accordingly, the ruling was affirmed.

13. MCGLYNN v. STATE, No. A17A0370, 342 Ga. App. 170 (2017)

Defendant appealed his denial for a new trial following his conviction for one count of misdemeanor possession of marijuana, asserting that the trial court erred by admitting evidence relating to his purchase and use of marijuana the day before his arrest for possession pursuant to O.C.G.A. § 24-4-404(b) (Rule 404(b)) and as intrinsic evidence of the offense. Evidence is intrinsic if it is (1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story, or (3) inextricably intertwined with the evidence regarding the charged offense. Here, because of the close temporal connection between the defendant's purchase and use of marijuana (the prior day) and the traffic stop at which he was found to be in possession of marijuana, the trial court did not abuse its discretion in determining that such evidence was intrinsic to the charged offense.

14. GUNN v. STATE, No. A17A0740, 2017 Ga. App. LEXIS 359 (2017)

After a jury trial, defendant was convicted of trafficking cocaine, possessing cocaine with the intent to distribute, and possessing cocaine with the intent to distribute. Defendant appealed, arguing that the trial court erred by admitting "other acts" evidence under Rule 404(b). The record reflects that prior to the trial, the State gave defendant notice of its intent to present evidence of a 2001 conviction for possession of cocaine with the intent to distribute. Rule 404(b) "is a law of inclusion rather than exclusion" and because the court found that the evidence could be appropriately admitted to show motive, intent and knowledge, the ruling was affirmed.

15. WILLIAMS v. STATE, No. A17A0740, 2017 Ga. App. LEXIS 381 (2017)

After a jury trial, defendant was convicted of four counts of aggravated assault, two counts of armed robbery, and two counts of hijacking a motor vehicle. Defendant appealed, arguing, among other things, that the trial court erred by admitting extrinsic act evidence under O.C.G.A. § 24-4-404(b) of a prior carjacking that failed to identify him as the perpetrator. O.C.G.A. § 24-4-404(b) provides that evidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. Nevertheless, the trial court ruled that the evidence of the prior carjacking, was intrinsic factual evidence "inextricably intertwined" with the crimes

charged in this case. This rule was carried forward to the new Evidence Code under the concept of “intrinsic facts” evidence, as compared to evidence of “extrinsic acts” which are generally inadmissible pursuant to O.C.G.A. § 24-4-404(b). Under relevant federal authority, evidence is intrinsic to the charged offense, and thus does not fall within Rule 404(b)’s ambit, if it is *inextricably intertwined with the evidence regarding the charged offense*. Here, the prior carjacking crime was the middle carjacking in a spree of three carjackings over a three-day period, and it occurred a mere two or three hours before the third and final carjacking. Moreover, the defendant was identified by the first victim and he admitted being in the stolen vehicle when it crashed. This, among other things, showed that the previous carjacking was inextricably intertwined with the first and third carjacking. The Court thus affirmed the trial court’s judgment.

16. JOHNSON v. STATE, No. A16A1844, 340 Ga. App. 429 (2017)

Following a jury trial, defendant was convicted of armed robbery and possession of a firearm during the commission of a felony (armed robbery). Defendant appealed, *inter alia*, on the basis that the trial court abused its discretion by admitting other acts evidence pursuant to O.C.G.A. § 24-4-404(b). The Court of Appeals held that the other acts evidence was admissible because in both of the other acts, one of which could be considered an aggravated assault, and the other of which could be considered an armed robbery, defendant was alleged to have used a gun in an offensive manner against others. Furthermore, both of the other acts involved the same intent as required to prove the crimes defendant was charged with in the current case; the other acts evidence was probative of the issue of defendant’s intent; the probative value was not substantially outweighed by undue prejudice; and the evidence was sufficient for the jury to find that the other acts were committed as the victims of the other acts identified defendant as the perpetrator of the crimes. The Court of Appeals affirmed defendant’s conviction.

17. OLDS v. STATE, No. A15A0136, 340 Ga. App. 401 (2017)

Following a jury trial, defendant was convicted of false imprisonment and battery of a woman with whom he previously shared a romantic relationship. Defendant appealed on the basis that the trial court abused its discretion by admitting other acts evidence pursuant to O.C.G.A. § 24-4-404(b). The Court of Appeals previously considered this appeal in *Olds v. State*, 332 Ga. App. 612 (774 S.E.2d 186) (2015) (*Olds I*). In *Olds v. State*, 299 Ga. 65 (786 S.E.2d 633) (2016) (*Olds II*), the Supreme Court of Georgia vacated the judgment of the Court of Appeals in *Olds I* and remanded with direction for the Court of Appeals to consider the admissibility of the extrinsic acts evidence in light of *Olds II*. On remand, the Court of Appeals found that the extrinsic acts evidence concerning two prior female victims of the defendant was relevant and admissible under O.C.G.A. § 24-4-404 (b), to show Olds’ intent and motive. The probative value of the extrinsic acts evidence was more significant than any prejudicial effect, and that the State offered sufficient proof of the extrinsic acts for the jury to conclude that Olds committed them. The Court of Appeals affirmed defendant’s conviction.

18. MONROE v. STATE, No. A16A1932, 340 Ga. App. 373 (2017)

Following a jury trial, defendant was convicted of driving under the influence of alcohol to the extent that he was a less safe driver, speeding, failure to maintain lane, and driving while possessing an open container of an alcoholic beverage. Defendant appealed, *inter alia*, for the following three reasons. First, defendant argued that the trial court abused its discretion by admitting other acts evidence, specifically defendant's prior DUI conviction, pursuant to O.C.G.A. § 24-4-404(b). The Court of Appeals held the trial court did not abuse its discretion in admitting defendant's prior DUI conviction to show intent because the same state of mind was required for committing the prior DUI and the charged crime of driving under the influence of alcohol to the extent that defendant was a less safe driver, which was the general intent to drive while under the influence of alcohol. Second, defendant argued that the trial court erred by admitting the State's demonstrative evidence portraying video clips of three types of horizontal gaze nystagmus. The Court of Appeals held the trial court did not err because the officer's testimony made clear that the video clips were not of defendant, but that in the substantial particulars, the conditions of the video clips and the officer's observations of defendant were similar, as both showed the same kind of nystagmus. Third, defendant argued the trial court erred in permitting the sergeant and the arresting officer to testify that they observed an open container that was full of ice cubes and a dark liquid with the distinct odor of alcohol in defendant's car. Defendant argued the testimony was inadmissible because the State failed to preserve the actual open container. The Court of Appeals held the trial court did not err in permitting such evidence because defendant did not show that the police acted in bad faith in failing to preserve it. The Court of Appeals affirmed defendant's conviction.

19. MORRIS v. STATE, No. A16A1960, 340 Ga. App. 295 (2017)

Following a jury trial, defendant was convicted of criminal attempt to commit armed robbery, aggravated assault, aggravated battery, three counts of violation of the Georgia Street Gang Terrorism and Prevention Act, and possession of a firearm during the commission of a felony. Defendant appealed, *inter alia*, for the following three reasons. First, defendant argued that the trial court abused its discretion by admitting other acts evidence pursuant to O.C.G.A. § 24-4-404(b), specifically defendant's prior theft conviction in order to establish motive and intent. The Court of Appeals held that the trial court did not err, citing the Supreme Court for the proposition that exclusion under Rule 403's balancing test is an extraordinary remedy which should be used only sparingly, and observing that even if the trial court committed error, such error was harmless. Second, defendant argued the trial court committed plain error in issuing limiting instructions to the jury. The Court of Appeals held that the trial court did not commit plain error because each of the three complained-of instructions was immediately preceded by testimony from witnesses as to whom the trial court gave explicit, clear limiting instructions. Third, defendant argued that his convictions for criminal attempt to commit armed robbery, aggravated assault, and aggravated battery should have merged for purposes of sentencing. The Court of Appeals agreed, stating defendant's conviction for aggravated assault should have merged with his conviction for criminal attempt to commit armed robbery because those acts were predicated upon the same act or transaction, i.e.,

defendant's use of a handgun to overpower and intimidate the victim for the purpose of attempting to rob the victim of his belongings. The Court of Appeals affirmed in part, vacated in part, and remanded the case to the trial court for resentencing.

20. DUBLIN v. STATE, No. S17A0822, 2017 Ga. LEXIS 765 (2017)

Defendant appealed his conviction for felony murder claiming ineffective assistance of counsel. This claim was raised based on defendant's argument that his counsel failed to object to hearsay statements made during trial. Defendant argued that the testimony of two of the State's witnesses did not fall under the hearsay exception for statements made by co-conspirators because the State failed to establish a conspiracy between defendant and co-defendants independent of the alleged co-conspirator declarations. The two witnesses for the State were identified as girlfriends of defendant and one of the co-conspirators. The trial court found the statements of the two witnesses to be admissible because the statements fell within the co-conspirator exception to the hearsay rule and the witnesses could identify the people they overheard speaking. The Supreme Court affirmed this ruling citing O.C.G.A § 24-8-801(d)(2)(E), "a statement by a defendant's co-conspirator made 'during the course and in furtherance of the conspiracy, including a statement made during the concealment phase of a conspiracy,' is not excluded by the hearsay rule when offered against the defendant." Conspiracy need not be charged in order for the exception to apply. O.C.G.A § 24-8-801(d)(2)(E). For evidence to be admissible under this rule, the court must find by a preponderance of the evidence that a conspiracy took place. A court may consider either the co-conspirator's statements or independent external evidence. The admission need only be proven at trial. The Supreme Court found that the State established its burden of proof that a conspiracy took place, therefore defendant's argument failed. Furthermore, the Supreme Court clarified that the State need not show any particular reliability of the declarant's statements for Confrontation Clause purposes. Judgment affirmed.

21. PERSON v. STATE, No. A16A1954, 340 Ga. App. 252 (2017)

Following a jury trial, defendant was convicted of one count each of aggravated assault, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. Defendant appealed for the following two reasons. First, defendant argued that the trial court abused its discretion by admitting other acts evidence pursuant to O.C.G.A. § 24-4-404(b), specifically defendant's prior difficulty with an individual who was not the victim of the assault. The Court of Appeals held that the trial court did not err because the prior difficulty was relevant to show motive as the jury would be authorized to conclude that defendant's actions toward the individual was motivated by defendant's desire to retaliate against the victim for continuing to intervene in defendant's physical abuse of the individual. Second, defendant argued that the trial court erred when it commented on the evidence at trial. The Court of Appeals held that the trial court did not express or intimate its opinion with regard to defendant's guilt or make a statement with respect to what had been proven but was instead announcing its ruling on the admissibility of the evidence and the purposes for which the jury could consider it. The Court of Appeals affirmed defendant's conviction.

22. MARTIN v. STATE, No. A17A0503, 340 Ga. App. 773 (2017)

Following a jury trial, defendant was convicted of armed robbery. Defendant appealed, arguing that the trial court improperly admitted other-crimes evidence under O.C.G.A. § 24-4-404(b). The court disagreed, as this evidence was admitted to establish defendant's identity as a participant in the robbery. The trial court did not err in admitting the evidence because the two incidents at issue occurred within approximately one month of each other, both involved the armed robbery of a Hispanic woman walking alone in Gainesville, during which a purse was snatched, the perpetrators wore dark clothing and used a small handgun, as well as a white SUV, to carry out the crimes. Further, in both instances, the stolen purses were later found discarded on a roadway. These circumstances allowed the trial court to find that the modus operandi for each robbery was sufficiently similar to mark the offenses as defendant's. Defendant also challenged an in-court identification based on a single photograph as improper. The court found no error as the extra safeguards applicable to pretrial identification did not apply to a prior victim's in-court identification of defendant from a photograph via Skype. The Court of Appeals affirmed the conviction.

23. McCRORY v. STATE, No. A16A1525, 341 Ga. App. 174 (2017)

Following a jury trial, defendant was convicted of possession of cocaine. Defendant appealed the denial of his motion for a new trial, arguing that the trial court erred in admitting evidence of a similar transaction. The court agreed. The trial court erred by failing to determine that the State possessed a proper purpose for admission of the evidence, or whether the two offenses were sufficiently connected or similar, pursuant to Uniform Superior Court Rule 31.3(B). The Court of Appeals vacated the judgment and remanded the case.

24. KING v. STATE, No. A16A1144, 338 Ga. App. 783 (2016)

Defendant appealed the denial of his motion for new trial after a jury convicted him of one count of driving under the influence ("DUI") to the extent it was less safe to drive. On appeal, defendant argued that the trial court erred in admitting evidence of his statement to police that he had a prior DUI because its probative value was substantially outweighed by its unfair prejudice. The trial court found that the prior DUI was relevant to defendant's intent to drive while intoxicated, his defense at trial that the State had failed to prove that he had driven while intoxicated (as opposed to becoming intoxicated after stopping the vehicle by the side of the road), and why defendant suddenly developed back pain moments after consenting to a breath test. Further, the trial court held that any prejudice resulting from the evidence of the prior DUI was outweighed by the probative nature of the evidence because the State needed this evidence to support its case and to counter the defendant's defense. The Court of Appeals affirmed.

25. HARRIS v. STATE, No. A16A1047, 338 Ga. App. 778 (2016)

Defendant was convicted of family violence battery following an incident in which he became sexually aggressive with the victim and, when she resisted, began hitting her in the face with his fists. He appealed following the denial of his motion for new trial,

arguing that the trial court improperly admitted evidence of his prior convictions for family violence battery and simple battery which he contended were irrelevant and unfairly prejudicial. Prior to trial, the State gave notice that it intended to introduce evidence showing that defendant had committed similar acts of family violence battery and simple battery in 2009 against his estranged wife and her sister. During this prior incident, defendant became angry with his now-estranged wife when she wanted to leave their house after they had gotten into an argument. Defendant proceeded to punch her in the head repeatedly. The estranged wife eventually left the house, but returned later with her sister to retrieve crates for her dogs. Defendant would not let his estranged wife and her sister in the house and began poking his sister-in-law in the face, pulling her hair, and twisting her arm. Defendant was subsequently arrested and entered guilty pleas to family violence battery and misdemeanor battery. The trial court ruled this evidence admissible for the purpose of showing motive—specifically, that defendant uses physical violence to control women who have denied him something that he wants. The Court of Appeals affirmed, finding that the trial court did not abuse its discretion in admitting the other acts evidence for the purpose of shedding light on why defendant reacted the way he did when the victim did not acquiesce to his sexual advances. With respect to defendant’s contention that the other acts evidence was unfairly prejudicial, the trial court found that the other acts evidence was needed by the State to counter the defense that the victim sustained the injuries to her face in a separate incident and to support its case that defendant intentionally hit the victim in the face after the victim refused his sexual advances. The Court of Appeals agreed with the trial court that, on balance, any prejudice resulting from the testimony of his estranged wife and her sister did not substantially outweigh the probative value of the evidence in the case.

26. STATE v. SPRIGGS, No. A16A0871, 338 Ga. App. 655 (2016)

After defendant was charged with the armed robbery of a convenience store clerk whom he shot in the head, the trial court granted defendant’s motion to suppress two undated “selfie” cell phone videos in which he talked about making money by various means, including armed robbery. The State appealed, arguing that the trial court erred when it excluded the videos as extrinsic evidence under O.C.G.A. § 24-4-402 and 24-4-404(b), because they were relevant and probative as to defendant’s intent and motive to commit the armed robbery at issue. In order for extrinsic evidence to be admissible: (1) it must be relevant to an issue other than a defendant’s character; (2) the probative value of the other acts evidence must not be substantially outweighed by its unfair prejudice; and (3) there must be sufficient proof so that the jury could find that the defendant committed the act in question. In this case, it was undisputed that the defendant made the videos in question. The State contended that the videos were relevant to show the defendant’s intent or motive to commit armed robbery under Rule 404(b). However, the State provided no evidence that the act of making the videos required the same intent as the charged offenses, or that the act of making the videos and committing the armed robbery were committed close in time and under similar circumstances. Accordingly, the trial court found the videos irrelevant to the defendant’s intent and motive. Further, with respect to whether the videos were more prejudicial than probative, the State failed to introduce any evidence as to the time when the videos were made, and the videos themselves made no reference to any specific victim. The trial court found that the videos

had only a tenuous logical connection to the defendant's intent to commit the specific armed robbery at issue and thus little or no probative value as extrinsic evidence. The Court of Appeals affirmed the trial court's decision to suppress the two videos.

27. *McGIL v. STATE*, No. A16A1225, 339 Ga. App. 130 (2016)

After a jury trial, defendant was convicted of aggravated assault, armed robbery, theft by taking, and possession of a weapon during the commission of a crime. He appealed, arguing that the trial court erred by allowing bad character evidence of his alleged gang membership. This evidence was not presented to the jury; rather, it was revealed to the trial court during a discussion between the State, the trial court, and the defense. Defendant contended that this evidence prejudiced the trial court to sentence him above the ten year mandatory minimum sentence. The sentencing hearing transcript indicates that the trial court sentenced the defendant to 11 years to serve based on the nature of the crime. Although the judgment was vacated and this case was remanded for further proceedings, the Court of Appeals determined that this enumeration was without error.

28. *SUMMERLIN v. STATE*, No. A16A0674, 339 Ga. App. 148 (2016)

A jury found defendant guilty of a number of charges after she attempted to hit two police officers with her car. Defendant appealed from her convictions and the denial of her motion for a new trial, arguing that the trial court improperly admitted hearsay testimony in the form of three telephone conversations between defendant and other individuals while she was in custody. The first conversation took place five days before the charged offenses, when defendant was in custody on other charges. The conversation itself could not be played for the jury, but the investigating officer, who listened to the recording, testified that she stated, "I know the bitch ass that just locked me up is about to get it, tell you what." The second and third conversations took place after defendant's arrest for the crimes charged in this case and were played aloud for the jury. In those conversations, defendant complained of previous harassment by law enforcement officers and stated that one of the deputies she hit with her car "tried to shoot at me so I ran the bitch over." The Court of Appeals affirmed the trial court's admission of all three of the phone conversations, finding that the defendant's statements were not hearsay because they were admissions under O.C.G.A. § 24-8-801(d)(2)(A) and were relevant to her motive and intent at the time of the incident and her propensity to use a motor vehicle to strike another person. The fact that the first call could not be played aloud and was instead relayed by the investigating officer did not negate the admissibility of the conversation, because the defendant had the opportunity to cross-examine the investigating officer as to his credibility.

29. *GERBERT v. STATE*, No. A16A0868, 339 Ga. App. 164 (2016)

A jury convicted defendant of aggravated sodomy and sexual exploitation of children based on his possession of child pornography, including some sexually explicit photos he took himself. Defendant appealed, arguing that the trial court erred in admitting evidence that, in 1999, defendant's ex-wife discovered him crouched in the corner of her younger sister's bedroom, which he described as a "voyeuristic activity." The ex-wife also testified that the defendant's relationship with her younger sister was weird and embarrassing

because they would often “spoon” on the couch when the younger sister was 11 years old. The trial court found this evidence relevant to show defendant’s intent. The Court of Appeals affirmed, explaining that defendant’s intent was at issue based on his plea of not guilty and his defense that the photos were on his computer because the victim’s boyfriend had taken the photos and placed them on the laptop. The other acts evidence made it more probable that defendant took the pictures with the intent to arouse his sexual desires. Further, the Court of Appeals held that the probative value of the other acts evidence outweighed any undue prejudice, because it was relevant to disprove defendant’s claim that he did not take the photos and because any risk of unfair prejudice was mitigated by the trial court’s limiting instruction that the jury could consider the other acts evidence only to the extent the evidence was relevant to show the defendant’s knowledge and intent in the charged offenses.

30. GREEN v. STATE, No. A16A1059, 339 Ga. App. 263 (2016)

A jury convicted defendant of battery and obstruction of a law enforcement officer following an altercation between defendant and his neighbor. On appeal, defendant argued that the trial court erred in admitting other acts evidence regarding two earlier instances in which he obstructed a law enforcement officer. The trial court admitted these incidents under O.C.G.A. § 24-4-404(b) to show defendant’s knowledge. Rule 404(b) permits the admission of a prior bad act if it is relevant to any fact of consequence to the determination of the action, so long as the evidence is not offered to prove the character of a person in order to show action in conformity therewith. Knowledge is an element of misdemeanor obstruction of an officer: a person commits the offense when he “knowingly and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties.” O.C.G.A. § 16-10-24(a). Here, by expressly challenging whether the officer was lawfully discharging his official duties in their encounter, the trial court found that defendant implicitly challenged his own knowledge that the officer’s commands to him were lawful. Accordingly, the prior convictions were relevant to the knowledge issue raised by the defendant’s defense. Further, the other acts evidence of repetitive conduct under similar circumstances was probative because it provided strong additional support for the inference that defendant knew the officer was acting in the lawful discharge of his official duties. The Court of Appeals affirmed the trial court’s admission of the other acts evidence. Defendant further challenged the trial court’s refusal to admit evidence of his neighbor’s 2001 conviction for deposit account fraud. The trial court found that the defendant’s notice to introduce this evidence, provided “11 business hours” before the start of trial, was insufficient under O.C.G.A. § 24-6-609. The Court of Appeals affirmed the trial court’s exclusion of the evidence.

31. PARKER v. STATE, No. A16A1252, 339 Ga. App. 285 (2016)

A jury found defendant guilty on two counts of armed robbery, two counts of aggravated assault, and one count each of aggravated battery and possession of a firearm during the commission of a felony. Following the denial of his motion for new trial, defendant appealed, arguing that the trial court erred in finding he opened the door to character evidence. On direct examination, defendant stated “I haven’t been in no situation like this,” which the State asserted opened the door to his prior charge and conviction for family violence battery. The trial court agreed with the State and admitted this evidence

on cross-examination. The Court of Appeals affirmed, noting that it was within the trial court's discretion to determine whether the jury might have interpreted the defendant's testimony to mean that he had never faced criminal charges, when in fact he had.

32. TAYLOR v. STATE, No. A16A1122, 339 Ga. App. 321 (2016)

A jury found defendant guilty of child molestation, aggravated child molestation, statutory rape, rape, and influencing a witness. Defendant appealed, arguing that the trial court erred by: (1) allowing testimony about an allegedly similar transaction because there were "no similarities" between the prior transaction and the acts alleged by the victims in this case; and (2) admitting evidence that defendant was hiding under a bed during a prior arrest and wearing a dress when taken into custody on that crime. With respect to the allegedly similar transaction, the trial court allowed defendant's sister to testify about an incident where the defendant touched his sister's arm and asked if he could kiss her on the mouth, which occurred 15 years prior to the crimes at issue. The Court of Appeals affirmed the trial court's decision to admit the evidence, holding that, although the similar transaction evidence was not illegal, it tended to show the defendant's lustful disposition toward young girls and "inappropriate or questionable behavior." The Court of Appeals further reasoned that the lapse in time between the prior incident and the crimes at issue in this case went to the weight and credibility of the evidence and did not demand its exclusion. With respect to evidence surrounding the circumstances of the defendant's prior arrest, the Court of Appeals held that any error in admitting this evidence was harmless in light of the overwhelming evidence of the defendant's guilt.

33. KRITLOW v. STATE, No. A16A1093, 339 Ga. App. 353 (2016)

After a jury trial, defendant was convicted of aggravated sodomy, aggravated sexual battery, aggravated assault, false imprisonment, and sexual battery. Defendant appealed, challenging the trial court's admission of evidence of his prior sex offenses. Under O.C.G.A. § 24-4-413, in a criminal proceeding in which the defendant is accused of sexual assault, evidence of the defendant's commission of another offense of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant. The trial court found that defendant's prior commission of sexual assault on two occasions was relevant to his intent, his lustful disposition, and because it had the tendency to bolster the credibility of the victim. The Court of Appeals affirmed.

34. STROUD v. STATE, No. S17A0709, 2017 Ga. LEXIS 690 (2017)

Defendant was convicted of murder, he appealed contending that the trial court erred in admitting evidence of prior felonies committed. Despite arguing that the prior convictions were more prejudicial than probative, defense counsel conceded that, if defendant were to testify, the court "can't keep all the convictions out," and thus urged the court to admit evidence of only "one or two" of the convictions. The trial court allowed in the prior convictions that could be used for impeachment purposes. However, the trial court eventually allowed in the other convictions after defendant brought his character into issue during direct examination. The Supreme Court found that because defendant acquiesced to the admission of the evidence in the trial court, he was precluded from

asserting that the trial court erred in admitting the prior conviction evidence. Judgment affirmed.

35. JONES v. STATE, No. S16G0890, 301 Ga. 544 (2017)

Defendant was tried and convicted for driving under the influence, he sought appellant review of that conviction on the ground that evidence of a prior DUI conviction was wrongfully admitted at trial. Rule 404 (b), provides that “evidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Extrinsic act evidence may be admitted if it is relevant, the probative value is not substantially outweighed by the risk of unfair prejudice, and there is sufficient proof for a jury to find by a preponderance of the evidence that the defendant committed the prior act. The Supreme Court found that the trial court’s use of the evidence to show intent was in error because it improperly found that the prejudicial effect of the evidence did not outweigh its probative effect. In this case, the admission of the prior conviction had the effect of emphasizing defendant’s dishonesty and creating the potential for the jury to make a decision based on negative impressions in addition to the stigma already associated with the prior conviction. However, because there was overwhelming direct evidence to convict defendant, the Supreme Court found only harmless error to exist.

36. BREWNER v. STATE, No. S17A1103, 2017 Ga. LEXIS 611 (2017)

After a murder conviction, defendant appealed contending that the court erred in admitting certain evidence, among other things. Defendant asserted that the trial court erred in admitting evidence of his prior drug dealings and involvement in a home invasion. Defendant argued that both pieces of evidence failed for lack of relevancy. The Supreme Court, in this case, adopted the three-part test used in the Eleventh Circuit under the analogous Rules 403 and 404(b) of the Federal Rules of Evidence. The test assesses whether (1) the evidence is relevant to an issue in the case other than the defendant’s character; (2) the probative value of the evidence is not substantially outweighed by the likelihood of its undue prejudice, and (3) there is sufficient proof for a jury to find by a preponderance of the evidence that the defendant in fact committed the other act. *Hood v. State*, 299 Ga. 95, 101 (2016). Using this test, the Supreme Court found that the evidence of the home invasion was relevant to prove defendant’s intent to participate in the scheme to invade the victim’s home. The probative value of the evidence was not substantially outweighed by the likelihood of undue prejudice. Lastly, there was little dispute that defendant did mastermind the crimes, because one of the witnesses’ testimony on this subject was unchallenged. Regarding the evidence of the prior drug dealings, this evidence, too was found to be relevant to establish context for his relationship with the before mentioned witness and to others involved in the crimes. Since the evidence was integral to the narrative of the crimes the probative value, again, substantially outweighed the risk of undue prejudice. Finally, since this evidence was undisputed, the jury was authorized to find by a preponderance of the evidence that defendant engaged in such drug dealings. Defendant also contended that the trial court erred in admitting the video recording of a witness’ interview with a detective as a prior

inconsistent statement. Under O.C.G.A § 24-6-613(b) extrinsic evidence of a witness' prior inconsistent statement may be admitted so long as "the witness is first afforded an opportunity to explain or deny the prior inconsistent statement and the opposite party is afforded an opportunity to interrogate the witness on the prior inconsistent statement." The trial court admitted the evidence, over objection by defense, after the witness on the recording testified at length to explain the statements made on the recording. When a witness fails to remember making a statement the court has held that foundation for offering extrinsic evidence to prove that the statement was made may be provided. In this case the foundation was laid for the prior statement to be used to confront the witness after the witness' testimony was inconsistent with that statement. Therefore, the Supreme Court found no error in the trial court's admission of the recorded statements at trial. Judgment affirmed.

37. BOOTH v. STATE, No. S17A0705, 2017 Ga. LEXIS 634 (2017)

Defendant was convicted of malice murder. He appealed, arguing that the trial court erred by: (1) allowing the State to make improper arguments during closing statement; and (2) admitting evidence of other acts to prove intent to commit the charged crimes. Rule 404 (b), provides that "evidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including, but not limited to, proof of ... intent..." Other acts evidence must meet the test which requires that the moving party show that the evidence is (1) relevant; (2) the probative value is not substantially outweighed by undue prejudice; and (3) there is sufficient proof that the jury can find that the defendant committed the acts. Defendant argued that the acts were not relevant because the intent required for one of his convictions was not required for the offenses charged in the case. Relevant evidence is evidence that tends "to make the existence of any fact more probable or less probable than it would be without the evidence." O.C.G.A § 24-4-401. In this case, defendant was charged with aggravated assault which required proof that defendant had the intent to injure victim with a weapon, which in this case were defendant's hands. Both offenses showed an intent to cause harm by hitting the victim in the head with hands or fists and such actions are likely to cause serious bodily injury. The Supreme Court concluded that those offenses were the same intent required to prove aggravated assault. Defendant also argued that the trial court erred in overruling his objection to the State's allegedly improper comments during closing arguments. The comments are in regards to the testimony of a defense expert witness in forensic DNA analysis. Defendant asserts that the State mischaracterized the expert witness' testimony which improperly allowed the jury to believe that DNA evidence can be time-stamped. The Supreme Court found the State's comments to be within the bounds of permissible closing arguments stating, "[A] prosecutor is granted wide latitude in the conduct of closing argument, the bounds of which are in the trial court's discretion[.]" *Scott v. State*, 290 Ga. 883, 885 (2012). Therefore, the Supreme Court found no error in the closing.

38. WILLIAMS v. STATE, No. S16A1158, 300 Ga. 218 (2016)

Defendant was convicted of malice murder in connection with the death of a female victim. As part of its case-in-chief, the State introduced other acts evidence of defendant's commission of three separate instances of violent assault or battery. Defendant appealed

his conviction, arguing that the trial court erred in admitting this evidence because there were insufficient connections or similarities to this murder. Under the former Evidence Code, which governed the trial, the State had to show that it sought to introduce the evidence for an appropriate purpose, deemed to be an exception to the general rule of inadmissibility; that there was sufficient evidence to establish that the accused committed the independent transaction; and that there was a sufficient connection or similarity between such transaction and the charged crime so that proof of the former tended to prove the latter. However, the independent act did not have to mirror every detail of the charged crime or crimes, but instead might reflect only a portion of the acts that established one or more of the charges being tried. Here, the Supreme Court found that evidence of other transactions was properly admitted, because the separate prior transactions involved defendant perpetrating violent acts with the use of a handgun and defendant targeting the heads of the victims, one incident involved a shooting with the same type of handgun used to kill the victim in the instant action, and the acts with the other victims were close in time and were also with women with whom defendant had some sexual involvement. Therefore, the Supreme Court affirmed the judgment.

39. CAPPS v. STATE, No. S16A1071, 300 Ga. 6 (2016)

Defendant, who is Caucasian, was convicted of malice murder of an African-American victim. Defendant appealed, arguing that his trial counsel was ineffective for not objecting to the employee's testimony of a similar transaction and the detective's testimony of defendant's racist comments. The testimony at issue was the employee's recounting of defendant's statements regarding defendant's family's history of killing African-Americans and that defendant had himself killed an African-American and was ready to kill again. The Supreme Court noted that in the trial of an individual charged with murder, evidence of motive for the homicide is relevant and, therefore, admissible. This is so even if the evidence incidentally places the defendant's character in evidence. Therefore, the Court found that the testimony was properly admitted as evidence of defendant's racial animus toward African-Americans as a possible motive for his killing of the African-American victim in this case. The detective's testimony at issue was about remarks defendant made to the detective about an African-American detective investigating the case. Similarly, the Supreme Court found that such evidence was plainly relevant to establishing a possible motive for the seemingly unprovoked killing. Thus, the Court held that the trial counsel's failure to object to the testimony did not lead to ineffective assistance. Judgment affirmed.

40. GIBSON v. STATE, No. S16A1507, 300 Ga. 494 (2017)

Defendant was convicted of murder in connection with the fatal beating of the victim. Defendant appealed, claiming that the trial court erred when it (1) admitted evidence of a similar transaction involving defendant and his father, and (2) excluded evidence that the victim had a reputation for violence. Under the old Evidence Code, which applied in this case, a similar transaction may be admitted if the State shows that (1) it seeks to introduce the evidence not to raise an improper inference as to the accused's character, but for some appropriate purpose which has been deemed to be an exception to the general rule of inadmissibility; (2) there is sufficient evidence to establish that the accused committed the independent offense or act; and (3) there is a sufficient connection or similarity

between the independent offense or act and the crime charged so that proof of the former tends to prove the latter. The Supreme Court noted that the trial court admitted the similar transaction to show defendant's "course of conduct," motive, and intent, which were, at the time of his trial, appropriate purposes for the introduction of evidence of a defendant's prior bad acts. As for the connection or similarity necessary to admit evidence of a similar transaction to show "course of conduct," motive, and intent, the Court noted "the proper focus under the old Evidence Code was on the similarities, not the differences, between the crime charged and the prior act." Here, in each instance, defendant argued with an older man, the argument involved defendant's girlfriend in some way and took place at defendant's father's house, defendant became violent, and defendant beat the victim about the head with a blunt instrument. Thus, the Court held that the trial court did not err in concluding that the incidents were similar and admitting the evidence of defendant's prior violent act against his father. Further, under the old Evidence Code, although the character of a victim generally was neither relevant nor admissible in a murder trial, the defendant could present evidence of the victim's general reputation for violence and his specific acts of violence against the defendant and third persons if the defendant claimed justification and offered evidence that the victim was the first aggressor. But the burden was on the proponent of the evidence to establish that the victim's prior acts involved violence and were therefore relevant to a claim of justification, and that the evidence specifically related to the victim's reputation for violence. Here, the testimony that defendant sought to admit showed only that the victim was obnoxious and verbally abusive when intoxicated. Thus, the Court agreed that such testimony consisted of neither general reputation for violence nor specific acts of violence and, thus, did not come within the exception to the general rule against admission of evidence of the victim's character. Judgment affirmed.

41. BROWN v. STATE, No. S16A1530, 300 Ga. 446 (2017)

Defendant was tried and found guilty of murder and related crimes including criminal street gang activity. The trial court granted defendant a new trial solely on the count of criminal gang activity, finding that evidence used to prove that crime at trial was not properly authenticated. Defendant appealed, claiming that the introduction of the improperly-authenticated evidence at trial requires a reversal of all his convictions. During trial, the trial court admitted defendant's prior conviction for participation in criminal street gang activity, aggravated assault, influencing a witness, and obstruction pursuant to former O.C.G.A. § 16-15-9. After admission of this evidence, the trial court properly instructed the jury that it could only be considered for the determination of whether defendant was currently guilty of criminal gang activity—not the remaining counts of the indictment. The Supreme Court must presume that the jury followed this instruction, and there was no evidence that the jury did not do so. Judgment affirmed.

C. Victim's Character

1. GREEN v. STATE, No. A16A1059, 339 Ga. App. 263 (2016)

A jury convicted defendant of battery and obstruction of a law enforcement officer following an altercation between defendant and his neighbor. On appeal, defendant argued that the trial court erred in admitting other acts evidence regarding two earlier

instances in which he obstructed a law enforcement officer. The trial court admitted these incidents under O.C.G.A. § 24-4-404(b) to show defendant's knowledge. Rule 404(b) permits the admission of a prior bad act if it is relevant to any fact of consequence to the determination of the action, so long as the evidence is not offered to prove the character of a person in order to show action in conformity therewith. Knowledge is an element of misdemeanor obstruction of an officer: a person commits the offense when he "knowingly and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties." O.C.G.A. § 16-10-24(a). Here, by expressly challenging whether the officer was lawfully discharging his official duties in their encounter, the trial court found that defendant implicitly challenged his own knowledge that the officer's commands to him were lawful. Accordingly, the prior convictions were relevant to the knowledge issue raised by the defendant's defense. Further, the other acts evidence of repetitive conduct under similar circumstances was probative because it provided strong additional support for the inference that defendant knew the officer was acting in the lawful discharge of his official duties. The Court of Appeals affirmed the trial court's admission of the other acts evidence. Defendant further challenged the trial court's refusal to admit evidence of his neighbor's 2001 conviction for deposit account fraud. The trial court found that the defendant's notice to introduce this evidence, provided "11 business hours" before the start of trial, was insufficient under O.C.G.A. § 24-6-609. The Court of Appeals affirmed the trial court's exclusion of the evidence.

2. MULLINS v. STATE, No. S16A0710, 299 Ga. 681 (2016)

A jury convicted defendant of felony murder and related crimes. Defendant appealed, contending that the trial court erred when it denied his request to admit evidence of the victim's specific acts of violence against a third person known as "Chandler" evidence. In order for Chandler evidence to be admitted at trial, a defendant must make a prima facie showing of justification by producing sufficient evidence that the victim was the aggressor, that the victim assaulted the defendant, and that the defendant was honestly trying to defend himself. Chandler has been superseded by the new evidence code. Here, none of the defense witnesses stated that the victim assaulted or attacked the defendant at the time of the shooting, but only that he opened defendant's car door. Accordingly, Judgment affirmed.

3. WILSON v. STATE, No. S17A0950, 2017 Ga. LEXIS 776 (2017)

Defendant appealed his murder conviction asserting that the trial court erred when it refused to admit evidence of the victim's prior convictions in order to support his self-defense claim. Defendant contended that these convictions were admissible to show that the victim was involved in the "drug lifestyle" and was most likely armed at the time of the encounter between defendant and victim. The Supreme Court cited the Evidence Code stating "evidence of a victim's character is admissible only if it bears on a 'pertinent trait of character' of the victim. O.C.G.A § 24-4-404(a)(2). It has previously been rejected that a victim's alleged involvement in the drug trade would tend to show that the victim was armed to support a defendant's claim of self-defense. Therefore, the Supreme Court found the evidence to be irrelevant and affirmed the trial court's decision. Judgment affirmed.

4. MCCRAY v. STATE, No. S17A0315, 301 Ga. 241 (2017)

Defendant was convicted of murder and other offenses arising out of the shooting death of the lover of his former girlfriend. The shotgun that killed the victim belonged to the victim. The victim retrieved the gun from a friend who had taken the gun from the victim for safekeeping because the victim was drunk on a prior day. The State moved to exclude this portion of the friend's testimony at trial on the ground that admission of the statement would impermissibly place the victim's character in issue. The trial court granted the State's motion in limine. Defendant appealed, arguing that the trial court erred in granting the State's motion in limine. The Supreme Court rejected the argument because the record reflected that despite the ruling to exclude that evidence, the testimony that defendant sought to admit was, in fact, presented to the jury during defense counsel's cross-examination of one of the State's witnesses. Accordingly, even defendant could demonstrate error by the grant of the State's motion in limine, the defendant can show no harm. Affirmed.

5. GIBSON v. STATE, No. S16A1507, 300 Ga. 494 (2017)

Defendant was convicted of murder in connection with the fatal beating of the victim. Defendant appealed, claiming that the trial court erred when it (1) admitted evidence of a similar transaction involving defendant and his father, and (2) excluded evidence that the victim had a reputation for violence. Under the old Evidence Code, which applied in this case, a similar transaction may be admitted if the State shows that (1) it seeks to introduce the evidence not to raise an improper inference as to the accused's character, but for some appropriate purpose which has been deemed to be an exception to the general rule of inadmissibility; (2) there is sufficient evidence to establish that the accused committed the independent offense or act; and (3) there is a sufficient connection or similarity between the independent offense or act and the crime charged so that proof of the former tends to prove the latter. The Supreme Court noted that the trial court admitted the similar transaction to show defendant's "course of conduct," motive, and intent, which were, at the time of his trial, appropriate purposes for the introduction of evidence of a defendant's prior bad acts. As for the connection or similarity necessary to admit evidence of a similar transaction to show "course of conduct," motive, and intent, the Court noted "the proper focus under the old Evidence Code was on the similarities, not the differences, between the crime charged and the prior act." Here, in each instance, defendant argued with an older man, the argument involved defendant's girlfriend in some way and took place at defendant's father's house, defendant became violent, and defendant beat the victim about the head with a blunt instrument. Thus, the Court held that the trial court did not err in concluding that the incidents were similar and admitting the evidence of defendant's prior violent act against his father. Further, under the old Evidence Code, although the character of a victim generally was neither relevant nor admissible in a murder trial, the defendant could present evidence of the victim's general reputation for violence and his specific acts of violence against the defendant and third persons if the defendant claimed justification and offered evidence that the victim was the first aggressor. But the burden was on the proponent of the evidence to establish that the victim's prior acts involved violence and were therefore relevant to a claim of justification, and that the evidence specifically related to the victim's reputation for violence. Here, the

testimony that defendant sought to admit showed only that the victim was obnoxious and verbally abusive when intoxicated. Thus, the Court agreed that such testimony consisted of neither general reputation for violence nor specific acts of violence and, thus, did not come within the exception to the general rule against admission of evidence of the victim's character. Judgment affirmed.

II. PHYSICAL EVIDENCE

A. Photographs

1. RAGAN v. STATE, No. S16A1107, 299 Ga. 828 (2016)

After a jury trial, defendant was convicted of murder, felony murder, aggravated assault and possession of a firearm by a convicted felon. Defendant appealed, arguing that the trial court erred in admitting five photographs of the victim while in life and erred in denying his subsequent motion for mistrial after he stated that the photographs elicited an emotional response from the jury. The State used five photographs of the victim depicting her alone and with her children—using her surviving husband (victim himself) to identify the photographs. It was noted on the record that members of the audience were “crying” and that there was an emotional response from the jury. However, the record was silent on the nature and extent of the “emotional response.” It is well established that the trial court has broad discretion in deciding whether to grant a mistrial. *Kirkland v. State*, 334 Ga. 778 (2015). Nothing in the record suggested that the trial court abused its discretion here. Accordingly, the judgment of the trial court was affirmed.

2. BENTON v. STATE, No. S17A0355, 301 Ga. 100 (2017)

After a jury trial, defendant was found guilty of malice murder, possession of a firearm by a convicted felon, and various other offenses. First, defendant claimed that the trial court erred when it allowed jurors to submit questions to be posed to the witnesses. It has been established that “jurors in Georgia courts may not ask questions of witnesses directly, a trial court may receive written questions from the jury and ask those questions which the court finds proper.” *Allen v. State*, 286 Ga. 392, 396 (3) (2010). In this case, the written questions were reviewed by the trial court and found proper before they were posed to the court. Therefore, no error was found. Second, defendant argued that by admitting the autopsy photographs into evidence, the trial court committed plain error. Plain error is found where an error is a deviation from the law, is clear and obvious, and affects defendant’s substantial rights. However, it is within the court’s discretion to correct this error if the other three prongs are satisfied. The Supreme Court first evaluated whether the photographs were relevant to the case. Relevancy is found where its probative value is not outweighed by unfair prejudice. O.C.G.A § 24-4-403. The Supreme Court found each of the photographs to be relevant to the case, therefore no error was found in the trial court’s decision. Judgment affirmed for these matters.

3. HAFEEZ v. STATE, No. A16A1174, 339 Ga. App. 467 (2016)

Following a jury trial, defendant was convicted of aggravated assault and armed robbery. Defendant appealed, *inter alia*, on the following two grounds. First, defendant contended that the trial court abused its discretion in admitting still photographs printed from a surveillance video recording. The Court of Appeals held that because the State admitted the surveillance video tape itself, the admission of photographs extracted from that tape presented no best evidence concerns. Second, defendant contended that the trial court abused its discretion in admitting hearsay testimony of a cashier that stated a customer told the cashier someone was lurking behind the store. The Court of Appeals held such evidence was not inadmissible hearsay because the State offered the testimony, not to prove that someone was lurking behind the store, but to explain why the cashier called the police. The Court of Appeals affirmed defendant's conviction.

B. Videotape Evidence

1. STATE v. SMITH, No. S16A1069, 299 Ga. 901 (2016)

Defendant was indicted by a grand jury for felony murder and other offenses. Defendant filed a pre-trial motion to suppress evidence of an oral admission, written statements and video recordings of any statement made to law enforcement officers while in custody. The trial court granted the motion, and the State appealed. Under O.C.G.A. § 24-9-901, to introduce a video recording of a defendant's custodial statement, the State must show it is a fair representation of the statement, and the State may authenticate the recording by any witness familiar with the subject depicted on the recording, as is the case with any other video recording presented as evidence at a criminal trial. Here, although the investigator testified that the investigator had auditioned a disc and that it reflected everything that occurred during defendant's interview, on cross-examination, the investigator admitted that the investigator did not view the entire video in the judge's chambers and could not attest to whether the recording was one hour and 23 minutes long as the investigator remembered. And, although the investigator testified that the disc presented was the one the investigator had reviewed earlier and gave to the prosecutor, the disc had no identifying markers on it that would confirm that fact. Thus, the Supreme Court found that the State failed to carry its burden of proving the video recording was a fair representation of defendant's interview. As for defendant's oral admission and written statement, although no evidence was presented that the investigator did, in fact, make a representation to the defendant that if the defendant cooperated the investigator would be willing to tell the victim's father that the defendant showed remorse, the investigator's uncertainty and inability to deny such a representation, considered with the evidence as a whole, was sufficient to create doubt about the investigator's credibility. Therefore, the Supreme Court found no error, and affirmed the trial court's judgment.

C. Tape Recordings

1. JACKSON v. STATE, No. S17A1128, 2017 Ga. LEXIS 702 (2017)

Defendant was convicted by jury trial of murder and two related firearms charges. He appealed asserting that the trial court erred when it admitted a partial recording of a phone call that he made and when it allowed the lead investigator to testify about what another law enforcement officer told him. Regarding the phone call, defendant claimed that the State's evidence violated the Rule of Completeness because it was only a partial recording of the phone conversation defendant had with his mom. Defendant was seeking to admit the part of the phone call where he told his mother that he would not plead guilty because he had not done anything wrong. The State only played the part of the conversation where defendant told his mother to tell his uncle (another witness in the case) to stay "out of sight, out of mind" while police were looking for him. Under O.C.G.A. § 24-1-106 if a writing or recorded statement is admitted into evidence partially, an adverse party may require the introduction of the whole writing or recording which, in fairness, should be considered contemporaneously with the writing or recording. O.C.G.A. § 24-1-106. In connection, "when admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence." O.C.G.A. § 24-8-822. The Rule of Completeness prevents parties from misleading the jury, only where statements are relevant to the part of the recording or writing admitted. In this case, the Supreme Court found that the part of the conversation defendant wished to have admitted was not relevant to the part of the recording that was admitted. It was not necessary "in fairness...to be considered." Therefore the Supreme Court found no error. Furthermore, regarding defendant's claim of inadmissible hearsay by the lead investigator, the trial court found the testimony to be admissible to explain why the lead investigator did not follow up with the eyewitness. In fact, this was an issue raised by defendant during cross-examination of the investigator. Since the conduct of the lead investigator was material to the case, the Supreme Court found that the trial court did not err in its decision. Judgment affirmed.

2. SMITH v. STATE, No. S16A1781, 300 Ga. 538 (2017)

Defendant was convicted of murder and related offenses. Defendant appealed, arguing that the trial court erred in admitting into evidence two incriminating recorded jail calls between defendant and his family members and handwritten letters authored by defendant because the State failed to lay the proper foundation for their admission. Defendant first claimed that the State failed to properly identify the speakers, the proper operation of the recording devices, and whether any changes or deletions were made to the recordings as required by *Davis v. State*, 279 Ga. 786 (2005) and its progeny. However, the Supreme Court pointed out that the new Evidence Code, not *Davis*, controls this case. O.C.G.A. § 24-9-923(c) allows the admission of computer controlled audio recordings, such as jail phone calls, "when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered . . ." Here, an investigator from the district attorney's office authenticated the calls by testifying that the investigator was able to access the jail's recorded phone calls through a computer program, was able to identify the parties on

both phone calls because they identified themselves in the recordings on numerous occasions, and both recordings contained automated information from the jail, including the number called, the inmate number, and the date and time the call was placed. Thus, the Court held that the trial court did not err by admitting into evidence the two incriminating recorded jail calls. As for the handwritten letters, the co-indictee testified that the co-indictee was familiar with defendant's handwriting and further identified the handwriting in many of the letters as belonging to defendant, and the co-indictee testified that many of the letters were either directly given to co-indictee by defendant, or were delivered by a third party at defendant's request. Thus, the Court held that the trial court did not abuse its discretion by admitting the handwritten letters at trial because the state provided sufficient evidence to establish a prima facie case that the letters were written and sent by defendant. The Supreme Court affirmed defendant's convictions.

D. Handwritten Materials

1. SMITH v. STATE, No. S16A1781, 300 Ga. 538 (2017)

Defendant was convicted of murder and related offenses. Defendant appealed, arguing that the trial court erred in admitting into evidence two incriminating recorded jail calls between defendant and his family members and handwritten letters authored by defendant because the State failed to lay the proper foundation for their admission. Defendant first claimed that the State failed to properly identify the speakers, the proper operation of the recording devices, and whether any changes or deletions were made to the recordings as required by *Davis v. State*, 279 Ga. 786 (2005) and its progeny. However, the Supreme Court pointed out that the new Evidence Code, not *Davis*, controls this case. O.C.G.A. § 24-9-923(c) allows the admission of computer controlled audio recordings, such as jail phone calls, “when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered” Here, an investigator from the district attorney's office authenticated the calls by testifying that the investigator was able to access the jail's recorded phone calls through a computer program, was able to identify the parties on both phone calls because they identified themselves in the recordings on numerous occasions, and both recordings contained automated information from the jail, including the number called, the inmate number, and the date and time the call was placed. Thus, the Court held that the trial court did not err by admitting into evidence the two incriminating recorded jail calls. As for the handwritten letters, the co-indictee testified that the co-indictee was familiar with defendant's handwriting and further identified the handwriting in many of the letters as belonging to defendant, and the co-indictee testified that many of the letters were either directly given to co-indictee by defendant, or were delivered by a third party at defendant's request. Thus, the Court held that the trial court did not abuse its discretion by admitting the handwritten letters at trial because the state provided sufficient evidence to establish a prima facie case that the letters were written and sent by defendant. The Supreme Court affirmed defendant's convictions.

E. Blood Alcohol Concentration (BAC) Evidence

1. HYNES v. STATE, No. A17A0633, 341 Ga. App. 500 (2017)

Defendant was charged with failure to maintain lane, driving under the influence of alcohol less safe, and DUI per se. Following a hearing, the trial court denied defendant's motion to suppress the results of a blood test. Defendant argued on interlocutory appeal that the denial violated his right to an independent test under O.C.G.A. § 40-6-392(a)(3), which he argued was not contingent upon his submission to a State-administered test. The court disagreed. Defendant's motion to suppress was properly denied because O.C.G.A. § 40-6-392 did not grant defendant the right to an independent test when the officer obtained a search warrant for a blood test. Under the implied consent law, defendant forfeited his right to independent testing by refusing the arresting officer's request to submit to a state-administered breath test after being advised under O.C.G.A. § 40-5-67.1; and defendant was not entitled to take advantage of the independent test incentive because he refused to submit to the chemical testing pursuant to O.C.G.A. § 40-5-55. The Court of Appeals affirmed the denial.

2. MONROE v. STATE, No. A16A1932, 340 Ga. App. 373 (2017)

Following a jury trial, defendant was convicted of driving under the influence of alcohol to the extent that he was a less safe driver, speeding, failure to maintain lane, and driving while possessing an open container of an alcoholic beverage. Defendant appealed, *inter alia*, for the following three reasons. First, defendant argued that the trial court abused its discretion by admitting other acts evidence, specifically defendant's prior DUI conviction, pursuant to O.C.G.A. § 24-4-404(b). The Court of Appeals held the trial court did not abuse its discretion in admitting defendant's prior DUI conviction to show intent because the same state of mind was required for committing the prior DUI and the charged crime of driving under the influence of alcohol to the extent that defendant was a less safe driver, which was the general intent to drive while under the influence of alcohol. Second, defendant argued that the trial court erred by admitting the State's demonstrative evidence portraying video clips of three types of horizontal gaze nystagmus. The Court of Appeals held the trial court did not err because the officer's testimony made clear that the video clips were not of defendant, but that in the substantial particulars, the conditions of the video clips and the officer's observations of defendant were similar, as both showed the same kind of nystagmus. Third, defendant argued the trial court erred in permitting the sergeant and the arresting officer to testify that they observed an open container that was full of ice cubes and a dark liquid with the distinct odor of alcohol in defendant's car. Defendant argued the testimony was inadmissible because the State failed to preserve the actual open container. The Court of Appeals held the trial court did not err in permitting such evidence because defendant did not show that the police acted in bad faith in failing to preserve it. The Court of Appeals affirmed defendant's conviction.

3. STATE v. WALSH, No. A16A1618, 339 Ga. App. 894 (2016)

The State charged defendant with DUI (less safe) and other traffic violations. Following a hearing on defendant's motion to suppress, the trial court excluded the results of a

horizontal gaze nystagmus (“HGN”) test conducted on defendant because the officer did not have defendant remove his eyeglasses while conducting the HGN test. On appeal, the State argued that irregularity in the administration of the HGN test went to the weight of the test results and not its admissibility. The Court of Appeals agreed, stating that the officer substantially complied with the applicable law enforcement guidelines with respect to administering the HGN test and testified that the glasses did not impair the officer's ability to read defendant's responses to the test and would not have had an effect on the interpretation of the test. The Court of Appeals reversed.

4. KETTLE v. STATE, No. A16A1338, 339 Ga. App. 612 (2016)

Defendant appealed the trial court’s denial of his motion to suppress evidence obtained after his vehicle was stopped at a roadblock. He contended that his consent to a blood test was not free and voluntary and that the roadblock was unlawful. The Court of Appeals stated the State met its burden of proving that defendant's consent to submit to a state test of blood was voluntary based on the implied consent notice being properly given, no evidence of fear, intimidation, threats or lengthy detention to obtain consent was shown, and defendant did not allege any incompetency. The Court of Appeals affirmed the trial court’s ruling.

F. Other Physical Evidence

1. MITCHELL v. STATE, No. S17A0459, 301 Ga. 563 (2017)

Defendant appealed from the denial of his motion to suppress and motions in limine. He argued that the trial court failed to require the proper foundation for the Romberg field sobriety test under *Harper v. State*, 249 Ga. 519, 524-526 (1982). Courts use the *Harper* decision to determine whether a scientific principle or technique is competent evidence in a criminal trial. The trial judge must decide whether the procedure or technique in question has reached a scientific stage of verifiable certainty. The trial court may make this determination from evidence presented to it at trial by the parties. In this case, the only witnesses testifying in support of the test were the police officers that arrested defendant. On cross-examination neither officer acknowledged that they were aware of any validation studies for the field test. No scientific or medical testimony was presented at the hearing. The Supreme Court agreed with the defendant based on the facts at hand. There was no proper foundation for the Romberg field sobriety test to be understood by a lay observer, for this reason this portion of the trial court’s order was reversed.

G. Spoliation

1. COOPER TIRE & RUBBER COMPANY v. KOCH, No. A16A1219, 339 Ga. App. 357 (2016)

The plaintiff’s husband was involved in a fatal car accident in 2012 when the tread on his left rear tire detached from his vehicle. After the accident but prior to his death, he told his wife to save the tire if she were to get rid of the car. The plaintiff relinquished control of the car to a wrecker service shortly thereafter, but asked the service to save the left rear tire. In 2014, the plaintiff filed a complaint for damages based on negligent

design/manufacture, strict liability, and failure to warn. The defendant moved to dismiss the complaint or, alternatively, to bar the plaintiff from presenting evidence to rebut its defense as a result of the plaintiff's spoliation of relevant evidence. The trial court denied the motion to dismiss, finding that the plaintiff's duty to preserve the vehicle was not triggered because the facts and circumstances of the case did not give rise to litigation being reasonably foreseeable. The defendant appealed, arguing that the trial court erred by focusing on whether the plaintiff subjectively knew that litigation was likely at the time she allowed the vehicle and companion tires to be destroyed. Defendant argued that the trial court should have applied the objective standard established by the Supreme Court in *Phillips v. Harmon*, 297 Ga. 386 (2015). *Phillips*, which dealt with a defendant's duty to preserve, set out objective factors to be considered in determining whether a defendant is on notice that a plaintiff is contemplating litigation. The Court of Appeals affirmed the trial court's denial of the defendant's motion to dismiss, reasoning that the issue of whether litigation was reasonably foreseeable to the plaintiff is separate and distinct from whether a defendant actually or reasonably should have foreseen litigation by the plaintiff. The Court of Appeals stated that it did not believe the Supreme Court intended the *Phillips* factors to apply in determining whether litigation was reasonably foreseeable to the plaintiff. Rather, a plaintiff's duty to preserve arises when the plaintiff is actually contemplating litigation or when litigation is reasonably foreseeable to someone in the plaintiff's position at the time.

2. SHEATS v. THE KROGER COMPANY, No. A17A0753, 2017 Ga. App. LEXIS 404 (2017)

Plaintiff was shopping at a Kroger grocery store. Plaintiff took a cardboard package containing several glass bottles of ginger ale off of the shelf. As she did so, the bottom of the package opened up, and at least one bottle struck the plaintiff's left foot. The store manager inspected the rest of the containers and did not see any liquid on the shelves or any of the other containers damaged. The store manager later disposed of the package after talking to the plaintiff. The plaintiff subsequently filed a motion for spoliation sanctions, arguing that defendants had destroyed essential evidence. Litigation may be reasonably foreseeable to the defendant based on (a) type and extent of the injury, (b) extent to which fault is clear, (c) potential financial exposures, (d) course of conduct, (e) frequency of similar litigation, and the (f) defendant's response to the injury. After considering these factors, the trial court denied the plaintiffs' spoliation claim and granted summary judgment to Kroger. Given the record in this case, the Court concluded that the trial court was entitled to resolve each of the factors in favor of Kroger. Consequently, the trial court did not clearly err when it determined that litigation was not reasonably foreseeable to Kroger. Judgment affirmed.

3. MONROE v. STATE, No. A16A1932, 340 Ga. App. 373 (2017)

Following a jury trial, defendant was convicted of driving under the influence of alcohol to the extent that he was a less safe driver, speeding, failure to maintain lane, and driving while possessing an open container of an alcoholic beverage. Defendant appealed, *inter alia*, for the following three reasons. First, defendant argued that the trial court abused its discretion by admitting other acts evidence, specifically defendant's prior DUI conviction, pursuant to O.C.G.A. § 24-4-404(b). The Court of Appeals held the trial court

did not abuse its discretion in admitting defendant's prior DUI conviction to show intent because the same state of mind was required for committing the prior DUI and the charged crime of driving under the influence of alcohol to the extent that defendant was a less safe driver, which was the general intent to drive while under the influence of alcohol. Second, defendant argued that the trial court erred by admitting the State's demonstrative evidence portraying video clips of three types of horizontal gaze nystagmus. The Court of Appeals held the trial court did not err because the officer's testimony made clear that the video clips were not of defendant, but that in the substantial particulars, the conditions of the video clips and the officer's observations of defendant were similar, as both showed the same kind of nystagmus. Third, defendant argued the trial court erred in permitting the sergeant and the arresting officer to testify that they observed an open container that was full of ice cubes and a dark liquid with the distinct odor of alcohol in defendant's car. Defendant argued the testimony was inadmissible because the State failed to preserve the actual open container. The Court of Appeals held the trial court did not err in permitting such evidence because defendant did not show that the police acted in bad faith in failing to preserve it. The Court of Appeals affirmed defendant's conviction.

4. STATE v. WALSH, No. A16A1618, 339 Ga. App. 894 (2016)

The State charged defendant with DUI (less safe) and other traffic violations. Following a hearing on defendant's motion to suppress, the trial court excluded the results of a horizontal gaze nystagmus ("HGN") test conducted on defendant because the officer did not have defendant remove his eyeglasses while conducting the HGN test. On appeal, the State argued that irregularity in the administration of the HGN test went to the weight of the test results and not its admissibility. The Court of Appeals agreed, stating that the officer substantially complied with the applicable law enforcement guidelines with respect to administering the HGN test and testified that the glasses did not impair the officer's ability to read defendant's responses to the test and would not have had an effect on the interpretation of the test. The Court of Appeals reversed.

H. Best Evidence Rule

1. MACKEY v. STATE, No. A17A1028, 2017 Ga. App. LEXIS 413 (2017)

Defendant was convicted of pimping a person under the age of 18, contributing to the delinquency of a minor and trafficking a person for sexual servitude. Defendant, on appeal, contended that admitting a copy of the victim's birth certificate and social security card violated the Best Evidence Rule in O.C.G.A § 24-10-1003, which provides, "A duplicate shall be admissible to the same extent as an original unless: (1) A genuine question is raised as to the authenticity of the original. Duplicate may be admitted into evidence unless opposing counsel meets the burden of showing that there is a genuine issue as to the authenticity." Georgia's new Evidence Code permits a court to take notice of "plain errors" affecting substantial rights although such errors were not brought to the attention of the trial court. In this case, opposing counsel never raised the issue that the copies entered into evidence were not accurate duplicates of the documents found in the minor's purse. Moreover, the minor's identity was further verified by an employee at the

youth residence from which the minor lived. Accordingly, any error in admitting copies of the documents found in the minors purse was harmless. Judgment affirmed.

2. HAFEEZ v. STATE, No. A16A1174, 339 Ga. App. 467 (2016)

Following a jury trial, defendant was convicted of aggravated assault and armed robbery. Defendant appealed, *inter alia*, on the following two grounds. First, defendant contended that the trial court abused its discretion in admitting still photographs printed from a surveillance video recording. The Court of Appeals held that because the State admitted the surveillance video tape itself, the admission of photographs extracted from that tape presented no best evidence concerns. Second, defendant contended that the trial court abused its discretion in admitting hearsay testimony of a cashier that stated a customer told the cashier someone was lurking behind the store. The Court of Appeals held such evidence was not inadmissible hearsay because the State offered the testimony, not to prove that someone was lurking behind the store, but to explain why the cashier called the police. The Court of Appeals affirmed defendant's conviction.

I. Demonstrative Evidence

1. MONROE v. STATE, No. A16A1932, 340 Ga. App. 373 (2017)

Following a jury trial, defendant was convicted of driving under the influence of alcohol to the extent that he was a less safe driver, speeding, failure to maintain lane, and driving while possessing an open container of an alcoholic beverage. Defendant appealed, *inter alia*, for the following three reasons. First, defendant argued that the trial court abused its discretion by admitting other acts evidence, specifically defendant's prior DUI conviction, pursuant to O.C.G.A. § 24-4-404(b). The Court of Appeals held the trial court did not abuse its discretion in admitting defendant's prior DUI conviction to show intent because the same state of mind was required for committing the prior DUI and the charged crime of driving under the influence of alcohol to the extent that defendant was a less safe driver, which was the general intent to drive while under the influence of alcohol. Second, defendant argued that the trial court erred by admitting the State's demonstrative evidence portraying video clips of three types of horizontal gaze nystagmus. The Court of Appeals held the trial court did not err because the officer's testimony made clear that the video clips were not of defendant, but that in the substantial particulars, the conditions of the video clips and the officer's observations of defendant were similar, as both showed the same kind of nystagmus. Third, defendant argued the trial court erred in permitting the sergeant and the arresting officer to testify that they observed an open container that was full of ice cubes and a dark liquid with the distinct odor of alcohol in defendant's car. Defendant argued the testimony was inadmissible because the State failed to preserve the actual open container. The Court of Appeals held the trial court did not err in permitting such evidence because defendant did not show that the police acted in bad faith in failing to preserve it. The Court of Appeals affirmed defendant's conviction.

J. Chain of Custody

1. ROSCOE v. STATE, No. S17A0718, 2017 Ga. LEXIS 780 (2017)

After a jury trial, defendant was found guilty of malice murder and other offenses. Defendant appealed, contending that the trial court erred in granting the State's motion in limine to exclude hearsay evidence that would show that someone other than defendant had murdered the victim. Generally, hearsay "declarations to third persons against the declarant's penal interest, to the effect that the declarant, and not the accused, was the actual perpetrator of the offense, are not admissible in favor of the accused at his trial." *Timberloake v. State*, 246 Ga. 488, 492 (1980). "However this kind of evidence may be admitted in the guilt-innocence phase under exceptional circumstances that show a considerable guaranty of the hearsay declarant's trustworthiness." *Brown v. State*, 288 Ga. 902, 906 (2011). The Supreme court did not find there was any abuse of discretion in this case considering the fact that the hearsay testimony was found to be untrue by the State after interviewing the declarant. Furthermore, defendant alleged that the State had not established a sufficient chain of custody for the bullets removed from the victim's body. However, the bullets were verified by the State's ballistic expert, therefore the Supreme Court failed to find abuse of discretion by the trial court. Judgment was affirmed.

III. HEARSAY

A. In General

1. DOWDA v. STATE, No. A17A0531, 341 Ga. App. 295 (2017)

Following a jury trial, defendant was convicted of criminal trespass. Defendant appealed, arguing that the trial court erred in admitting hearsay. Specifically, the officer's testimony regarding the demeanor of defendant's parents. The court disagreed, finding that the admission of any hearsay was harmless. Indeed, it was highly probable that the testimony did not contribute to the jury's verdict in light of the eyewitness testimony and other cumulative evidence presented against the defendant. Defendant also argued that the trial court erred in failing to allow defense counsel to read and respond to a note the jury sent out during its deliberations that showed that the jury was confused and had not reached a unanimous verdict. The court agreed, finding that the trial court's failure to inform counsel of the contents of a jury note and to seek input for the court's response violated defendant's right to counsel. The Court of Appeals reversed the conviction.

2. REID v. STATE, No. A17A0481, 341 Ga. App. 604 (2017)

Following a jury trial, defendant was convicted of rape, aggravated sodomy, kidnapping, false imprisonment, aggravated assault, and possession of a firearm during the commission of a felony. Defendant appealed, arguing that the trial court improperly admitted bad character evidence. Specifically, that an officer's reference to him as a "violent felon" was false, irrelevant, and prejudicial. The court disagreed. Evidence presented prior to the officer's testimony showed that defendant had in fact committed several violent crimes against the victim, and, the same officer testified that his primary

role is apprehending people that are wanted for violent crimes. Further, there was no evidence that defendant had been previously convicted of other violent crimes. As a result, the jury could have reasonably inferred that “violent felons” referred to defendant’s instant crimes, rendering the reference to “violent felons” not false, irrelevant or unfairly prejudicial. Further, defendant argued that a witness for the State improperly commented on his right to remain silent. However, the arresting officer’s statement indicating that defendant did not speak to him was not prejudicial as it was made during a narrative describing the circumstances of the arrest, the comment did not point at the substance of defendant’s defense, and the comment did not speak to defendant’s guilt or innocence. Additionally, defendant argued that the trial court violated former O.C.G.A. § 17-8-57 when it invited a hearsay objection to defendant’s testimony about what the witnesses said to the defendant and to each other. The court found no error, however, as the trial judge did not express an opinion on defendant’s guilt, or favor the State. Finally, the defendant argued that the trial court erred by failing to include a coercion charge in the jury instruction, but the court disagreed as there was no evidence to show that a risk of immediate violence forced the defendant to commit the offenses. The Court of Appeals affirmed defendant’s conviction.

3. CISNEROS v. STATE, No. S16G0443, 299 Ga. 841 (2016)

After a jury trial in 2004, defendant was indicted, along with eight others, for crimes related to a series of home invasions. In 2008, following a separate jury trial at which two of his co-defendants testified, defendant was found guilty of six counts of armed robbery. The Court of Appeals held that all five home invasions had a “markedly similar modus operandi” and held that this modus operandi was sufficient by itself to corroborate the other defendants’ testimony. Defendant contended the Court of Appeals erred by holding that the modus operandi evidence was by itself sufficient to corroborate co-defendants testimony regarding the other home invasions. Former O.C.G.A. § 24-4-8, applicable at the time of defendants trial, provided that a defendant may not be convicted of a felony based on the uncorroborated testimony of an accomplice. In this case however, the robberies were very similar in nature, allowing for both corroborating facts and the circumstances to have more than sufficient evidence to cast grave suspicion of guilt. Accordingly, there was sufficient evidence to support the jury’s verdicts related to the 2008 robberies and the Court of Appeals did not err by affirming these convictions.

4. WALKER v. STATE, No. S17A0385, 301 Ga. 482 (2017)

Defendant was convicted of malice murder and other crimes. He appealed contending that the trial court committed plain error in failing to charge the jury on voluntary manslaughter and defense of habitation and that the trial court abused its discretion in excluding testimony at trial. The facts of this case show that during the charge conference after the close of the evidence, defendant explicitly withdrew his request for a voluntary manslaughter instruction. Thus defendant affirmatively waived any right to a voluntary manslaughter charge. Furthermore, defendant argued that the trial court abused its discretion in excluding testimony by his father on the ground of hearsay. The defense counsel relied on O.C.G.A § 24-8-801(d)(2)(A) to admit the hearsay statement. This provision recognizes a blanket exclusion from the hearsay rule only for a statement by a party-opponent, not for a party’s out-of-court statements offered by the party himself.

The Supreme Court found that defendant lacked proof that the out-of-court statements would have been admissible at trial since they were not considered party-opponent statements. Therefore no error was found in the trial court's decision. Judgment affirmed.

5. JOHNSON v. STATE, No. S17A0313, 301 Ga. 277 (2017)

Defendant was convicted of murder. The trial court denied his amended motion for new trial, and he appealed, asserting error in the admission of hearsay testimony. The Supreme Court noted here that whether admission of the testimony was error, it was harmless error given the substantial evidence of the defendant's guilt. Judgment affirmed.

6. HAFEEZ v. STATE, No. A16A1174, 339 Ga. App. 467 (2016)

Following a jury trial, defendant was convicted of aggravated assault and armed robbery. Defendant appealed, *inter alia*, on the following two grounds. First, defendant contended that the trial court abused its discretion in admitting still photographs printed from a surveillance video recording. The Court of Appeals held that because the State admitted the surveillance video tape itself, the admission of photographs extracted from that tape presented no best evidence concerns. Second, defendant contended that the trial court abused its discretion in admitting hearsay testimony of a cashier that stated a customer told the cashier someone was lurking behind the store. The Court of Appeals held such evidence was not inadmissible hearsay because the State offered the testimony, not to prove that someone was lurking behind the store, but to explain why the cashier called the police. The Court of Appeals affirmed defendant's conviction.

7. JACKSON v. STATE, No. S17A1128, 2017 Ga. LEXIS 702 (2017)

Defendant was convicted by jury trial of murder and two related firearms charges. He appealed asserting that the trial court erred when it admitted a partial recording of a phone call that he made and when it allowed the lead investigator to testify about what another law enforcement officer told him. Regarding the phone call, defendant claimed that the State's evidence violated the Rule of Completeness because it was only a partial recording of the phone conversation defendant had with his mom. Defendant was seeking to admit the part of the phone call where he told his mother that he would not plead guilty because he had not done anything wrong. The State only played the part of the conversation where defendant told his mother to tell his uncle (another witness in the case) to stay "out of sight, out of mind" while police were looking for him. Under O.C.G.A § 24-1-106 if a writing or recorded statement is admitted into evidence partially, an adverse party may require the introduction of the whole writing or recording which, in fairness, should be considered contemporaneously with the writing or recording. O.C.G.A § 24-1-106. In connection, "when admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence." O.C.G.A § 24-8-822. The Rule of Completeness prevents parties from misleading the jury, only where statements are relevant to the part of the recording or writing admitted. In this case, the Supreme Court found that the part of the conversation defendant wished to have admitted was not relevant to the part of the recording that was admitted. It was not necessary "in fairness...to be considered." Therefore the Supreme Court found no error. Furthermore,

regarding defendant's claim of inadmissible hearsay by the lead investigator, the trial court found the testimony to be admissible to explain why the lead investigator did not follow up with the eyewitness. In fact, this was an issue raised by defendant during cross-examination of the investigator. Since the conduct of the lead investigator was material to the case, the Supreme Court found that the trial court did not err in its decision. Judgment affirmed.

8. WESTERN SKY FINANCIAL, LLC v. STATE, No. S16A1011, No. S16X1012, 300 Ga. 340 (2016)

Defendants were payday lending companies who operated outside Georgia and dealt with Georgia borrowers over the telephone or over the Internet. The State filed a complaint against defendants, alleging defendants collected illegal usurious interest from Georgia borrowers in violation of the Payday Lending Act. The State sought civil penalties and injunctive and other equitable relief. The trial court entered an interlocutory injunction prohibiting defendants from making new loans or assigning existing loans to any third party. The State moved to modify the original injunction after the State found that the amount defendants had collected approximately \$15 million from Georgia borrowers during the pendency of the litigation. The trial court granted the modified injunction, ordering defendants to deposit the \$15 million sum into the court's registry and to make quarterly deposits of any additional amounts that may be collected from Georgia borrowers in the future. Defendants appealed, arguing that the State failed to present competent evidence to support its request for injunctive relief. Defendants claimed that the only evidence presented was unauthenticated hearsay evidence, such as evidence that defendant had laid off nearly all its employees in 2013 and suspended its operations, and evidence that a multi-million-dollar judgment had been entered against defendant in West Virginia in a case in which the Supreme Court had recently denied certiorari. This hearsay evidence went primarily to whether there is a substantial threat the State will suffer irreparable injury if the injunction is not granted—because of the likelihood of defendants' insolvency. The Supreme Court has declared that whether there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted is the most important factor in considering an interlocutory injunction. Therefore, despite the hearsay nature of much of the State's evidence relating to defendants' potential insolvency, the Supreme Court found that the State presented sufficient evidence to demonstrate it was entitled to injunctive relief, and affirmed the trial court's grant of the modified injunction. In addition to its holding, the Supreme Court did note that (1) at least seven federal circuit courts, applying the Federal Rules of Civil Procedure and the Federal Rules of Evidence, permit a trial court to rely on hearsay evidence for the purpose of ruling on a motion for preliminary injunctive relief, that (2) under Georgia's old Evidence Code, the rules of evidence were not as rigidly enforced in an interlocutory hearing, and that (3) pursuant to Georgia's new Evidence Code, only specific proceedings are exempt from the rules of evidence, and interlocutory injunction proceedings are not expressly exempted.

B. Prior Consistent Statements

1. DIMAURO v. STATE, No. A17A0180, 341 Ga. App. 710 (2017)

Following a jury trial, defendant, a former police officer, was convicted of aggravated assault, aggravated battery, and two counts of violating his oath of office. Defendant appealed the convictions, arguing that the trial court erred in admitting evidence of a similar transaction under O.C.G.A. § 24-4-404. Specifically, an assault against another detainee. The court disagreed as such evidence was relevant to show that defendant committed a similar act against the victim with a similar intent. Indeed, the probative value of the assault video was not substantially outweighed by any undue prejudice. Defendant also argued that the trial court erred in admitting evidence that defendant and other police officers harassed a witness. The court disagreed, finding this evidence relevant as a defendant's attempt to intimidate a witness can serve as circumstantial evidence of guilt. Further, defendant argued that the trial court improperly admitted opinion evidence from various police officials. The court disagreed. Officers' testimony that defendant had been administered an oath of office and that defendant's use of force violated police policy was relevant to whether defendant violated the oath. Defendant also argued that the trial court erred in admitting a witness' prior consistent statements. The trial court did not abuse its discretion as defendant's cross-examination of the witness strongly implied that the witness's direct testimony was a recent fabrication and the prior consistent statement was made to an investigator before the allegedly fabricated trial testimony. Additionally, defendant argued the trial court erred by excluding impeachment evidence regarding the victim. Specifically, one of the victim's prior burglary convictions. The court found no reversible error as the conviction was more than ten years old, and, the probative value of the conviction did not outweigh its prejudicial impact. Finally, defendant argued the trial court erred by failing to dismiss the indictment on the ground that he was prohibited from presenting evidence to the grand jury. The court disagreed. While former O.C.G.A. § 45-11-4(g) entitles a police officer charged with a crime occurring in the course of his duties to notice of grand jury proceedings and an opportunity to make a sworn statement, the phrase "sworn statement" does not contemplate presenting documentary evidence. The Court of Appeals affirmed defendant's conviction.

2. BOLLING v. STATE, No. S16A1674, 300 Ga. 694 (2017)

Defendant was tried for murder. His first trial resulted in a hung jury. He was convicted in the second trial. Defendant appealed, arguing that the trial court erred in (1) allowing the State to introduce into evidence testimony of the co-defendant in the first trial, and (2) allowing the State to play the co-defendant's videotaped police interview to the jury. The Supreme Court rejected the first argument because O.C.G.A. § 24-8-804(b)(1) provides an exception to the hearsay rule when a witness is unavailable. The co-defendant was unavailable at the time of the second trial, and the State made a reasonable effort to locate him. The Supreme Court rejected the second argument because O.C.G.A. § 24-6-613(c) permits the use of a prior consistent statement "to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive." The State moved to publish the co-defendant's videotaped statement made to the police before any plea negotiations to rebut defendant's implication that the co-defendant had an

improper motive for testifying against him to receive the benefit of the plea deal. Judgment affirmed.

C. Prior Inconsistent Statements

1. BREWNER v. STATE, No. S17A1103, 2017 Ga. LEXIS 611 (2017)

After a murder conviction, defendant appealed contending that the court erred in admitting certain evidence, among other things. Defendant asserted that the trial court erred in admitting evidence of his prior drug dealings and involvement in a home invasion. Defendant argued that both pieces of evidence failed for lack of relevancy. The Supreme Court, in this case, adopted the three-part test used in the Eleventh Circuit under the analogous Rules 403 and 404(b) of the Federal Rules of Evidence. The test assesses whether (1) the evidence is relevant to an issue in the case other than the defendant's character; (2) the probative value of the evidence is not substantially outweighed by the likelihood of its undue prejudice, and (3) there is sufficient proof for a jury to find by a preponderance of the evidence that the defendant in fact committed the other act. *Hood v. State*, 299 Ga. 95, 101 (2016). Using this test, the Supreme Court found that the evidence of the home invasion was relevant to prove defendant's intent to participate in the scheme to invade the victim's home. The probative value of the evidence was not substantially outweighed by the likelihood of undue prejudice. Lastly, there was little dispute that defendant did mastermind the crimes, because one of the witnesses' testimony on this subject was unchallenged. Regarding the evidence of the prior drug dealings, this evidence, too was found to be relevant to establish context for his relationship with the before mentioned witness and to others involved in the crimes. Since the evidence was integral to the narrative of the crimes the probative value, again, substantially outweighed the risk of undue prejudice. Finally, since this evidence was undisputed, the jury was authorized to find by a preponderance of the evidence that defendant engaged in such drug dealings. Defendant also contended that the trial court erred in admitting the video recording of a witness' interview with a detective as a prior inconsistent statement. Under O.C.G.A § 24-6-613(b) extrinsic evidence of a witness' prior inconsistent statement may be admitted so long as "the witness is first afforded an opportunity to explain or deny the prior inconsistent statement and the opposite party is afforded an opportunity to interrogate the witness on the prior inconsistent statement." The trial court admitted the evidence, over objection by defense, after the witness on the recording testified at length to explain the statements made on the recording. When a witness fails to remember making a statement the court has held that foundation for offering extrinsic evidence to prove that the statement was made may be provided. In this case the foundation was laid for the prior statement to be used to confront the witness after the witness' testimony was inconsistent with that statement. Therefore, the Supreme Court found no error in the trial court's admission of the recorded statements at trial. Judgment affirmed.

D. Statements Against Interest

1. ROSCOE v. STATE, No. S17A0718, 2017 Ga. LEXIS 780 (2017)

After a jury trial, defendant was found guilty of malice murder and other offenses. Defendant appealed, contending that the trial court erred in granting the State's motion in limine to exclude hearsay evidence that would show that someone other than defendant had murdered the victim. Generally, hearsay "declarations to third persons against the declarant's penal interest, to the effect that the declarant, and not the accused, was the actual perpetrator of the offense, are not admissible in favor of the accused at his trial." *Timberloake v. State*, 246 Ga. 488, 492 (1980). "However this kind of evidence may be admitted in the guilt-innocence phase under exceptional circumstances that show a considerable guaranty of the hearsay declarant's trustworthiness." *Brown v. State*, 288 Ga. 902, 906 (2011). The Supreme court did not find there was any abuse of discretion in this case considering the fact that the hearsay testimony was found to be untrue by the State after interviewing the declarant. Furthermore, defendant alleged that the State had not established a sufficient chain of custody for the bullets removed from the victim's body. However, the bullets were verified by the State's ballistic expert, therefore the Supreme Court failed to find abuse of discretion by the trial court. Judgment was affirmed.

2. VUGUEROS v. ROBLES, No. S16G0619, 300 Ga. 58 (2016)

The Supreme Court granted certiorari to determine whether the Court of Appeals was correct in holding that deposition testimony of an organizational representative taken under O.C.G.A. § 9-11-30(b)(6) may be admitted into evidence at trial under O.C.G.A. § 9-11-32(a)(2). Plaintiff's wife was treated by defendant doctor. Defendant doctor provided certain treatment, but did not order a CT scan or procure the radiology report from another hospital. Plaintiff's wife died. Plaintiff sued defendant doctor and the institution where he worked. Plaintiff served defendant institution with a notice of deposition to depose a representative of the practice under O.C.G.A. § 9-11-30(b)(6). In the deposition, the deponent, founder and co-owner of defendant institution, answered questions about the standard of care to order a CT scan. Defendants moved to exclude the testimony because the requirements of the admission of expert testimony in civil cases, O.C.G.A. § 27-7-702, had not been met in part because the founder had not been provided all the data necessary to form an opinion. The trial court agreed and excluded the testimony, and the jury returned a defense verdict. On appeal, the Court of Appeals reversed on the ground that the evidence was not offered as expert testimony under O.C.G.A. § 27-7-702(b), but as a party's admission against interest under O.C.G.A. § 9-11-32(a)(2). The Supreme Court disagreed. The Supreme Court noted that although O.C.G.A. § 9-11-32(a)(2) states that the deposition of an organizational representative "may be used by an adverse party for any purpose," it does not create a rule of evidence that allows any deposition taken by an organizational representative to be admitted at trial in its entirety as an admission against interest. It only provides for the admission of the deposition when that admission is permitted under relevant rules of evidence, such as in circumstances in which deposition may be used for the purpose of impeachment under O.C.G.A. § 9-11-32(a)(1). Therefore, the Supreme Court reversed the Court of Appeals' judgment and remanded case with direction.

E. Admissions by Party Opponent

1. LYNCHAR, INC. v. COLONIAL OIL INDUS., INC., No. A17A0391, 341 Ga. App. 489 (2017)

Plaintiff filed suit against defendants, alleging breach of the stockholders' guaranties. Defendants appealed an order granting plaintiff partial summary judgment, arguing that the trial court erred in considering their withdrawn admissions concerning the legal effect of the guaranties. The court agreed. An admission in judicio applies only to the admission of fact and does not apply where the admission is merely the opinion or conclusion of the pleader as to law or fact. Thus, where the admission is an opinion on the part of the party making it as to the legal effect of a paper, the withdrawn admission is not a fact that a party-opponent can take advantage of. The Court of Appeals reversed the judgment.

2. LAWTON v. STATE, No. A16A2089, 340 Ga. App. 903 (2017)

Following a jury trial, defendant was convicted of one count of rape, four counts of aggravated sodomy, four counts of aggravated child molestation, and two counts of child molestation. Defendant appealed, arguing that the State improperly commented on his pre-arrest failure to come forward. The court disagreed and found no reversible error. Defendant spoke with the officer and agreed to meet with her; however, despite this, he failed to appear at the meeting. The officer's testimony was thus limited to noting the inconsistencies between defendant's statements and his behavior. The Court of Appeals affirmed the conviction.

3. SUMMERLIN v. STATE, No. A16A0674, 339 Ga. App. 148 (2016)

A jury found defendant guilty of a number of charges after she attempted to hit two police officers with her car. Defendant appealed from her convictions and the denial of her motion for a new trial, arguing that the trial court improperly admitted hearsay testimony in the form of three telephone conversations between defendant and other individuals while she was in custody. The first conversation took place five days before the charged offenses, when defendant was in custody on other charges. The conversation itself could not be played for the jury, but the investigating officer, who listened to the recording, testified that she stated, "I know the bitch ass that just locked me up is about to get it, tell you what." The second and third conversations took place after defendant's arrest for the crimes charged in this case and were played aloud for the jury. In those conversations, defendant complained of previous harassment by law enforcement officers and stated that one of the deputies she hit with her car "tried to shoot at me so I ran the bitch over." The Court of Appeals affirmed the trial court's admission of all three of the phone conversations, finding that the defendant's statements were not hearsay because they were admissions under O.C.G.A. § 24-8-801(d)(2)(A) and were relevant to her motive and intent at the time of the incident and her propensity to use a motor vehicle to strike another person. The fact that the first call could not be played aloud and was instead relayed by the investigating officer did not negate the admissibility of the conversation, because the defendant had the opportunity to cross-examine the investigating officer as to his credibility.

4. HARVEY v. STATE, No. S16A1667, 300 Ga. 598 (2017)

Defendant and her boyfriend were charged with malice murder and other crimes in connection with the death of defendant's mother. Defendant was convicted of malice murder, and her boyfriend was convicted of voluntary manslaughter. Defendant's cell mate testified that, while awaiting trial, defendant told her "the murder was an accident and it wasn't supposed to happen like that." The cell mate also testified that defendant told her defendant's boyfriend warned defendant not to say anything about the incident. Defendant appealed, arguing that the trial court erred in admitting defendant's admission which referenced a statement made by her boyfriend because hearsay statements made by co-conspirator are inadmissible if they are made after the end of conspiracy. Defendant further argued that when her boyfriend made the statement to her, he had already confessed to police, thereby bringing the conspiracy to an end and rendering the statement inadmissible. The Supreme Court found the argument unsound because defendant's statement to her cell mate was defendant's own, and therefore it was admissible as a statement of a party opponent. Although defendant's admission referenced a statement made by her boyfriend, it was not offered to prove the truth of the boyfriend's statement. The Supreme Court affirmed the murder conviction.

F. Admissions by Co-Conspirator

1. DUBLIN v. STATE, No. S17A0822, 2017 Ga. LEXIS 765 (2017)

Defendant appealed his conviction for felony murder claiming ineffective assistance of counsel. This claim was raised based on defendant's argument that his counsel failed to object to hearsay statements made during trial. Defendant argued that the testimony of two of the State's witnesses did not fall under the hearsay exception for statements made by co-conspirators because the State failed to establish a conspiracy between defendant and co-defendants independent of the alleged co-conspirator declarations. The two witnesses for the State were identified as girlfriends of defendant and one of the co-conspirators. The trial court found the statements of the two witnesses to be admissible because the statements fell within the co-conspirator exception to the hearsay rule and the witnesses could identify the people they overheard speaking. The Supreme Court affirmed this ruling citing O.C.G.A § 24-8-801(d)(2)(E), "a statement by a defendant's co-conspirator made 'during the course and in furtherance of the conspiracy, including a statement made during the concealment phase of a conspiracy,' is not excluded by the hearsay rule when offered against the defendant." Conspiracy need not be charged in order for the exception to apply. O.C.G.A § 24-8-801(d)(2)(E). For evidence to be admissible under this rule, the court must find by a preponderance of the evidence that a conspiracy took place. A court may consider either the co-conspirator's statements or independent external evidence. The admission need only be proven at trial. The Supreme Court found that the State established its burden of proof that a conspiracy took place, therefore defendant's argument failed. Furthermore, the Supreme Court clarified that the State need not show any particular reliability of the declarant's statements for Confrontation Clause purposes. Judgment affirmed.

2. WILSON v. STATE, No. S17A0708, 2017 Ga. LEXIS 616 (2017)

Defendant appealed his conviction for murder, possession of marijuana with the intent to distribute, and related crimes, contending that hearsay statements of his co-conspirators were improperly admitted against him because the State failed to make a prima facie showing of conspiracy. Per the former O.C.G.A. § 24-3-5, once the fact of conspiracy is proven, declarations by any one of the conspirators during the pendency of the crime shall be admissible against all.” The State then must make a prima facie showing of the existence of the conspiracy without regard to the declarations of the co-conspirators, in order to admit his out-of-court declaration. Following the new Georgia Evidence Code, the Supreme Court found that a prima facie showing of conspiracy was made in this case. The facts showed that the co-conspirator/witness was present at trial where he testified in full regarding the night of the murder, covering the activities of the group. The statements were found to be properly admitted. Judgment affirmed.

3. HARVEY v. STATE, No. S16A1667, 300 Ga. 598 (2017)

Defendant and her boyfriend were charged with malice murder and other crimes in connection with the death of defendant’s mother. Defendant was convicted of malice murder, and her boyfriend was convicted of voluntary manslaughter. Defendant’s cell mate testified that, while awaiting trial, defendant told her “the murder was an accident and it wasn’t supposed to happen like that.” The cell mate also testified that defendant told her defendant’s boyfriend warned defendant not to say anything about the incident. Defendant appealed, arguing that the trial court erred in admitting defendant’s admission which referenced a statement made by her boyfriend because hearsay statements made by co-conspirator are inadmissible if they are made after the end of conspiracy. Defendant further argued that when her boyfriend made the statement to her, he had already confessed to police, thereby bringing the conspiracy to an end and rendering the statement inadmissible. The Supreme Court found the argument unsound because defendant’s statement to her cell mate was defendant’s own, and therefore it was admissible as a statement of a party opponent. Although defendant’s admission referenced a statement made by her boyfriend, it was not offered to prove the truth of the boyfriend’s statement. The Supreme Court affirmed the murder conviction.

G. Necessity Exception

1. HORNBUCKLE v. STATE, No. S16A1439, 300 Ga. 750 (2017)

Defendant was convicted of murder. Defendant appealed, arguing that the trial counsel was ineffective in failing to object to the testimony of the victim’s supervisor regarding phone call threats the victim received from defendant prior to the victim’s death. Former O.C.G.A. § 24-3-1(b) allows a statement to be admissible under the necessity exception to the rule against hearsay when its proponent “show[s] a necessity for the evidence, a circumstantial guaranty of the statement's trustworthiness, and that the hearsay statements are more probative and revealing than other available evidence.” The Supreme Court held that the supervisor’s testimony was admissible under the necessity exception because the victim was clearly unavailable, the supervisor testified that the supervisor and the victim had “opened up” to one another and had “extensive”

conversations about personal matters, and that the supervisor had no apparent motive to be untruthful in the supervisor's report of the victim's spontaneous statement contemporaneous with the phone call that precipitated it. Judgement affirmed.

H. Public Records Exception

1. HUNGRY WOLF/SUGAR & SPICE, INC. v. LANGDEAU, No. A16A1442, 338 Ga. App. 750 (2016)

The plaintiff filed suit against defendant, alleging that defendant was vicariously liable for the tortious actions of its alleged employee. The trial court denied defendant's motion for summary judgment, concluding that a police report submitted by the plaintiff created a question of fact as to whether the tortfeasor was employed by defendant. The Court of Appeals granted defendant's application for interlocutory review. On appeal, defendant argued that the trial court erred in considering the police report because it was not certified or authenticated. O.C.G.A. § 24-9-901(a) provides that the authentication or identification of a document is a condition precedent to admissibility of evidence. The trial court determined that the police report was admissible because it fell within the public records hearsay exception under O.C.G.A. § 24-8-803(8); however, it applied an incomplete standard because it failed to address the defendant's argument that the report was not authenticated. As a result, the Court of Appeals vacated the trial court's denial of the defendant's motion for summary judgment and remanded for consideration of the authentication issue.

2. BARNETT v. ATLANTA INDEPENDENT SCHOOL SYSTEM, No. A16A1194, 339 Ga. App. 533 (2016)

A Benjamin E. Mays High School student died following an incident involving another student in his classroom. A subsequent investigation by an independent company concluded that the student's teacher was away from the classroom when he was injured. The parents of the child filed a wrongful death claim against the teacher in her individual capacity, among other defendants, alleging that leaving students unsupervised in her classroom in violation of a school policy caused the death of the plaintiffs' child. The trial court granted summary judgment in favor of the teacher, finding that decisions relating to the control and supervision of students are discretionary actions for which teachers are entitled to official immunity. On appeal, the teacher challenged the admissibility of the investigator's report. Under O.C.G.A. § 24-8-803(8)(C), factual findings resulting from an investigation made pursuant to authority granted by law are admissible in civil proceedings, unless the sources of information or other circumstances indicate a lack of trustworthiness. Because neither party challenged the reliability or trustworthiness of the statements of the witnesses on which the investigator relied, the investigator's report was deemed admissible and competent evidence. The Court of Appeals affirmed the trial court's decision to admit the investigator's report and affirmed summary judgment in favor of the teacher.

3. TRAN v. STATE, No. A16A1654, 340 Ga. App. 546 (2017)

Following a jury trial, defendant was convicted of two counts of armed robbery and one count each of aggravated sexual battery and possession of a firearm during the commission of a felony. Defendant appealed, arguing, *inter alia*, that his trial counsel was ineffective for failing to object to hearsay. At trial, a Clayton County police officer testified that he had checked Clayton County's database and found no record of defendant being a victim of a crime in Clayton County. The officer's testimony about the search of the Clayton County, Georgia, database was admissible to prove the absence of a public record or entry under O.C.G.A. § 24-8-803(10) because the officer testified that he helped to maintain the records of crimes that occurred in Clayton County and that he regularly accessed the database to get information about victims and defendants, and the information about defendant used in the search. The Court of Appeals reversed defendant's conviction on other grounds.

4. CHRYSLER GROUP, LLC v. WALDEN, No. A16A1285, 339 Ga. App. 733 (2016)

Following a jury trial, the jury awarded plaintiffs \$150 million in damages resulting from a motor vehicle collision. By remittitur, the amount was reduced to \$40 million. Defendant Chrysler ("defendant") appealed, *inter alia*, on the following four grounds. First, defendant argued that the trial court erred in excluding the testimony and statistical analyses of two experts which were relevant to show the overall safety of the challenged design to the overall safety of available alternative designs. Defendant argued that the trial court erred by excluding the evidence for lack of substantial similarity because the substantial similarity rule does not apply to this kind of evidence. The Court of Appeals disagreed, holding that the trial court also excluded the evidence because it was irrelevant in that it concerned the overall safety of various vehicles while the plaintiffs' claims related only to the safety of the fuel system design in rear impacts. Second, defendant argued that the trial court erred by permitting evidence of defendant's chief executive officer's ("CEO") compensation. The Court of Appeals affirmed the trial court's ruling, stating *inter alia*, that the CEO was not a party so the rule which generally excludes evidence of the financial circumstances of a party did not apply. Third, defendant argued that the trial court abused its discretion in admitting evidence of the National Highway Traffic Safety Administration ("NHTSA") Office of Defects Investigation's (ODI) recall request letter. The Court of Appeals held that no error occurred because, *inter alia*, the recall request letter was offered, at least in part, not for the substance of the finding of defect, but to support an inference that a meeting between defendant's CEO with the head of the NHTSA and the Secretary of the United States Department of Transportation led ODI to change the opinion regarding the defect to that expressed in the ODI résumé. Fourth, defendant argued that the trial court abused its discretion in admitting evidence of ODI's recall request letter under the public records exception to the hearsay rule. The Court of Appeals held that the trial court did not abuse its discretion because, *inter alia*, some of the findings in the recall request were not labeled as tentative, including the findings that defendant was certainly aware of the safety benefits of placing the tank in front of the rear axle. The Court of Appeals affirmed the trial court's ruling.

I. Child Hearsay Statute

1. MORRIS v. STATE, No. A17A0615, 341 Ga. App. 568 (2017)

Following a jury trial, defendant was convicted of aggravated child molestation, child molestation, and aggravated sexual battery. Defendant appealed, arguing that the trial erred in granting the State's motion in limine to prohibit cross-examination of the victim's father as to whether he suffered sexual abuse as a child. The court found that such evidence was irrelevant under O.C.G.A. § 24-4-401 as there was no logical link between the fact that the victim had a father who also endured sexual abuse and the conclusion that the victim might therefore be an unreliable witness. Defendant also argued that the trial court erred in failing to limit two witnesses' child-hearsay testimony to the specific facts to which the victim testified at trial. The trial court did not abuse its discretion as former O.C.G.A. § 24-3-16 did not require the child to corroborate the hearsay testimony. Further, defendant argued that the trial court improperly admitted evidence of a drawing made by the victim during a counseling session that the State did not produce during discovery. Given that defendant failed to show that the State acted in bad faith by not including the drawing in the discovery materials, or that defendant suffered prejudice as a result, the trial court did not abuse its discretion in admitting the drawing. The Court of Appeals affirmed defendant's conviction.

2. LATTA v. STATE, No. A17A0562, 341 Ga. App. 696 (2017)

After a jury trial, defendant was convicted of child molestation. Defendant appealed, arguing that the trial court erred in admitting other acts evidence. Testimony that defendant previously intentionally touched a student's buttocks, without consent, was admissible under O.C.G.A. § 24-4-413(a) as evidence of an "offense of sexual assault." O.C.G.A. § 24-4-413 provides that in a criminal proceeding in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense of sexual assault is admissible. An "offense of sexual assault" includes any crime that involves contact between any part of the accused's body and the genitals of another person without consent. It also includes conduct that would constitute sexual battery in violation of O.C.G.A. § 16-6-22.1. Admission of the defendant's previous conduct did not abuse discretion because defendant's touching constituted an "offense of sexual assault." On appeal, defendant also argued that the trial court erred in admitting evidence of his victim's out-of-court outcry statements to four witnesses. Testimony about these statements was admissible under Georgia's Child Hearsay Statute, O.C.G.A. § 24-8-820. Under this statute, a statement made by a child younger than 16 years of age describing sexual contact or physical abuse by another is admissible by the person to whom the statement was made, so long as notice is provided to the adverse party, the child testifies at trial, and the person to whom the statement was made is subject to cross-examination. The statute does not require a showing that these statements have an indicia of reliability, nor do the statements need to meet the admissibility requirements for prior consistent statements. The Court of Appeals affirmed the defendant's conviction.

3. McMURTRY v. STATE, No. A16A1142, 338 Ga. App. 622 (2016)

Defendant was convicted of one count of sexual battery as a lesser included offense to child molestation and two counts of child molestation. The convictions resulted from his actions toward a ten-year-old girl. Defendant appealed from the denial of his motion for new trial, arguing that the trial court erred in refusing to instruct the jury on simple battery as a lesser included offense to child molestation and in admitting the victim's prior out-of-court statements. The Court of Appeals held that the trial court did not err in failing to instruct the jury on the lesser included offense of simple battery for two reasons: (1) the defendant did not submit a written request to charge on simple battery; and (2) the evidence presented established all the elements of the offense of child molestation but did not raise the lesser offense. The Court of Appeals further held that the trial court did not err in admitting the testimony of the victim's mother and a police officer regarding the victim's prior out-of-court statements to them about his inappropriate sexual contact with her. The statements were properly admitted under O.C.G.A. § 24-8-820 because the State provided the statutorily required notice of intent, the victim was under the age of 16, the victim testified at trial about the sexual abuse, and both her mother and the police officer were available for cross-examination about the out-of-court statements.

4. ROBINSON v. STATE, No A17A1415, 2017 Ga. App. LEXIS 390 (2017)

A jury found defendant guilty of aggravated child molestation. Defendant appealed. Defendant and another person followed the minor victim into the woods and proceeded to molest the victim. Defendant argued that there was sufficient evidence that on the day in question the 13 year old victim sustained injuries to her vaginal area however, there was insufficient evidence that he (rather than the other person) was the one who vaginally penetrated the victim and caused her injuries, given the inconsistencies in the victim's forensic interview. The court stated that defendant's argument was without merit. Under the Child Hearsay Statute O.C.G.A. § 24-8-820, the jury is permitted to consider the victim's testimony as substantive evidence. Given the combined evidence, the jury was entitled to find that the defendant vaginally penetrated the victim, causing her physical injury which went to the weight and credibility that the jury is able to determine. The Court of Appeals found no basis for reversal. Judgment affirmed.

5. LASTER v. STATE, No. A16A1801, 340 Ga. App. 96 (2017)

Following a jury trial, defendant was convicted of child molestation and sexual battery against a child under the age of 16. Defendant appealed on the following two grounds. First, defendant contended that the trial court erroneously overruled his objection to the hearsay testimony of several witnesses who took the witness stand before the child victim and who relayed statements made to them by the child victim. The Court of Appeals held that the trial court did not err and that under the former Child Hearsay Statute, O.C.G.A. § 24-3-16 (2012), the order of witnesses is irrelevant to the question of the admissibility of child hearsay evidence. Second, defendant contended that the trial court erroneously instructed the jury that, as to the offense of sexual battery, a child under the age of 16 lacks the legal capacity to consent to sexual conduct. The Court of Appeals agreed with defendant's argument, citing the Supreme Court's holding that the crime of sexual battery "require[s] actual proof of the victim's lack of consent, regardless of the victim's age."

Watson v. State, 297 Ga. 718, 720 (2015). The Court of Appeals reversed defendant's conviction of sexual battery and affirmed in all other respects.

J. Confrontation Clause

1. AKINTOYE v. STATE, No. A16A1625, 340 Ga. App. 777 (2017)

Following a jury trial, defendant was convicted of two counts of theft by taking, two counts of theft by deception, two counts of exploitation of an elder person, one count of violating Georgia's RICO statute, and three counts of money laundering. Defendant appealed, arguing that the trial court erred in allowing improper hearsay testimony, violating his Sixth Amendment right to confrontation. The court disagreed, finding that the statements from a conversation between family members were not testimonial as there was no expectation that the statements would be used in a criminal trial. Further, the statements made by a victim to his grandson were properly admitted under the excited utterance exception to Georgia's hearsay rule. Evidence that showed the victim was 91 years old, made the statements at issue to his grandson immediately after learning he had been scammed, and when the victim made the statement, he was confused and distraught collectively demonstrated that the statements were made under the stress of excitement caused by a startling event. Further, testimony from a victim's grandson regarding another victim's statements were properly admitted under the residual exception to the hearsay rule because the victim died prior to trial, the statements to the grandson provided a material fact, that the victim wired money under a false pretense, the circumstances provided guarantees of trustworthiness due to the close relationship, there was no other comparable evidence that the transfer was induced by fraud, and the State gave pretrial notice to the defendant. Defendant also argued that the trial court improperly allowed a witness to testify as an expert regarding defendant's bank account records. The court disagreed, finding that the evidence was admissible as intrinsic evidence related to the charged offenses. The Court of Appeals affirmed the conviction.

2. JONES v. STATE, No. A16A1279, 339 Ga. App. 95 (2016)

Following a trial by jury, defendant was convicted of possessing a controlled substance outside of its original container, trafficking in heroin, and possessing heroin with the intent to distribute. Defendant appealed, arguing (1) that the trial court improperly admitted into evidence a recorded telephone call between defendant and a nontestifying speaker; and (2) that the trial court erred by permitting a law-enforcement officer to testify about the effects of heroin. With respect to the telephone call between the defendant and a confidential informant who did not testify at trial, the defendant argued that the statements of the informant were inadmissible hearsay and that he was deprived of his Sixth Amendment right of confrontation. The trial court held that the informant's statements were admissible not for their truth but to provide context for the defendant's responses to those statements. The Court of Appeals found that the trial court did not err in allowing the informant's statements into evidence, reasoning that the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. Likewise, the Court of Appeals affirmed the trial court's admission of a law enforcement officer's testimony about the pernicious effects of heroin and addiction. The State argued that this testimony was relevant to put heroin in context

and to demonstrate how heroin's effect on a user would provide a motive for an individual to engage in heroin distribution to make money. The Court of Appeals was satisfied with this explanation, noting that O.C.G.A. § 24-4-401 sets a low threshold for relevancy, while O.C.G.A. § 24-4-403 requires that relevant evidence be "substantially outweighed by the danger of unfair prejudice" in order to be excluded.

3. SHAW v. STATE, No. S17A0352, 301 Ga. 14 (2017)

Defendant was convicted of malice murder, attempt to commit murder, aggravated assault, and possession of a firearm. He contended that the trial court erred in excluding evidence of a witness' alleged gang affiliation and in not instructing the jury on voluntary manslaughter as a lesser included offense. Regarding the exclusion of evidence, defendant argued that the trial court violated his constitutional right to confront the witnesses against him by refusing to allow him to cross-examine witnesses about the attempted murder victim's gang affiliation. "[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fenster*, 474 U.S. 15, 20 (1985). In this case, the trial court ruled that defendant failed to show that the victim's gang affiliation was related to the shooting death of another victim or claims of witness bias. The Supreme Court found no abuse of discretion by the trial court, finding that the evidence of the victim's gang affiliation would be highly prejudicial. Regarding the jury charge, a trial court is required to grant the defendant's request for a charge on the lesser included offense of voluntary manslaughter only if there is evidence to support the charge. *Johnson v. State*, 297 Ga. 839, 842 (2015). Voluntary manslaughter is found when there is evidence that the defendant acted solely as the result of sudden passion. However, in this case, there was no evidence to support that defendant acted out of sudden passion. Therefore, the Supreme Court affirmed the trial court's decision. Judgment affirmed.

4. TANNER v. STATE, No. S17A1024, 2017 Ga. LEXIS 712 (2017)

Defendant appealed his convictions for felony murder, conspiracy to commit robbery, and attempt to purchase marijuana. He argued that the victim's statements made to his mother were inadmissible at trial and the admission of the hearsay testimony violated his rights under the Confrontation Clause because the statements were testimonial. The Supreme Court found differently on both challenges. Rule 807 applies only where there are certain exceptional guarantees of trustworthiness. Here, the evidence showed that the victim was in critical condition, but was lucid and oriented at the time of his statements to his mother. The Supreme Court found that guarantees of trustworthiness were established in this case because the victim had no apparent reason to lie to his mother about the statements. Although the victim was in critical condition and had recently woken from a coma, it was shown that he was lucid and oriented at the time of his statements. The Supreme Court also found that the trial court did not abuse its discretion because the victim did not have any apparent bias or potential benefit in making the identification to his mother. Defendant argued that the victim's mother's ongoing cooperation with the police in the investigation made her essentially an agent of the police, and, therefore, the statements were testimonial in nature. "A statement is considered testimonial if its 'primary purpose ... was to establish evidence that could be used in a future prosecution.'" *Favors v. State*, 296 Ga. 842, 845 (2015). In this case, the

statements the victim made were not made in order to assist in a future prosecution. Judgment affirmed.

5. DUBLIN v. STATE, No. S17A0822, 2017 Ga. LEXIS 765 (2017)

Defendant appealed his conviction for felony murder claiming ineffective assistance of counsel. This claim was raised based on defendant's argument that his counsel failed to object to hearsay statements made during trial. Defendant argued that the testimony of two of the State's witnesses did not fall under the hearsay exception for statements made by co-conspirators because the State failed to establish a conspiracy between defendant and co-defendants independent of the alleged co-conspirator declarations. The two witnesses for the State were identified as girlfriends of defendant and one of the co-conspirators. The trial court found the statements of the two witnesses to be admissible because the statements fell within the co-conspirator exception to the hearsay rule and the witnesses could identify the people they overheard speaking. The Supreme Court affirmed this ruling citing O.C.G.A § 24-8-801(d)(2)(E), "a statement by a defendant's co-conspirator made 'during the course and in furtherance of the conspiracy, including a statement made during the concealment phase of a conspiracy,' is not excluded by the hearsay rule when offered against the defendant." Conspiracy need not be charged in order for the exception to apply. O.C.G.A § 24-8-801(d)(2)(E). For evidence to be admissible under this rule, the court must find by a preponderance of the evidence that a conspiracy took place. A court may consider either the co-conspirator's statements or independent external evidence. The admission need only be proven at trial. The Supreme Court found that the State established its burden of proof that a conspiracy took place, therefore defendant's argument failed. Furthermore, the Supreme Court clarified that the State need not show any particular reliability of the declarant's statements for Confrontation Clause purposes. Judgment affirmed.

6. ALLEN v. STATE, No. S16A1528, 300 Ga. 500 (2017)

Defendant was convicted of malice murder and other crimes arising from the shooting deaths of two victims. Defendant appealed, arguing that the admission of one of the State's exhibits violated the Confrontation Clause. The exhibit was a signed, handwritten statement that the co-defendant's uncle, who testified at the trial, gave to the police before trial. In the written statement, the uncle repeated another co-defendant's oral statement to him that "they would have nothing on them saying how [the other defendant] set up the robbery" if defendant "would have just kept his mouth close[d]." The Supreme Court noted that the co-defendant's statement to the uncle was subject to a Confrontation Clause challenge "only if the statement was testimonial." A statement is testimonial if its primary purpose was to establish evidence for use in a future prosecution. The Court further stated that the co-defendant's statement which was made to the uncle shortly after the crimes and before any arrests, rather than to police officers investigating a crime—clearly was not intended for use in a future prosecution and could not be considered testimonial. Accordingly, the Court held that admission of that statement did not violate the Confrontation Clause. Judgment affirmed.

K. Residual Exception

1. AKINTOYE v. STATE, No. A16A1625, 340 Ga. App. 777 (2017)

Following a jury trial, defendant was convicted of two counts of theft by taking, two counts of theft by deception, two counts of exploitation of an elder person, one count of violating Georgia's RICO statute, and three counts of money laundering. Defendant appealed, arguing that the trial court erred in allowing improper hearsay testimony, violating his Sixth Amendment right to confrontation. The court disagreed, finding that the statements from a conversation between family members were not testimonial as there was no expectation that the statements would be used in a criminal trial. Further, the statements made by a victim to his grandson were properly admitted under the excited utterance exception to Georgia's hearsay rule. Evidence that showed the victim was 91 years old, made the statements at issue to his grandson immediately after learning he had been scammed, and when the victim made the statement, he was confused and distraught collectively demonstrated that the statements were made under the stress of excitement caused by a startling event. Further, testimony from a victim's grandson regarding another victim's statements were properly admitted under the residual exception to the hearsay rule because the victim died prior to trial, the statements to the grandson provided a material fact, that the victim wired money under a false pretense, the circumstances provided guarantees of trustworthiness due to the close relationship, there was no other comparable evidence that the transfer was induced by fraud, and the State gave pretrial notice to the defendant. Defendant also argued that the trial court improperly allowed a witness to testify as an expert regarding defendant's bank account records. The court disagreed, finding that the evidence was admissible as intrinsic evidence related to the charged offenses. The Court of Appeals affirmed the conviction.

L. Dying Declarations

1. ADKINS v. STATE, No. S17A0111, 301 Ga. 153 (2017)

Following a jury trial, defendant was convicted of crimes arising from a murder. He appealed this conviction arguing that the trial court erred by permitting the State to introduce a purported dying declaration by the victim, and permitting the State to elicit improper opinion testimony by two law enforcement officers. Regarding the dying declaration by victim, the Supreme Court concluded that since defendant's counsel elicited the testimony in question, defendant's claim failed. During trial, in the State's opening, the State referenced a statement made by the victim prior to his death. Defense counsel objected to this reference, arguing that the statement should not be referenced in the State's opening because it was hearsay, posed a Confrontation Clause issue, and was inadmissible unless a hearing were held on its trustworthiness. The prosecutor argued the dying declaration exception to the hearsay rule applied. The trial court found the testimony to be admissible "at least on a preliminary basis." However, the prosecutor never elicited the testimony about the statement in her direct examination of the witness giving the supposed hearsay testimony. Instead, on cross-examination, the defense counsel induced the issue of the hearsay statement. Generally, a defendant cannot complain on appeal about the admission of evidence that he introduced himself. The Supreme Court concluded that although defendant objected to the State's opening statement, his objection was waived once he introduced evidence of the statement after the State failed to introduce the evidence during direct examination of its witness.

Defendant also argued that the trial court erred by permitting the State to elicit improper opinion testimony of two law enforcement officers. Although the Supreme Court found that one of the officers' testimony should not have been admitted, any error from the admission was deemed harmless. Finally, defendant argued that the officers' testimony bolstered another witness' later identification of defendant. It has been held that "a witness can never bolster the credibility of another witness as to whether the witness is telling the truth," as this is a matter for the jury to discern. *Manzano v State*, 282 Ga. 557, 560 (2017). The Supreme Court decided that the testimony in question could have been read as a comment on the honesty of the other witness' testimony, however, this error was harmless. Judgment affirmed on these matters.

2. TANNER v. STATE, No. S17A1024, 2017 Ga. LEXIS 712 (2017)

Defendant appealed his convictions for felony murder, conspiracy to commit robbery, and attempt to purchase marijuana. He argued that the victim's statements made to his mother were inadmissible at trial and the admission of the hearsay testimony violated his rights under the Confrontation Clause because the statements were testimonial. The Supreme Court found differently on both challenges. Rule 807 applies only where there are certain exceptional guarantees of trustworthiness. Here, the evidence showed that the victim was in critical condition, but was lucid and oriented at the time of his statements to his mother. The Supreme Court found that guarantees of trustworthiness were established in this case because the victim had no apparent reason to lie to his mother about the statements. Although the victim was in critical condition and had recently woken from a coma, it was shown that he was lucid and oriented at the time of his statements. The Supreme Court also found that the trial court did not abuse its discretion because the victim did not have any apparent bias or potential benefit in making the identification to his mother. Defendant argued that the victim's mother's ongoing cooperation with the police in the investigation made her essentially an agent of the police, and, therefore, the statements were testimonial in nature. "A statement is considered testimonial if its 'primary purpose ... was to establish evidence that could be used in a future prosecution.'" *Favors v. State*, 296 Ga. 842, 845 (2015). In this case, the statements the victim made were not made in order to assist in a future prosecution. Judgment affirmed.

M. Statements for Context

1. JONES v. STATE, No. A16A1279, 339 Ga. App. 95 (2016)

Following a trial by jury, defendant was convicted of possessing a controlled substance outside of its original container, trafficking in heroin, and possessing heroin with the intent to distribute. Defendant appealed, arguing (1) that the trial court improperly admitted into evidence a recorded telephone call between defendant and a nontestifying speaker; and (2) that the trial court erred by permitting a law-enforcement officer to testify about the effects of heroin. With respect to the telephone call between the defendant and a confidential informant who did not testify at trial, the defendant argued that the statements of the informant were inadmissible hearsay and that he was deprived of his Sixth Amendment right of confrontation. The trial court held that the informant's statements were admissible not for their truth but to provide context for the defendant's

responses to those statements. The Court of Appeals found that the trial court did not err in allowing the informant's statements into evidence, reasoning that the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. Likewise, the Court of Appeals affirmed the trial court's admission of a law enforcement officer's testimony about the pernicious effects of heroin and addiction. The State argued that this testimony was relevant to put heroin in context and to demonstrate how heroin's effect on a user would provide a motive for an individual to engage in heroin distribution to make money. The Court of Appeals was satisfied with this explanation, noting that O.C.G.A. § 24-4-401 sets a low threshold for relevancy, while O.C.G.A. § 24-4-403 requires that relevant evidence be "substantially outweighed by the danger of unfair prejudice" in order to be excluded.

N. Excited Utterance

1. AKINTOYE v. STATE, No. A16A1625, 340 Ga. App. 777 (2017)

Following a jury trial, defendant was convicted of two counts of theft by taking, two counts of theft by deception, two counts of exploitation of an elder person, one count of violating Georgia's RICO statute, and three counts of money laundering. Defendant appealed, arguing that the trial court erred in allowing improper hearsay testimony, violating his Sixth Amendment right to confrontation. The court disagreed, finding that the statements from a conversation between family members were not testimonial as there was no expectation that the statements would be used in a criminal trial. Further, the statements made by a victim to his grandson were properly admitted under the excited utterance exception to Georgia's hearsay rule. Evidence that showed the victim was 91 years old, made the statements at issue to his grandson immediately after learning he had been scammed, and when the victim made the statement, he was confused and distraught collectively demonstrated that the statements were made under the stress of excitement caused by a startling event. Further, testimony from a victim's grandson regarding another victim's statements were properly admitted under the residual exception to the hearsay rule because the victim died prior to trial, the statements to the grandson provided a material fact, that the victim wired money under a false pretense, the circumstances provided guarantees of trustworthiness due to the close relationship, there was no other comparable evidence that the transfer was induced by fraud, and the State gave pretrial notice to the defendant. Defendant also argued that the trial court improperly allowed a witness to testify as an expert regarding defendant's bank account records. The court disagreed, finding that the evidence was admissible as intrinsic evidence related to the charged offenses. The Court of Appeals affirmed the conviction.

O. Unavailability

1. BOLLING v. STATE, No. S16A1674, 300 Ga. 694 (2017)

Defendant was tried for murder. His first trial resulted in a hung jury. He was convicted in the second trial. Defendant appealed, arguing that the trial court erred in (1) allowing the State to introduce into evidence testimony of the co-defendant in the first trial, and (2) allowing the State to play the co-defendant's videotaped police interview to the jury. The Supreme Court rejected the first argument because O.C.G.A. § 24-8-804(b)(1)

provides an exception to the hearsay rule when a witness is unavailable. The co-defendant was unavailable at the time of the second trial, and the State made a reasonable effort to locate him. The Supreme Court rejected the second argument because O.C.G.A. § 24-6-613(c) permits the use of a prior consistent statement “to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive.” The State moved to publish the co-defendant’s videotaped statement made to the police before any plea negotiations to rebut defendant’s implication that the co-defendant had an improper motive for testifying against him to receive the benefit of the plea deal. Judgement affirmed.

IV. OPINION EVIDENCE AND EXPERT WITNESSES

A. Expert Testimony, Generally

1. DIMAURO v. STATE, No. A17A0180, 341 Ga. App. 710 (2017)

Following a jury trial, defendant, a former police officer, was convicted of aggravated assault, aggravated battery, and two counts of violating his oath of office. Defendant appealed the convictions, arguing that the trial court erred in admitting evidence of a similar transaction under O.C.G.A. § 24-4-404. Specifically, an assault against another detainee. The court disagreed as such evidence was relevant to show that defendant committed a similar act against the victim with a similar intent. Indeed, the probative value of the assault video was not substantially outweighed by any undue prejudice. Defendant also argued that the trial court erred in admitting evidence that defendant and other police officers harassed a witness. The court disagreed, finding this evidence relevant as a defendant’s attempt to intimidate a witness can serve as circumstantial evidence of guilt. Further, defendant argued that the trial court improperly admitted opinion evidence from various police officials. The court disagreed. Officers’ testimony that defendant had been administered an oath of office and that defendant’s use of force violated police policy was relevant to whether defendant violated the oath. Defendant also argued that the trial court erred in admitting a witness’ prior consistent statements. The trial court did not abuse its discretion as defendant’s cross-examination of the witness strongly implied that the witness’s direct testimony was a recent fabrication and the prior consistent statement was made to an investigator before the allegedly fabricated trial testimony. Additionally, defendant argued the trial court erred by excluding impeachment evidence regarding the victim. Specifically, one of the victim’s prior burglary convictions. The court found no reversible error as the conviction was more than ten years old, and, the probative value of the conviction did not outweigh its prejudicial impact. Finally, defendant argued the trial court erred by failing to dismiss the indictment on the ground that he was prohibited from presenting evidence to the grand jury. The court disagreed. While former O.C.G.A. § 45-11-4(g) entitles a police officer charged with a crime occurring in the course of his duties to notice of grand jury proceedings and an opportunity to make a sworn statement, the phrase “sworn statement” does not contemplate presenting documentary evidence. The Court of Appeals affirmed defendant’s conviction.

2. GIBBS v. STATE, No. A16A2229, 340 Ga. App. 723 (2017)

Defendant was convicted of one count of aggravated assault on a peace officer, two counts of fleeing or attempting to elude a police officer, and one count of reckless driving. On appeal, defendant argued that the nurse's testimony concerning what defendant had told the nurse (that defendant had smoked marijuana earlier that day) was subject to an objection under O.C.G.A. § 24-4-404(b). The court disagreed because such testimony was intrinsic evidence. Defendant also argued that the trial court erred in allowing a police expert witness to testify that the officer's use of force was proper and within policy. The court disagreed. The trial court properly admitted the testimony because the witness qualified as an expert and the testimony concerned something with which the jurors ordinarily would not be familiar. Expert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves. The Court of Appeals affirmed in part and vacated in part, and remanded for resentencing.

3. EVERSON v. PHOEBE SUMTER MEDICAL CENTER, INC., JORDAN v. EVERSON, No. A16A1709 and A16A1710, 341 Ga. App. 182 (2017)

In Case No. A16A1709, a wrongful death action, the plaintiffs appealed from the trial court's order granting summary judgment to the hospital. The plaintiffs argued that the trial court erred in excluding the opinion testimony of an expert witness. Specifically, that the registered nurses deviated from the applicable standard of care by failing to question the physician's treatment of the deceased. The court disagreed, and held that the trial court did not abuse its discretion in excluding the testimony after concluding that the opinion pertained to conduct beyond the scope of nursing care allowed by Georgia law. The expert's opinion did not satisfy the admissibility requirements of O.C.G.A. § 24-7-702(b). The Court of Appeals affirmed the judgment.

4. HARRIS v. STATE, No. A16A2041, 340 Ga. App. 865 (2017)

Following a jury trial, defendant was convicted of six counts of child molestation. Defendant appealed, arguing that the trial court erred in admitting similar transaction evidence. The court disagreed. Under O.C.G.A. § 24-4-414, in a criminal proceeding where the accused is accused of an offense of child molestation, evidence of the accused's commission of another offense of child molestation is admissible for any relevant purpose. Although defendant's sister's testimony about a similar transaction that occurred about 44 years earlier was remote in time, the trial court did not clearly abuse its discretion in allowing the testimony as it was relevant to show defendant's lustful disposition with respect to preteen or teenaged girls, and defendant's pattern of molesting young girls with whom defendant was living. Testimony from defendant's niece, neighbor, and mother was similarly relevant. Defendant also argued that the trial court erred in allowing a detective to bolster the testimony of one of the victims. The court disagreed. After being qualified as an expert in the field of forensic interviewing of children, the detective testified that it was not unusual to find out that a child had been abused even though she had denied it. The court found no error as the detective did not directly address the victim's credibility or express an opinion as to whether the child had actually been sexually abused. The Court of Appeals affirmed the conviction.

5. ORENGO v. STATE, No. A16A1171, 339 Ga. App. 117 (2016)

Following a 2009 jury trial, defendant was convicted of rape, false imprisonment, sexual battery, and battery. The trial court granted his subsequent motion for new trial solely as to the rape conviction, and in 2012, he was retried for rape and convicted. Defendant appealed the denial of his motions for new trial as to all four charges. With respect to the 2009 trial, defendant argued that the trial court erred by failing to *sua sponte* charge the jury on consent and by admitting testimony from an expert witness who was not timely disclosed by the State and whose testimony constituted improper bolstering. The Court of Appeals held that the trial court's failure to specifically charge the jury on consent was not reversible error when the case as a whole had been presented to the jury, and when the effect of a consent defense is simply to traverse the State's proof. The Court of Appeals found defendant had waived his arguments as to the inadmissibility of the State's expert testimony because he failed to object to this testimony with sufficient specificity at trial. With respect to the 2012 trial, defendant argued that the trial court erred by admitting improper bolstering testimony by the same expert witness for the State and by admitting testimony regarding the victim's sexual orientation and activity in violation of Georgia's Rape Shield Statute. The at-issue expert for the State testified regarding sexual assault victims' demeanor after an assault and possible disclosure delays. Defendant argued that, because the expert never observed the victim in this case, her testimony served only to improperly bolster the State's case. The Court of Appeals disagreed. Defendant argued at trial that the victim's behavior after the alleged incident—including the delay in reporting it—supported the conclusion that she fabricated the allegations. Based on this argument, the Court of Appeals found no abuse of discretion in admitting the expert's testimony. Likewise, the Court of Appeals found that the trial court did not abuse its discretion in admitting the victim's testimony that she had not had sex with anyone within a few days of the assault, because the Rape Shield Statute cannot be invoked by a defendant to prevent a victim from offering otherwise relevant evidence.

6. RABON v. STATE, No. S17A0644, 301 Ga. 200 (2017)

Defendant was convicted of numerous offenses including rape. He appealed claiming the trial court erred in denying his motions for investigative services and experts. Defendant claimed that he was indigent and needed assistance in hiring expert witnesses, but the trial court disagreed. Defendant argued that his inability to bring expert witnesses to the stand resulted in his conviction. The Supreme Court found that defendant did not present any evidence at the hearing to show that the aid of the experts could have impacted the outcome of the trial. Therefore, the Supreme Court did not find any error in the trial court's decision. Judgment affirmed.

7. AGUILAR v. STATE, No. A16A1893, 340 Ga. App. 522 (2017)

Following a jury trial, defendant was convicted of one count of cruelty to a child in the first degree and two counts of sexual battery as lesser included charges of aggravated child molestation. Defendant appealed, *inter alia*, for the following three reasons. First, defendant argued that the trial court wholly failed to charge the essential element of the crime of sexual battery -- lack of consent to the touching. On this ground, the Court of Appeals reversed defendant's conviction as to the two counts of sexual battery. Second,

defendant argued that the trial court improperly prohibited defendant from presenting good character evidence in defense of the maliciousness element of the charge of cruelty to a child. The Court of Appeals affirmed the trial court on this ground because defendant failed to proffer specific evidence defendant was prevented from presenting to the jury or how any testimony as to general good parenting would have countered the underlying allegations of sexual abuse of the victim that were the predicate acts supporting that count. Third, defendant argued that the trial court erred by permitting the State to present cumulative bolstering evidence from expert witnesses. The Court of Appeals held that this argument lacked merit as defendant conceded that such testimony was permitted, defendant failed to identify any specific expert testimony that should have been excluded, defendant presented no citation to authority supporting a claim that the sheer number of experts results in error, and the testimony was not cumulative because the various experts were called to testify as to the different roles they played in diagnosing or treating the victim. The Court of Appeals affirmed defendant's conviction as to the count of cruelty to a child in the first degree but reversed defendant's conviction as to the two counts of sexual battery.

8. SWINT v. MAE, No. A16A1759, 340 Ga. App. 480 (2017)

Following a hearing, the trial court entered summary judgment in favor of defendant medical providers against plaintiffs. Plaintiffs appealed on the basis that their expert's causation testimony created a genuine issue of material fact on the element of causation of the plaintiffs' alleged injury. The trial court found that the expert's causation testimony amounted to a conclusory and speculative opinion, and that the expert's testimony regarding the nurse was not based on sufficient facts or data and fell short of the requirements established under O.C.G.A. § 24-7-702. The Court of Appeals affirmed the trial court.

9. FIELDS v. TAYLOR, and vice versa, Nos. A16A1753, A16A1754, 340 Ga. App. 706 (2017)

Following a hearing and the trial court's grant of summary judgment in favor of Taylor et al. (collectively "Taylor") against Fields et al. (collectively "Fields"), the Court of Appeals ruled on both appeals in the interest of judicial economy. Fields appealed on the basis that the trial court erred in concluding that there existed no genuine basis of material fact. In reviewing the record *de novo* and in a light most favorable to Fields, the Court of Appeals reversed the trial court and concluded there existed triable issues of material fact. In his cross-appeal, Taylor contends that the trial court erred in denying his motion to exclude Fields's medical expert testimony because the experts based their opinions on unsworn and uncertified medical records, *inter alia*. The Court of Appeals held that while Taylor's contention may have been appropriate grounds to exclude the expert *affidavits* for purposes of summary judgment, it is insufficient grounds on which to exclude their *testimony*. The Court of Appeals reversed the grant of summary judgment and affirmed the trial court's ruling permitting the expert testimony.

10. BARKO RESPONSE TEAM, INC. v. SUDDUTH, No. A16A1722, 339 Ga. App. 897 (2016)

Barko Response Team, Inc. (“Barko”) appealed the trial court’s denial of summary judgment in which Barko contended there was no evidence that its alleged negligence caused Sudduth et al.’s (“Sudduth”) illnesses and, therefore, that it was entitled to judgment as a matter of law. Upon de novo review, the Court of Appeals agreed. Sudduth’s doctor’s affidavit and attached letter did not constitute expert testimony that was sufficient to clear the summary judgment threshold, as the doctor did not give any opinion on the degree to which the homeowner’s exposure to mold contributed to the homeowner’s injuries. Furthermore, the doctor did not state the basis for the doctor’s understanding that there were “high levels of toxic mold” in the home and did not give the factual basis for the doctor’s opinion that the mold caused the homeowner’s illnesses. The Court of Appeals highlighted the Supreme Court’s recent decision explaining an expert’s opinion on causation in a toxic tort case is admissible only if the expert concludes that the plaintiff’s exposure to a toxic substance made at least a “meaningful contribution” to his injuries. *See Scapa Dryer Fabrics, Inc. v. Knight*, 299 Ga. 286, 291 (2016). Accordingly, the Court of Appeals reversed the trial court’s denial of Barko’s motion for summary judgment.

11. CHRYSLER GROUP, LLC v. WALDEN, No. A16A1285, 339 Ga. App. 733 (2016)

Following a jury trial, the jury awarded plaintiffs \$150 million in damages resulting from a motor vehicle collision. By remittitur, the amount was reduced to \$40 million. Defendant Chrysler (“defendant”) appealed, *inter alia*, on the following four grounds. First, defendant argued that the trial court erred in excluding the testimony and statistical analyses of two experts which were relevant to show the overall safety of the challenged design to the overall safety of available alternative designs. Defendant argued that the trial court erred by excluding the evidence for lack of substantial similarity because the substantial similarity rule does not apply to this kind of evidence. The Court of Appeals disagreed, holding that the trial court also excluded the evidence because it was irrelevant in that it concerned the overall safety of various vehicles while the plaintiffs’ claims related only to the safety of the fuel system design in rear impacts. Second, defendant argued that the trial court erred by permitting evidence of defendant’s chief executive officer’s (“CEO”) compensation. The Court of Appeals affirmed the trial court’s ruling, stating *inter alia*, that the CEO was not a party so the rule which generally excludes evidence of the financial circumstances of a party did not apply. Third, defendant argued that the trial court abused its discretion in admitting evidence of the National Highway Traffic Safety Administration (“NHTSA”) Office of Defects Investigation’s (ODI) recall request letter. The Court of Appeals held that no error occurred because, *inter alia*, the recall request letter was offered, at least in part, not for the substance of the finding of defect, but to support an inference that a meeting between defendant’s CEO with the head of the NHTSA and the Secretary of the United States Department of Transportation led ODI to change the opinion regarding the defect to that expressed in the ODI résumé. Fourth, defendant argued that the trial court abused its discretion in admitting evidence of ODI’s recall request letter under the public records exception to the hearsay rule. The Court of Appeals held that the trial court did not abuse its discretion because, *inter alia*, some of

the findings in the recall request were not labeled as tentative, including the findings that defendant was certainly aware of the safety benefits of placing the tank in front of the rear axle. The Court of Appeals affirmed the trial court's ruling.

12. VUGUEROS v. ROBLES, No. S16G0619, 300 Ga. 58 (2016)

The Supreme Court granted certiorari to determine whether the Court of Appeals was correct in holding that deposition testimony of an organizational representative taken under O.C.G.A. § 9-11-30(b)(6) may be admitted into evidence at trial under O.C.G.A. § 9-11-32(a)(2). Plaintiff's wife was treated by defendant doctor. Defendant doctor provided certain treatment, but did not order a CT scan or procure the radiology report from another hospital. Plaintiff's wife died. Plaintiff sued defendant doctor and the institution where he worked. Plaintiff served defendant institution with a notice of deposition to depose a representative of the practice under O.C.G.A. § 9-11-30(b)(6). In the deposition, the deponent, founder and co-owner of defendant institution, answered questions about the standard of care to order a CT scan. Defendants moved to exclude the testimony because the requirements of the admission of expert testimony in civil cases, O.C.G.A. § 27-7-702, had not been met in part because the founder had not been provided all the data necessary to form an opinion. The trial court agreed and excluded the testimony, and the jury returned a defense verdict. On appeal, the Court of Appeals reversed on the ground that the evidence was not offered as expert testimony under O.C.G.A. § 27-7-702(b), but as a party's admission against interest under O.C.G.A. § 9-11-32(a)(2). The Supreme Court disagreed. The Supreme Court noted that although O.C.G.A. § 9-11-32(a)(2) states that the deposition of an organizational representative "may be used by an adverse party for any purpose," it does not create a rule of evidence that allows any deposition taken by an organizational representative to be admitted at trial in its entirety as an admission against interest. It only provides for the admission of the deposition when that admission is permitted under relevant rules of evidence, such as in circumstances in which deposition may be used for the purpose of impeachment under O.C.G.A. § 9-11-32(a)(1). Therefore, the Supreme Court reversed the Court of Appeals' judgment and remanded case with direction.

13. JONES v. STATE, No. S16A1790, No. S16A1791, 300 Ga. 543 (2017)

Defendant and her husband were convicted of the murder of their six-year-old son. Defendant appealed, arguing that the trial court erred when it failed to sua sponte instruct the jury to ignore testimony that defendant's expert witness had been hired by defendant's lawyer to participate in a separate case in which a mother was found guilty of suffocating her child. In addition, this witness was asked how much she was paid to testify both in the other case and at defendant's trial. Defendant claimed that this testimony was not relevant to any material issue. The Supreme Court has held in the past that "[t]he State's cross-examination of [an expert witness] concerning the number of times [s]he had been hired by defense counsel and how much [s]he was paid was appropriate to show that the objectivity of the witness may have been clouded." Therefore, the Court noted that the only portion of the testimony at issue that might have been irrelevant was the inclusion of the fact that the jury in the other case found the defendant guilty. However, defendant had not shown that the outcome of her trial likely was affected by the mention—in the middle of a long question to an expert witness—that a jury in a different case found

another mother guilty of suffocating her child. Accordingly, allowing such testimony was not obviously erroneous. Judgment affirmed.

B. Qualification of Experts

1. DAVIS v. STATE, No. S7A0176, 301 Ga. 397 (2017)

Following a jury trial, defendant was found guilty of felony murder, armed robbery, aggravated assault, and possession of a firearm during the commission of a felony. Defendant appealed the conviction contending that the trial court erred in allowing evidence of defendant's friend's gang affiliation because it was irrelevant. Generally, under O.C.G.A § 24-4-402, any relevant evidence will be admissible, but if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury then it may be excluded per Rule 403. The purpose of the evidence of the friend's gang activity was to show a connection between the robbery and the murder and the foreseeable consequence of defendant's participation in the robbery with his friend. Defendant asserted that because he was not charged with gang activity the evidence was improper. However, "there is no requirement that the State charge a defendant with violating the prohibition of participation in criminal street gang activity in O.C.G.A § 16-15-4 in order to admit otherwise relevant gang activity." *Wolfe v. State*, 273 Ga. 670, 674 (2001). Therefore the Supreme Court found no abuse of discretion by the trial court in allowing the evidence of the friend's gang affiliation. Defendant further argued that counsel was ineffective in failing to object to the tendering of an expert, a police detective, to give testimony concerning the meaning of slang terms used by witnesses. "To qualify as an expert generally all that is required is that a person must have been educated in a particular skill or profession. Formal education in the subject at hand is not a prerequisite for expert status." *Allen v. State*, 296 Ga. 785, 790 (2015). Under O.C.G.A § 24-7-707, "in criminal proceedings, the opinions of experts on any question of science, skill, trade, or like questions shall always be admissible." The defendant argued that some of the expert's opinion testimony was cumulative of other evidence presented by the witnesses at trial and the State could have asked those witnesses the meaning of certain terms. However, the court reasoned that the cumulative nature of one of the terms explained by the expert did not require the exclusion of his testimony. Moreover, the detective testified to his extensive experience with street slang and explained further that he previously testified in many robbery cases as a lead investigator. The Supreme Court found no error by the trial court. Judgment affirmed on these matters.

2. NAJI v. STATE, No. S16A1489, No. S17A0503, 300 Ga. 659 (2017)

Defendants were convicted of murder. The trial court denied their motions for new trial. Defendants appealed, arguing that the trial court erred in admitted the testimony of a medical examiner who did not perform the autopsy, but reviewed the report prepared by another, unavailable, medical examiner, photographs of the autopsy, and other documents associated with the case. The Supreme Court rejected the argument, ruling testimony of the medical examiner who did not perform the autopsy was admissible because the report, photographs, and other documents were kept in the normal course of business of the Medical Examiner's office, that the medical examiner had access to them,

and that the medical examiner was able to form an independent opinion based upon the documentation. Denial affirmed.

C. Lay Witness Testimony

1. ADKINS v. STATE, No. S17A0111, 301 Ga. 153 (2017)

Following a jury trial, defendant was convicted of crimes arising from a murder. He appealed this conviction arguing that the trial court erred by permitting the State to introduce a purported dying declaration by the victim, and permitting the State to elicit improper opinion testimony by two law enforcement officers. Regarding the dying declaration by victim, the Supreme Court concluded that since defendant's counsel elicited the testimony in question, defendant's claim failed. During trial, in the State's opening, the State referenced a statement made by the victim prior to his death. Defense counsel objected to this reference, arguing that the statement should not be referenced in the State's opening because it was hearsay, posed a Confrontation Clause issue, and was inadmissible unless a hearing were held on its trustworthiness. The prosecutor argued the dying declaration exception to the hearsay rule applied. The trial court found the testimony to be admissible "at least on a preliminary basis." However, the prosecutor never elicited the testimony about the statement in her direct examination of the witness giving the supposed hearsay testimony. Instead, on cross-examination, the defense counsel induced the issue of the hearsay statement. Generally, a defendant cannot complain on appeal about the admission of evidence that he introduced himself. The Supreme Court concluded that although defendant objected to the State's opening statement, his objection was waived once he introduced evidence of the statement after the State failed to introduce the evidence during direct examination of its witness. Defendant also argued that the trial court erred by permitting the State to elicit improper opinion testimony of two law enforcement officers. Although the Supreme Court found that one of the officers' testimony should not have been admitted, any error from the admission was deemed harmless. Finally, defendant argued that the officers' testimony bolstered another witness' later identification of defendant. It has been held that "a witness can never bolster the credibility of another witness as to whether the witness is telling the truth," as this is a matter for the jury to discern. *Manzano v State*, 282 Ga. 557, 560 (2017). The Supreme Court decided that the testimony in question could have been read as a comment on the honesty of the other witness' testimony, however, this error was harmless. Judgment affirmed on these matters.

V. DOCUMENTARY EVIDENCE

A. Authentication

1. HUNGRY WOLF/SUGAR & SPICE, INC. v. LANGDEAU, No. A16A1442, 338 Ga. App. 750 (2016)

The plaintiff filed suit against defendant, alleging that defendant was vicariously liable for the tortious actions of its alleged employee. The trial court denied defendant's motion for summary judgment, concluding that a police report submitted by the plaintiff created a

question of fact as to whether the tortfeasor was employed by defendant. The Court of Appeals granted defendant's application for interlocutory review. On appeal, defendant argued that the trial court erred in considering the police report because it was not certified or authenticated. O.C.G.A. § 24-9-901(a) provides that the authentication or identification of a document is a condition precedent to admissibility of evidence. The trial court determined that the police report was admissible because it fell within the public records hearsay exception under O.C.G.A. § 24-8-803(8); however, it applied an incomplete standard because it failed to address the defendant's argument that the report was not authenticated. As a result, the Court of Appeals vacated the trial court's denial of the defendant's motion for summary judgment and remanded for consideration of the authentication issue.

2. **BROWN v. STATE**, No. S16A1530, 300 Ga. 446 (2017)

Defendant was tried and found guilty of murder and related crimes including criminal street gang activity. The trial court granted defendant a new trial solely on the count of criminal gang activity, finding that evidence used to prove that crime at trial was not properly authenticated. Defendant appealed, claiming that the introduction of the improperly-authenticated evidence at trial requires a reversal of all his convictions. During trial, the trial court admitted defendant's prior conviction for participation in criminal street gang activity, aggravated assault, influencing a witness, and obstruction pursuant to former O.C.G.A. § 16-15-9. After admission of this evidence, the trial court properly instructed the jury that it could only be considered for the determination of whether defendant was currently guilty of criminal gang activity—not the remaining counts of the indictment. The Supreme Court must presume that the jury followed this instruction, and there was no evidence that the jury did not do so. Judgment affirmed.

B. Cell Phone Records

1. **WISE v. STATE**, No. S16A1661, 300 Ga. 593 (2017)

Defendant was convicted of several crimes including murder and armed robbery. During the trial, the State introduced certain cell phone records that indicated the location of defendant's cell phone at the time of some of the crimes. The State also called a custodian of the records who worked for MetroPCS. The custodian testified that he pulled the records, and was capable of assessing the information to determine the location of the cell towers off of which the cell phones pinged. Defendant appealed, arguing that the trial court erred by admitting certain of the phone records. The Supreme Court rejected the argument, ruling that the trial court did not violate the Confrontation Clause by admitting the cell phone records because the custodian of the records "was present, available at trial, and thoroughly cross-examined." Judgment affirmed.

VI. EXAMINATION OF WITNESSES

A. Direct Examination

1. ISSA v. STATE, No. A16A1495, 340 Ga. App. 327 (2017)

Following a jury trial, defendant was convicted of one count of conspiracy to commit armed robbery, one count of burglary, four counts of aggravated assault, three counts of attempt to commit armed robbery, three counts of false imprisonment, and one count of possession of a firearm during the commission of a felony. Defendant appealed, *inter alia*, for the following three reasons. First, defendant argued that the trial court's aggravated assault instruction constituted plain error. The Court of Appeals held that the aggravated assault instruction was proper as the transcript clearly showed that the court instructed the jury as to both forms of simple assault in its aggravated-assault instruction. Second, defendant contests the trial court erred in permitting the State to ask leading questions of a witness while on direct examination. The Court of Appeals held the trial court did not abuse its discretion because the witness testified that the witness did not want to testify and was afraid of the defendants, thus demonstrating both reluctance and nervousness. Third, defendant argues that the trial court failed to apply the rule of lenity when sentencing defendant. The Court of Appeals upheld the trial court's ruling and stated there was no ambiguity in the application of O.C.G.A. § 17-10-7(a) to the sentencing provision for attempted armed robbery, which under O.C.G.A. § 16-4-6(a), carried a maximum sentence of 30 years, given the fact that a completed armed robbery carries a maximum sentence of life imprisonment. The Court of Appeals affirmed defendant's conviction.

2. WASHINGTON v. STATE, No. A16A1430, 339 Ga. App. 715 (2016)

Following a jury trial, defendant was convicted of possession of a firearm during the commission of a felony. Defendant appealed, *inter alia*, on the following two grounds. First, defendant argued that the trial court erred when it prevented defendant from calling two jurors as witnesses and admitting their affidavits into evidence. The Court of Appeals held that the trial court did not err because any error was rendered moot when the trial court cured any alleged error on remand by admitting both affidavit and oral testimony of the jurors during the remand hearing. Second, defendant argued that the trial court failed to inspect the verdict form and resolve the inherent ambiguity. The Court of Appeals agreed and reversed the trial court's denial of defendant's plea in bar and remanded the case for a new trial on voluntary manslaughter.

B. Witness Credibility

1. JONES v. STATE, No. A16A2014, 340 Ga. App. 568 (2017)

Following a jury trial, defendant was convicted of the 2003 rape and child molestation of A. M., who was then ten years old. Defendant appealed, *inter alia*, for the following three reasons. First, defendant argued that the trial court erred in permitting the State to introduce evidence of the victim's earlier statements that were consistent with the victim's testimony at trial. The Court of Appeals held such evidence was permissible to refute

defendant's allegation of recent fabrication. Second, defendant argued that the trial court improperly excluded evidence of the victim's older sister's sexual conduct. The Court of Appeals held that such evidence was properly excluded under the Rape Shield Statute, former O.C.G.A. § 24-2-3, because the evidence related to the past sexual behavior of the older sister and did not fall within the statutory exceptions, as the past sexual behavior of the older sister having sex with boys for money did not involve the participation of defendant and did not support an inference that defendant reasonably believed that the older sister consented to defendant's alleged sexual activities with the older sister. Third, defendant argued that the trial court improperly excluded defendant's requested charge on credibility relating to a delay in reporting a crime. The Court of Appeals held that the trial court's exclusion was not an obvious error that likely affected the outcome of the trial and that seriously affected the fairness, integrity or public reputation of the judicial proceedings. The Court of Appeals affirmed defendant's conviction.

2. CHRYSLER GROUP, LLC v. WALDEN, No. A16A1285, 339 Ga. App. 733 (2016)

Following a jury trial, the jury awarded plaintiffs \$150 million in damages resulting from a motor vehicle collision. By remittitur, the amount was reduced to \$40 million. Defendant Chrysler ("defendant") appealed, *inter alia*, on the following four grounds. First, defendant argued that the trial court erred in excluding the testimony and statistical analyses of two experts which were relevant to show the overall safety of the challenged design to the overall safety of available alternative designs. Defendant argued that the trial court erred by excluding the evidence for lack of substantial similarity because the substantial similarity rule does not apply to this kind of evidence. The Court of Appeals disagreed, holding that the trial court also excluded the evidence because it was irrelevant in that it concerned the overall safety of various vehicles while the plaintiffs' claims related only to the safety of the fuel system design in rear impacts. Second, defendant argued that the trial court erred by permitting evidence of defendant's chief executive officer's ("CEO") compensation. The Court of Appeals affirmed the trial court's ruling, stating *inter alia*, that the CEO was not a party so the rule which generally excludes evidence of the financial circumstances of a party did not apply. Third, defendant argued that the trial court abused its discretion in admitting evidence of the National Highway Traffic Safety Administration ("NHTSA") Office of Defects Investigation's (ODI) recall request letter. The Court of Appeals held that no error occurred because, *inter alia*, the recall request letter was offered, at least in part, not for the substance of the finding of defect, but to support an inference that a meeting between defendant's CEO with the head of the NHTSA and the Secretary of the United States Department of Transportation led ODI to change the opinion regarding the defect to that expressed in the ODI résumé. Fourth, defendant argued that the trial court abused its discretion in admitting evidence of ODI's recall request letter under the public records exception to the hearsay rule. The Court of Appeals held that the trial court did not abuse its discretion because, *inter alia*, some of the findings in the recall request were not labeled as tentative, including the findings that defendant was certainly aware of the safety benefits of placing the tank in front of the rear axle. The Court of Appeals affirmed the trial court's ruling.

3. STATE v. SMITH, No. S16A1069, 299 Ga. 901 (2016)

Defendant was indicted by a grand jury for felony murder and other offenses. Defendant filed a pre-trial motion to suppress evidence of an oral admission, written statements and video recordings of any statement made to law enforcement officers while in custody. The trial court granted the motion, and the State appealed. Under O.C.G.A. § 24-9-901, to introduce a video recording of a defendant's custodial statement, the State must show it is a fair representation of the statement, and the State may authenticate the recording by any witness familiar with the subject depicted on the recording, as is the case with any other video recording presented as evidence at a criminal trial. Here, although the investigator testified that the investigator had auditioned a disc and that it reflected everything that occurred during defendant's interview, on cross-examination, the investigator admitted that the investigator did not view the entire video in the judge's chambers and could not attest to whether the recording was one hour and 23 minutes long as the investigator remembered. And, although the investigator testified that the disc presented was the one the investigator had reviewed earlier and gave to the prosecutor, the disc had no identifying markers on it that would confirm that fact. Thus, the Supreme Court found that the State failed to carry its burden of proving the video recording was a fair representation of defendant's interview. As for defendant's oral admission and written statement, although no evidence was presented that the investigator did, in fact, make a representation to the defendant that if the defendant cooperated the investigator would be willing to tell the victim's father that the defendant showed remorse, the investigator's uncertainty and inability to deny such a representation, considered with the evidence as a whole, was sufficient to create doubt about the investigator's credibility. Therefore, the Supreme Court found no error, and affirmed the trial court's judgment.

C. Impeachment

1. BILL v. STATE, No. A17A0790, 341 Ga. App. 340 (2017)

Following a jury trial, defendant was convicted of kidnapping, aggravated assault, aggravated sodomy, aggravated sexual battery, rape, and false imprisonment. Defendant appealed, arguing that the trial court improperly excluded evidence that the victim engaged in prostitution. Under O.C.G.A. § 24-2-3(a), the Rape Shield Statute applicable at the time of trial, evidence relating to a victim's past sexual behavior is generally not admissible in a rape trial. Past sexual behavior, however, may be admitted when the trial court finds that such behavior directly involved the accused's participation, and the evidence expected to be introduced supports an inference that the accused could have believed the witness consented. However, even if the evidence might be admissible despite the limitations of the Rape Shield Statute, the Court agreed that the evidence was irrelevant, speculative, and highly prejudicial as defendant drew no nexus between the victim's history of prostitution and the assault in this case. Further, even if some nexus had been shown, exclusion of the evidence was harmless as further testimony regarding the victim's behavior would have been cumulative. Defendant additionally argued that the trial court improperly prevented him from impeaching the victim with the prostitution-related evidence. While evidence of prior sexual behavior may be admissible to impeach a victim's trial testimony, the impeachment evidence cited by defendant related only to

general allegations, which did not contradict any testimony in the record. Further, defendant argued that the State improperly called the victim as a rebuttal witness to bolster her prior testimony. The Court found no error; a trial court may allow relevant evidence during rebuttal even if such evidence tends to bolster the State's case more than to directly impeach defense evidence. Finally, defendant challenged the trial court's exclusion of evidence regarding the death of defendant's friend to explain his alcoholism. However, the Court found no error as this evidence shed no light on the assault in this case. The Court of Appeals affirmed the conviction.

2. DIMAURO v. STATE, No. A17A0180, 341 Ga. App. 710 (2017)

Following a jury trial, defendant, a former police officer, was convicted of aggravated assault, aggravated battery, and two counts of violating his oath of office. Defendant appealed the convictions, arguing that the trial court erred in admitting evidence of a similar transaction under O.C.G.A. § 24-4-404. Specifically, an assault against another detainee. The court disagreed as such evidence was relevant to show that defendant committed a similar act against the victim with a similar intent. Indeed, the probative value of the assault video was not substantially outweighed by any undue prejudice. Defendant also argued that the trial court erred in admitting evidence that defendant and other police officers harassed a witness. The court disagreed, finding this evidence relevant as a defendant's attempt to intimidate a witness can serve as circumstantial evidence of guilt. Further, defendant argued that the trial court improperly admitted opinion evidence from various police officials. The court disagreed. Officers' testimony that defendant had been administered an oath of office and that defendant's use of force violated police policy was relevant to whether defendant violated the oath. Defendant also argued that the trial court erred in admitting a witness' prior consistent statements. The trial court did not abuse its discretion as defendant's cross-examination of the witness strongly implied that the witness's direct testimony was a recent fabrication and the prior consistent statement was made to an investigator before the allegedly fabricated trial testimony. Additionally, defendant argued the trial court erred by excluding impeachment evidence regarding the victim. Specifically, one of the victim's prior burglary convictions. The court found no reversible error as the conviction was more than ten years old, and, the probative value of the conviction did not outweigh its prejudicial impact. Finally, defendant argued the trial court erred by failing to dismiss the indictment on the ground that he was prohibited from presenting evidence to the grand jury. The court disagreed. While former O.C.G.A. § 45-11-4(g) entitles a police officer charged with a crime occurring in the course of his duties to notice of grand jury proceedings and an opportunity to make a sworn statement, the phrase "sworn statement" does not contemplate presenting documentary evidence. The Court of Appeals affirmed defendant's conviction.

3. WILLIAMS v. STATE, No. S17A0954, 2017 Ga. LEXIS 706 (2017)

Defendant was convicted of malice murder and appealed arguing that the trial court erroneously admitted the record of his first-offender plea. However, the State, in this case, was using the evidence of defendant's plea to challenge the veracity of a defense witness' testimony. The State was not using this evidence to show the defendant's true character or even to impeach the defendant. Georgia's new Evidence Code did not apply in this case,

however, the Supreme Court found that even if the trial court did abuse its discretion in admitting the plea record, the ruling did not rise to the level of reversible error. Therefore, if any error existed, it was harmless. Judgment affirmed for this matter.

4. STROUD v. STATE, No. S17A0709, 2017 Ga. LEXIS 690 (2017)

Defendant was convicted of murder, he appealed contending that the trial court erred in admitting evidence of prior felonies committed. Despite arguing that the prior convictions were more prejudicial than probative, defense counsel conceded that, if defendant were to testify, the court “can’t keep all the convictions out,” and thus urged the court to admit evidence of only “one or two” of the convictions. The trial court allowed in the prior convictions that could be used for impeachment purposes. However, the trial court eventually allowed in the other convictions after defendant brought his character into issue during direct examination. The Supreme Court found that because defendant acquiesced to the admission of the evidence in the trial court, he was precluded from asserting that the trial court erred in admitting the prior conviction evidence. Judgment affirmed.

5. DOUGLAS v. STATE, No. A16A1488, 340 Ga. App. 168 (2017)

Following a jury trial, defendant was found guilty on one count of child molestation for viewing a pornographic video with his then four-year-old daughter. Defendant appealed, *inter alia*, on the basis that the trial court erred when it refused to allow defendant to cross-examine the victim’s mother about the mother’s accusations of molestation against the mother’s step-father, who was later acquitted. The Court of Appeals held that the trial court did not err. The fact that the mother’s step-father was acquitted did not mean the accusations were false. Furthermore, the incident was temporally remote, and there was no showing of similarity between the mother's accusation and the child's accusations against defendant. The Court of Appeals affirmed defendant’s conviction.

6. CHRYSLER GROUP, LLC v. WALDEN, No. A16A1285, 339 Ga. App. 733 (2016)

Following a jury trial, the jury awarded plaintiffs \$150 million in damages resulting from a motor vehicle collision. By remittitur, the amount was reduced to \$40 million. Defendant Chrysler (“defendant”) appealed, *inter alia*, on the following four grounds. First, defendant argued that the trial court erred in excluding the testimony and statistical analyses of two experts which were relevant to show the overall safety of the challenged design to the overall safety of available alternative designs. Defendant argued that the trial court erred by excluding the evidence for lack of substantial similarity because the substantial similarity rule does not apply to this kind of evidence. The Court of Appeals disagreed, holding that the trial court also excluded the evidence because it was irrelevant in that it concerned the overall safety of various vehicles while the plaintiffs' claims related only to the safety of the fuel system design in rear impacts. Second, defendant argued that the trial court erred by permitting evidence of defendant’s chief executive officer’s (“CEO”) compensation. The Court of Appeals affirmed the trial court’s ruling, stating *inter alia*, that the CEO was not a party so the rule which generally excludes evidence of the financial circumstances of a party did not apply. Third, defendant argued that the trial court abused its discretion in admitting evidence of the National Highway Traffic Safety

Administration (“NHTSA”) Office of Defects Investigation's (ODI) recall request letter. The Court of Appeals held that no error occurred because, *inter alia*, the recall request letter was offered, at least in part, not for the substance of the finding of defect, but to support an inference that a meeting between defendant's CEO with the head of the NHTSA and the Secretary of the United States Department of Transportation led ODI to change the opinion regarding the defect to that expressed in the ODI résumé. Fourth, defendant argued that the trial court abused its discretion in admitting evidence of ODI's recall request letter under the public records exception to the hearsay rule. The Court of Appeals held that the trial court did not abuse its discretion because, *inter alia*, some of the findings in the recall request were not labeled as tentative, including the findings that defendant was certainly aware of the safety benefits of placing the tank in front of the rear axle. The Court of Appeals affirmed the trial court's ruling.

7. BREWNER v. STATE, No. S17A1103, 2017 Ga. LEXIS 611 (2017)

After a murder conviction, defendant appealed contending that the court erred in admitting certain evidence, among other things. Defendant asserted that the trial court erred in admitting evidence of his prior drug dealings and involvement in a home invasion. Defendant argued that both pieces of evidence failed for lack of relevancy. The Supreme Court, in this case, adopted the three-part test used in the Eleventh Circuit under the analogous Rules 403 and 404(b) of the Federal Rules of Evidence. The test assesses whether (1) the evidence is relevant to an issue in the case other than the defendant's character; (2) the probative value of the evidence is not substantially outweighed by the likelihood of its undue prejudice, and (3) there is sufficient proof for a jury to find by a preponderance of the evidence that the defendant in fact committed the other act. *Hood v. State*, 299 Ga. 95, 101 (2016). Using this test, the Supreme Court found that the evidence of the home invasion was relevant to prove defendant's intent to participate in the scheme to invade the victim's home. The probative value of the evidence was not substantially outweighed by the likelihood of undue prejudice. Lastly, there was little dispute that defendant did mastermind the crimes, because one of the witnesses' testimony on this subject was unchallenged. Regarding the evidence of the prior drug dealings, this evidence, too was found to be relevant to establish context for his relationship with the before mentioned witness and to others involved in the crimes. Since the evidence was integral to the narrative of the crimes the probative value, again, substantially outweighed the risk of undue prejudice. Finally, since this evidence was undisputed, the jury was authorized to find by a preponderance of the evidence that defendant engaged in such drug dealings. Defendant also contended that the trial court erred in admitting the video recording of a witness' interview with a detective as a prior inconsistent statement. Under O.C.G.A § 24-6-613(b) extrinsic evidence of a witness' prior inconsistent statement may be admitted so long as “the witness is first afforded an opportunity to explain or deny the prior inconsistent statement and the opposite party is afforded an opportunity to interrogate the witness on the prior inconsistent statement.” The trial court admitted the evidence, over objection by defense, after the witness on the recording testified at length to explain the statements made on the recording. When a witness fails to remember making a statement the court has held that foundation for offering extrinsic evidence to prove that the statement was made may be provided. In this case the foundation was laid for the prior statement to be used to confront the witness

after the witness' testimony was inconsistent with that statement. Therefore, the Supreme Court found no error in the trial court's admission of the recorded statements at trial. Judgment affirmed.

8. UPSHAW v. STATE, No. S16A1524, 300 Ga. 442 (2017)

Defendant was tried and convicted of murder for a crime he committed more than a decade ago. Defendant appealed, arguing that the trial court erred when it (1) prevented defendant from interrogating a prosecution witness about the specific facts of a prior offer, (2) refused to grant a mistrial after another prosecution witness refused to be cross-examined, and (3) excepted the lead detective from the rule of sequestration. The Supreme Court has held that when a defendant seeks to impeach a witness with a prior conviction, the specific facts underlying the crime are irrelevant unless the witness attempts to rehabilitate himself by explaining the circumstances of his conviction. Thus, the trial court did not err when it prevented defendant from interrogating the prosecution witness about the specific facts of a prior offense because the witness explained that the witness was on parole for aggravated assault and made no effort at rehabilitation. Further, when another prosecution witness refused to be cross-examined, the trial court provided a curative instruction for the jury to disregard any testimony about a statement defendant made to the witness instead of granting a mistrial. The Court found that the trial court acted within its discretion. Finally, the Court held that the trial court did not abuse its discretion when it permitted the lead detective to remain in the courtroom to assist the prosecution with the orderly presentation of evidence, because the presence of the lead detective was especially important because of the large number of witnesses that the detective had personally interviewed and the length of time between the murder (in 1996) and the trial (in 2012). Accordingly, the Supreme Court affirmed defendant's malice murder conviction.

D. Refreshing Recollection

1. JONES v. STATE, JOHNSON v. STATE, LEMONS v. STATE, Nos. A16A2058, A16A2066, A17A0110, 340 Ga. App. 142 (2017)

Following a jury trial, defendants Travis Jones, Willie Johnson, William Lemons, and Robert Turner were convicted of burglary. Defendants Jones, Johnson, and Lemons appealed, *inter alia*, on the basis that the trial court erred in denying their motions for a mistrial after a main witness on behalf of the State used the prosecutor's own notes to refresh his recollection. The Court of Appeals held that the motions for mistrial were properly denied for the following two reasons. First, the trial court determined that the guard did not actually use the notes prepared by the prosecutor to refresh the guard's recollection. Indeed, on direct examination, the guard testified that the guard was not actually using the notes. Second, the guard's recollection was only refreshed after the guard was permitted to review the incident report that the guard created in the immediate wake of the day in question, after review of which the guard provided more detailed and substantial answers to the State's questions. The Court of Appeals also noted that the trial judge had the benefit of observing the work-detail guard's demeanor and judging the guard's credibility before ruling upon the motions for mistrial. The Court of Appeals affirmed the defendants' conviction.

E. Cross Examination

1. WRIGHT v. STATE, No. S16A1035, 300 Ga. 185 (2016)

Defendant was convicted of malice murder and other crimes. Defendant appealed, arguing that (1) the trial counsel failed to provide effective assistance because the counsel failed to object to the State's cross-examination of defendant about his pre-arrest silence, (2) the trial court erred in prohibiting him from introducing evidence of specific violent acts by the victim against third parties, and (3) the trial court erred in denying his request to charge the jury on the lesser included offense of voluntary manslaughter. First, the Supreme Court noted that although questions about defendant's failure to contact police following a confrontation and shooting ordinarily would constitute improper comments by the State on defendant's pre-arrest silence, the prosecution had every right to pursue a thorough and sifting examination after defense counsel opened the door to that line of questioning on direct examination. Thus, the Court held that the counsel's failure to make a meritless objection could not constitute ineffective assistance. Second, the Supreme Court recognized that under Georgia's former Evidence Code, a defendant claiming self-defense justification could introduce evidence of specific violent acts by the victim against third parties. However, the defendant was required to make a prima facie showing of justification—that the victim was the aggressor, the victim assaulted the defendant, and the defendant was honestly trying to defend himself. The Court found that testimony was not sufficient to show that the victim assaulted defendant, especially as there was no evidence presented at trial that the victim was armed at the time of the confrontation, and thus, the trial court did not err when it prohibited defendant from introducing evidence of specific acts of violence committed by the victim against third parties. Finally, to support a charge on voluntary manslaughter, there must be evidence that the accused acted solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. Because there was no evidence presented that defendant shot the victim due to an irresistible passion, there was no evidence to support a voluntary manslaughter charge and no error in the trial court's refusal to give such a charge. Judgment affirmed.

VII. JUDICIAL MATTERS

A. Sentencing

1. ASHLEY v. STATE, No. A14A1848, 340 Ga. App. 539 (2017)

Following a jury trial, defendant was convicted of kidnapping, criminal attempt to kidnap, entering an automobile, and criminal trespass. Defendant appealed, *inter alia*, for the following two reasons. First, defendant argued that the trial court made an improper comment on the evidence while instructing the jury on similar transaction evidence. The Court of Appeals held that the trial court's comment was not improper as it did not express or intimate the trial court's opinion as to whether any fact had been or had not been proved and, before making the statement, the trial court told the jury that, by giving the instruction, the trial court in no way suggested to the jury that defendant had or had not committed any other acts, nor whether such acts, if committed, proved anything.

Second, defendant argued that the trial court's sentencing of defendant was cruel and unusual. The Court of Appeals held that defendant's life sentence for kidnapping the seven-year-old girl and the 30-year sentence for criminal attempt to kidnap the two-year-old girl did not constitute cruel and unusual punishment forbidden by the Eighth Amendment because they fell within the statutory limits set by the legislature for those offenses, and were, furthermore, untimely as defendant did not make the challenge at the first available opportunity. The Court of Appeals affirmed defendant's conviction.

2. EPPERSON v. STATE, No. A16A1849, 340 Ga. App. 25 (2016)

Following a jury trial, defendant was convicted of armed robbery, aggravated assault, aggravated battery, and three counts of possession of a firearm during the commission of a felony. Defendant appealed on the basis, *inter alia*, that the trial court should have merged his aggravated battery conviction into his armed robbery and aggravated assault convictions for purposes of sentencing. In analyzing why defendant's aggravated battery conviction did not merge with defendant's armed robbery conviction, the Court of Appeals highlighted that aggravated battery and armed robbery do not simply prohibit different degrees of injury or risk of injury; rather, the two crimes prohibit entirely different categories of injury -- depriving a victim of a member of his body versus depriving a victim of property. Regarding defendant's argument that his aggravated battery conviction should have merged with defendant's aggravated assault conviction, the Court of Appeals acknowledged that the Supreme Court recent ruling may support such a merger. *See Regent v. State*, 299 Ga. 172 (2016). Still, any error by the trial court was harmless error. The Court of Appeals affirmed defendant's conviction.

B. Relevancy (Prejudice, Confusion, Waste of Time)

1. SANCHEZ-VILLA v. STATE, No. A17A0459, 341 Ga. App. 264 (2017)

Defendant was convicted of one count of trafficking in cocaine. On appeal, defendant contended the trial court violated O.C.G.A. § 24-4-404(b) by permitting the State to introduce evidence from a United States Drug Enforcement Administration (DEA) investigation of him without pre-trial notice from the State. The evidence included testimony from a DEA agent regarding the agency's surveillance of defendant for over a year prior to his arrest and a recording of a conversation involving defendant that occurred almost a month prior to his arrest on the cocaine trafficking charge. The court agreed that the trial court abused its discretion as the evidence lacked any demonstrated connection to the events on the night of defendant's arrest, and was thus not intrinsic to the charged trafficking offense. Indeed, the testimony was in regard to "other acts" by defendant, and was offered by the State to prove knowledge without providing defendant notice, thus violating O.C.G.A. § 24-4-404(b). The Court of Appeals vacated the judgment and remanded the case.

2. DIXON v. STATE, No. A17A0233, 341 Ga. App. 255 (2017)

Defendant was convicted of one count of aggravated child molestation and four counts of child molestation. On appeal, defendant argued that the trial court erred in admitting evidence qualifying as "another offense of sexual assault" under O.C.G.A. § 24-4-413 or

“another offense of child molestation” under O.C.G.A. § 24-4-412. The court disagreed, finding that the State could admit the evidence under these provisions for any relevant purpose, including propensity. Further, the probative value substantially outweighed any unfair prejudice given the similarity of the acts. The Court of Appeals affirmed the conviction.

3. BILL v. STATE, No. A17A0790, 341 Ga. App. 340 (2017)

Following a jury trial, defendant was convicted of kidnapping, aggravated assault, aggravated sodomy, aggravated sexual battery, rape, and false imprisonment. Defendant appealed, arguing that the trial court improperly excluded evidence that the victim engaged in prostitution. Under O.C.G.A. § 24-2-3(a), the Rape Shield Statute applicable at the time of trial, evidence relating to a victim’s past sexual behavior is generally not admissible in a rape trial. Past sexual behavior, however, may be admitted when the trial court finds that such behavior directly involved the accused’s participation, and the evidence expected to be introduced supports an inference that the accused could have believed the witness consented. However, even if the evidence might be admissible despite the limitations of the Rape Shield Statute, the Court agreed that the evidence was irrelevant, speculative, and highly prejudicial as defendant drew no nexus between the victim’s history of prostitution and the assault in this case. Further, even if some nexus had been shown, exclusion of the evidence was harmless as further testimony regarding the victim’s behavior would have been cumulative. Defendant additionally argued that the trial court improperly prevented him from impeaching the victim with the prostitution-related evidence. While evidence of prior sexual behavior may be admissible to impeach a victim’s trial testimony, the impeachment evidence cited by defendant related only to general allegations, which did not contradict any testimony in the record. Further, defendant argued that the State improperly called the victim as a rebuttal witness to bolster her prior testimony. The Court found no error; a trial court may allow relevant evidence during rebuttal even if such evidence tends to bolster the State’s case more than to directly impeach defense evidence. Finally, defendant challenged the trial court’s exclusion of evidence regarding the death of defendant’s friend to explain his alcoholism. However, the Court found no error as this evidence shed no light on the assault in this case. The Court of Appeals affirmed the conviction.

4. STATE v. McPHERSON, No. A17A0364, 341 Ga. App. 871 (2017)

In a child molestation case, the State appealed, arguing that the trial court improperly excluded similar transaction evidence of prior acts of child molestation allegedly committed by the defendant. The court agreed. Under O.C.G.A. § 24-4-414, in a criminal child molestation case, evidence of the accused’s commission of another offense of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant, including a propensity to commit certain sexual offenses. In light of the strong statutory presumption of admissibility and the close similarities between the crimes at issue, there was no basis for excluding the evidence. Further, there was no showing that the evidence would confuse the issues, mislead the jury, waste time, or be cumulative of other evidence, or that the probative value of the evidence would otherwise be substantially outweighed by its prejudicial impact. The fact that the prior acts allegedly committed by defendant were committed about 35 years earlier did not automatically

require their exclusion, as there was no showing that the potential witness's memory about the alleged incidents was either impaired or patently unreliable. The Court of Appeals reversed.

5. DIMAURO v. STATE, No. A17A0180, 341 Ga. App. 710 (2017)

Following a jury trial, defendant, a former police officer, was convicted of aggravated assault, aggravated battery, and two counts of violating his oath of office. Defendant appealed the convictions, arguing that the trial court erred in admitting evidence of a similar transaction under O.C.G.A. § 24-4-404. Specifically, an assault against another detainee. The court disagreed as such evidence was relevant to show that defendant committed a similar act against the victim with a similar intent. Indeed, the probative value of the assault video was not substantially outweighed by any undue prejudice. Defendant also argued that the trial court erred in admitting evidence that defendant and other police officers harassed a witness. The court disagreed, finding this evidence relevant as a defendant's attempt to intimidate a witness can serve as circumstantial evidence of guilt. Further, defendant argued that the trial court improperly admitted opinion evidence from various police officials. The court disagreed. Officers' testimony that defendant had been administered an oath of office and that defendant's use of force violated police policy was relevant to whether defendant violated the oath. Defendant also argued that the trial court erred in admitting a witness' prior consistent statements. The trial court did not abuse its discretion as defendant's cross-examination of the witness strongly implied that the witness's direct testimony was a recent fabrication and the prior consistent statement was made to an investigator before the allegedly fabricated trial testimony. Additionally, defendant argued the trial court erred by excluding impeachment evidence regarding the victim. Specifically, one of the victim's prior burglary convictions. The court found no reversible error as the conviction was more than ten years old, and, the probative value of the conviction did not outweigh its prejudicial impact. Finally, defendant argued the trial court erred by failing to dismiss the indictment on the ground that he was prohibited from presenting evidence to the grand jury. The court disagreed. While former O.C.G.A. § 45-11-4(g) entitles a police officer charged with a crime occurring in the course of his duties to notice of grand jury proceedings and an opportunity to make a sworn statement, the phrase "sworn statement" does not contemplate presenting documentary evidence. The Court of Appeals affirmed defendant's conviction.

6. MORRIS v. STATE, No. A17A0615, 341 Ga. App. 568 (2017)

Following a jury trial, defendant was convicted of aggravated child molestation, child molestation, and aggravated sexual battery. Defendant appealed, arguing that the trial erred in granting the State's motion in limine to prohibit cross-examination of the victim's father as to whether he suffered sexual abuse as a child. The court found that such evidence was irrelevant under O.C.G.A. § 24-4-401 as there was no logical link between the fact that the victim had a father who also endured sexual abuse and the conclusion that the victim might therefore be an unreliable witness. Defendant also argued that the trial court erred in failing to limit two witnesses' child-hearsay testimony to the specific facts to which the victim testified at trial. The trial court did not abuse its discretion as former O.C.G.A. § 24-3-16 did not require the child to corroborate the hearsay testimony.

Further, defendant argued that the trial court improperly admitted evidence of a drawing made by the victim during a counseling session that the State did not produce during discovery. Given that defendant failed to show that the State acted in bad faith by not including the drawing in the discovery materials, or that defendant suffered prejudice as a result, the trial court did not abuse its discretion in admitting the drawing. The Court of Appeals affirmed defendant's conviction.

7. HUGHES v. STATE, No A17A0868, 341 Ga. App. 594 (2017)

Following a jury trial, defendant was convicted of child molestation and statutory rape. Defendant appealed, arguing that the trial court erred in admitting prior act evidence. In particular, defendant's prior statutory rape conviction. The court disagreed. Such evidence was admissible to prove defendant's intent and to show that defendant engaged in a common scheme or plan in the prior and charged acts. Here, that defendant engaged in a common scheme of befriending young girls from families, by giving them rides, and engaging in sexual relations with them in defendant's vehicle. In light of the prior act's relevance and the trial court's multiple limiting instructions, the court found that the danger of unfair prejudice did not substantially outweigh the probative value of the challenged evidence. The Court of Appeals affirmed defendant's conviction.

8. GIBBS v. STATE, No. A16A2229, 340 Ga. App. 723 (2017)

Defendant was convicted of one count of aggravated assault on a peace officer, two counts of fleeing or attempting to elude a police officer, and one count of reckless driving. On appeal, defendant argued that the nurse's testimony concerning what defendant had told the nurse (that defendant had smoked marijuana earlier that day) was subject to an objection under O.C.G.A. § 24-4-404(b). The court disagreed because such testimony was intrinsic evidence. Defendant also argued that the trial court erred in allowing a police expert witness to testify that the officer's use of force was proper and within policy. The court disagreed. The trial court properly admitted the testimony because the witness qualified as an expert and the testimony concerned something with which the jurors ordinarily would not be familiar. Expert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves. The Court of Appeals affirmed in part and vacated in part, and remanded for resentencing.

9. REDCEDAR, LLC v. CML-GA SOCIAL CIRCLE, LLC; and vice versa, Nos. A16A2192 and A16A2193, 341 Ga App. 110 (2017)

In these companion cases, the parties disputed whether plaintiff could be held liable under the Georgia Timber Collateral Conversion Statute, and, if so, the proper measurement of damages arising from such conversion. In Case No. A16A2193, defendant appealed an order granting plaintiff partial summary judgment as to the applicable measure of damages. Defendant argued that the trial court erred in refusing to allow it to present evidence of the diminished value of the property for the purpose of showing that it is entitled to attorney fees and punitive damages. Specifically, defendant argued that such evidence was relevant to show that plaintiff acted in bad faith. The court agreed. The trial court erred in refusing to allow defendant to present evidence of the diminished value

of the property following plaintiff's removal of timber at trial for the limited purpose of demonstrating its entitlement to attorney fees and punitive damages. The Court of Appeals reversed that portion of the trial court's order.

10. HARRIS v. STATE, No. A16A2041, 340 Ga. App. 865 (2017)

Following a jury trial, defendant was convicted of six counts of child molestation. Defendant appealed, arguing that the trial court erred in admitting similar transaction evidence. The court disagreed. Under O.C.G.A. § 24-4-414, in a criminal proceeding where the accused is accused of an offense of child molestation, evidence of the accused's commission of another offense of child molestation is admissible for any relevant purpose. Although defendant's sister's testimony about a similar transaction that occurred about 44 years earlier was remote in time, the trial court did not clearly abuse its discretion in allowing the testimony as it was relevant to show defendant's lustful disposition with respect to preteen or teenaged girls, and defendant's pattern of molesting young girls with whom defendant was living. Testimony from defendant's niece, neighbor, and mother was similarly relevant. Defendant also argued that the trial court erred in allowing a detective to bolster the testimony of one of the victims. The court disagreed. After being qualified as an expert in the field of forensic interviewing of children, the detective testified that it was not unusual to find out that a child had been abused even though she had denied it. The court found no error as the detective did not directly address the victim's credibility or express an opinion as to whether the child had actually been sexually abused. The Court of Appeals affirmed the conviction.

11. STATE v. SPRIGGS, No. A16A0871, 338 Ga. App. 655 (2016)

After defendant was charged with the armed robbery of a convenience store clerk whom he shot in the head, the trial court granted defendant's motion to suppress two undated "selfie" cell phone videos in which he talked about making money by various means, including armed robbery. The State appealed, arguing that the trial court erred when it excluded the videos as extrinsic evidence under O.C.G.A. § 24-4-402 and 24-4-404(b), because they were relevant and probative as to defendant's intent and motive to commit the armed robbery at issue. In order for extrinsic evidence to be admissible: (1) it must be relevant to an issue other than a defendant's character; (2) the probative value of the other acts evidence must not be substantially outweighed by its unfair prejudice; and (3) there must be sufficient proof so that the jury could find that the defendant committed the act in question. In this case, it was undisputed that the defendant made the videos in question. The State contended that the videos were relevant to show the defendant's intent or motive to commit armed robbery under Rule 404(b). However, the State provided no evidence that the act of making the videos required the same intent as the charged offenses, or that the act of making the videos and committing the armed robbery were committed close in time and under similar circumstances. Accordingly, the trial court found the videos irrelevant to the defendant's intent and motive. Further, with respect to whether the videos were more prejudicial than probative, the State failed to introduce any evidence as to the time when the videos were made, and the videos themselves made no reference to any specific victim. The trial court found that the videos had only a tenuous logical connection to the defendant's intent to commit the specific

armed robbery at issue and thus little or no probative value as extrinsic evidence. The Court of Appeals affirmed the trial court's decision to suppress the two videos.

12. JONES v. STATE, No. A16A1279, 339 Ga. App. 95 (2016)

Following a trial by jury, defendant was convicted of possessing a controlled substance outside of its original container, trafficking in heroin, and possessing heroin with the intent to distribute. Defendant appealed, arguing (1) that the trial court improperly admitted into evidence a recorded telephone call between defendant and a nontestifying speaker; and (2) that the trial court erred by permitting a law-enforcement officer to testify about the effects of heroin. With respect to the telephone call between the defendant and a confidential informant who did not testify at trial, the defendant argued that the statements of the informant were inadmissible hearsay and that he was deprived of his Sixth Amendment right of confrontation. The trial court held that the informant's statements were admissible not for their truth but to provide context for the defendant's responses to those statements. The Court of Appeals found that the trial court did not err in allowing the informant's statements into evidence, reasoning that the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. Likewise, the Court of Appeals affirmed the trial court's admission of a law enforcement officer's testimony about the pernicious effects of heroin and addiction. The State argued that this testimony was relevant to put heroin in context and to demonstrate how heroin's effect on a user would provide a motive for an individual to engage in heroin distribution to make money. The Court of Appeals was satisfied with this explanation, noting that O.C.G.A. § 24-4-401 sets a low threshold for relevancy, while O.C.G.A. § 24-4-403 requires that relevant evidence be "substantially outweighed by the danger of unfair prejudice" in order to be excluded.

13. GEORGIA DERMATOLOGIC SURGERY CENTERS, P.C. v. PHARIS, No. A16A1331, 339 Ga. App. 764 (2016)

A jury awarded the plaintiff \$1,300,000 in damages in his claim against defendant for breach of his employment contract. Defendant appealed, arguing that the trial court erred in disallowing the introduction of defendant's shareholders' agreement and in unilaterally redacting portions of the employment agreement. The Court of Appeals affirmed, reasoning first that the trial court was authorized to conclude that the shareholders' agreement, in the context of the trial on the issue of damages for breach of the employment agreement, was not relevant. Further, the Court of Appeals affirmed the trial court's *sua sponte* exclusion of a provision in the employment contract, because the provision did not address or limit damages for breach of the employment contract, and was therefore irrelevant.

14. BENTON v. STATE, No. S17A0355, 301 Ga. 100 (2017)

After a jury trial, defendant was found guilty of malice murder, possession of a firearm by a convicted felon, and various other offenses. First, defendant claimed that the trial court erred when it allowed jurors to submit questions to be posed to the witnesses. It has been established that "jurors in Georgia courts may not ask questions of witnesses directly, a trial court may receive written questions from the jury and ask those questions which the

court finds proper.” *Allen v. State*, 286 Ga. 392, 396 (3) (2010). In this case, the written questions were reviewed by the trial court and found proper before they were posed to the court. Therefore, no error was found. Second, defendant argued that by admitting the autopsy photographs into evidence, the trial court committed plain error. Plain error is found where an error is a deviation from the law, is clear and obvious, and affects defendant’s substantial rights. However, it is within the court’s discretion to correct this error if the other three prongs are satisfied. The Supreme Court first evaluated whether the photographs were relevant to the case. Relevancy is found where its probative value is not outweighed by unfair prejudice. O.C.G.A § 24-4-403. The Supreme Court found each of the photographs to be relevant to the case, therefore no error was found in the trial court’s decision. Judgment affirmed for these matters.

15. DAVIS v. STATE, No. S7A0176, 301 Ga. 397 (2017)

Following a jury trial, defendant was found guilty of felony murder, armed robbery, aggravated assault, and possession of a firearm during the commission of a felony. Defendant appealed the conviction contending that the trial court erred in allowing evidence of defendant’s friend’s gang affiliation because it was irrelevant. Generally, under O.C.G.A § 24-4-402, any relevant evidence will be admissible, but if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury then it may be excluded per Rule 403. The purpose of the evidence of the friend’s gang activity was to show a connection between the robbery and the murder and the foreseeable consequence of defendant’s participation in the robbery with his friend. Defendant asserted that because he was not charged with gang activity the evidence was improper. However, “there is no requirement that the State charge a defendant with violating the prohibition of participation in criminal street gang activity in O.C.G.A § 16-15-4 in order to admit otherwise relevant gang activity.” *Wolfe v. State*, 273 Ga. 670, 674 (2001). Therefore the Supreme Court found no abuse of discretion by the trial court in allowing the evidence of the friend’s gang affiliation. Defendant further argued that counsel was ineffective in failing to object to the tendering of an expert, a police detective, to give testimony concerning the meaning of slang terms used by witnesses. “To qualify as an expert generally all that is required is that a person must have been educated in a particular skill or profession. Formal education in the subject at hand is not a prerequisite for expert status.” *Allen v. State*, 296 Ga. 785, 790 (2015). Under O.C.G.A § 24-7-707, “in criminal proceedings, the opinions of experts on any question of science, skill, trade, or like questions shall always be admissible.” The defendant argued that some of the expert’s opinion testimony was cumulative of other evidence presented by the witnesses at trial and the State could have asked those witnesses the meaning of certain terms. However, the court reasoned that the cumulative nature of one of the terms explained by the expert did not require the exclusion of his testimony. Moreover, the detective testified to his extensive experience with street slang and explained further that he previously testified in many robbery cases as a lead investigator. The Supreme Court found no error by the trial court. Judgment affirmed on these matters.

16. JONES v. STATE, No. S16Go890, 301 Ga. 544 (2017)

Defendant was tried and convicted for driving under the influence, he sought appellant review of that conviction on the ground that evidence of a prior DUI conviction was

wrongfully admitted at trial. Rule 404 (b), provides that “evidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Extrinsic act evidence may be admitted if it is relevant, the probative value is not substantially outweighed by the risk of unfair prejudice, and there is sufficient proof for a jury to find by a preponderance of the evidence that the defendant committed the prior act. The Supreme Court found that the trial court’s use of the evidence to show intent was in error because it improperly found that the prejudicial effect of the evidence did not outweigh its probative effect. In this case, the admission of the prior conviction had the effect of emphasizing defendant’s dishonesty and creating the potential for the jury to make a decision based on negative impressions in addition to the stigma already associated with the prior conviction. However, because there was overwhelming direct evidence to convict defendant, the Supreme Court found only harmless error to exist.

17. ENTWISLE v. STATE, No. A16A1782, 340 Ga. App. 122 (2017)

Following a jury trial, defendant was convicted of first degree burglary, second degree burglary, criminal trespass, two counts of theft by taking, theft by receiving, computer invasion of privacy, and possession of a firearm by a convicted felon. Defendant appealed, *inter alia*, on the basis that the trial court erred by admitting his prior convictions without holding a hearing as required by O.C.G.A. § 24-4-403. The Court of Appeals held that the trial court did not err because the trial court had implicitly performed the balancing test in O.C.G.A. § 24-4-403. Although the trial court did not make specific findings regarding whether the probative value of the prior crimes was outweighed by its prejudicial impact, the trial court explicitly referenced the balancing test and noted that the evidence had to satisfy the balancing test rule in O.C.G.A. § 24-4-403. Thus, by admitting the evidence, the trial court implicitly found that the evidence was admissible pursuant to the balancing test in O.C.G.A. § 24-4-403. The Court of Appeals reversed the denial of defendant’s motion for new trial as to computer invasion of privacy on the basis of ineffective assistance of counsel and affirmed defendant’s remaining convictions.

18. WARD v. STATE, No. A16A1339, 339 Ga. App. 621 (2016)

Following a jury trial, defendant was convicted of criminal attempt to commit armed robbery, two counts of burglary, possession of a firearm during the commission of a crime, possession of a tool for commission of a crime, possession of a controlled substance, and possession of a firearm by a convicted felon. Defendant appealed, *inter alia*, on the following two grounds. First, defendant argued that the trial court abused its discretion in permitting the jury to hear evidence of defendant’s rap lyrics in which he references violence toward witnesses. The Court of Appeals held the trial court did not abuse its discretion in admitting such evidence as it was relevant to the issue of witness intimidation. Second, defendant contended that the attempted armed robbery and burglary offenses should have been merged for purposes of sentencing. The Court of Appeals held that the two burglary counts, which were based on a single illegal entry into a building, should have been merged. However, the attempted armed robbery and burglary offenses were not based on the same conduct and thus properly were not merged

for sentencing. Accordingly, the Court of Appeals affirmed in part, vacated in part, and remanded for resentencing on the burglary counts.

19. BREWNER v. STATE, No. S17A1103, 2017 Ga. LEXIS 611 (2017)

After a murder conviction, defendant appealed contending that the court erred in admitting certain evidence, among other things. Defendant asserted that the trial court erred in admitting evidence of his prior drug dealings and involvement in a home invasion. Defendant argued that both pieces of evidence failed for lack of relevancy. The Supreme Court, in this case, adopted the three-part test used in the Eleventh Circuit under the analogous Rules 403 and 404(b) of the Federal Rules of Evidence. The test assesses whether (1) the evidence is relevant to an issue in the case other than the defendant's character; (2) the probative value of the evidence is not substantially outweighed by the likelihood of its undue prejudice, and (3) there is sufficient proof for a jury to find by a preponderance of the evidence that the defendant in fact committed the other act. *Hood v. State*, 299 Ga. 95, 101 (2016). Using this test, the Supreme Court found that the evidence of the home invasion was relevant to prove defendant's intent to participate in the scheme to invade the victim's home. The probative value of the evidence was not substantially outweighed by the likelihood of undue prejudice. Lastly, there was little dispute that defendant did mastermind the crimes, because one of the witnesses' testimony on this subject was unchallenged. Regarding the evidence of the prior drug dealings, this evidence, too was found to be relevant to establish context for his relationship with the before mentioned witness and to others involved in the crimes. Since the evidence was integral to the narrative of the crimes the probative value, again, substantially outweighed the risk of undue prejudice. Finally, since this evidence was undisputed, the jury was authorized to find by a preponderance of the evidence that defendant engaged in such drug dealings. Defendant also contended that the trial court erred in admitting the video recording of a witness' interview with a detective as a prior inconsistent statement. Under O.C.G.A § 24-6-613(b) extrinsic evidence of a witness' prior inconsistent statement may be admitted so long as "the witness is first afforded an opportunity to explain or deny the prior inconsistent statement and the opposite party is afforded an opportunity to interrogate the witness on the prior inconsistent statement." The trial court admitted the evidence, over objection by defense, after the witness on the recording testified at length to explain the statements made on the recording. When a witness fails to remember making a statement the court has held that foundation for offering extrinsic evidence to prove that the statement was made may be provided. In this case the foundation was laid for the prior statement to be used to confront the witness after the witness' testimony was inconsistent with that statement. Therefore, the Supreme Court found no error in the trial court's admission of the recorded statements at trial. Judgment affirmed.

20. BOOTH v. STATE, No. S17A0705, 2017 Ga. LEXIS 634 (2017)

Defendant was convicted of malice murder. He appealed, arguing that the trial court erred by: (1) allowing the State to make improper arguments during closing statement; and (2) admitting evidence of other acts to prove intent to commit the charged crimes. Rule 404 (b), provides that "evidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. It may,

however, be admissible for other purposes, including, but not limited to, proof of ... intent... .” Other acts evidence must be meet the test which requires that the moving party show that the evidence is (1) relevant; (2) the probative value is not substantially outweighed by undue prejudice; and (3) there is sufficient proof that the jury can find that the defendant committed the acts. Defendant argued that the acts were not relevant because the intent required for one of his convictions was not required for the offenses charged in the case. Relevant evidence is evidence that tends “to make the existence of any fact more probable or less probable than it would be without the evidence.” O.C.G.A § 24-4-401. In this case, defendant was charged with aggravated assault which required proof that defendant had the intent to injure victim with a weapon, which in this case were defendant’s hands. Both offenses showed an intent to cause harm by hitting the victim in the head with hands or fists and such actions are likely to cause serious bodily injury. The Supreme Court concluded that those offenses were the same intent required to prove aggravated assault. Defendant also argued that the trial court erred in overruling his objection to the State’s allegedly improper comments during closing arguments. The comments are in regards to the testimony of a defense expert witness in forensic DNA analysis. Defendant asserts that the State mischaracterized the expert witness’ testimony which improperly allowed the jury to believe that DNA evidence can be time-stamped. The Supreme Court found the State’s comments to be within the bounds of permissible closing arguments stating, “[A] prosecutor is granted wide latitude in the conduct of closing argument, the bounds of which are in the trial court’s discretion[.]” *Scott v. State*, 290 Ga. 883, 885 (2012). Therefore, the Supreme Court found no error in the closing.

21. MCCRAY v. STATE, No. S17A0315, 301 Ga. 241 (2017)

Defendant was convicted of murder and other offenses arising out of the shooting death of the lover of his former girlfriend. The shotgun that killed the victim belonged to the victim. The victim retrieved the gun from a friend who had taken the gun from the victim for safekeeping because the victim was drunk on a prior day. The State moved to exclude this portion of the friend’s testimony at trial on the ground that admission of the statement would impermissibly place the victim’s character in issue. The trial court granted the State’s motion in limine. Defendant appealed, arguing that the trial court erred in granting the State’s motion in limine. The Supreme Court rejected the argument because the record reflected that despite the ruling to exclude that evidence, the testimony that defendant sought to admit was, in fact, presented to the jury during defense counsel’s cross-examination of one of the State’s witnesses. Accordingly, even defendant could demonstrate error by the grant of the State’s motion in limine, the defendant can show no harm. Affirmed.

22. ELLIS v. STATE, No. S16A1246, 300 Ga. 371 (2017)

Defendant, former DeKalb County Chief Executive Officer, was found guilty by a jury of attempt to commit theft by extortion and perjury. The charge for attempted extortion stemmed from defendant’s alleged efforts to procure a \$2,500 political campaign contribution from a DeKalb County vendor by threatening to cut the vendor’s contract with the County if the vendor did not contribute to defendant’s campaign. The perjury charges stemmed from defendant allegedly lying to a special purpose grand jury about his role in cutting the contract of the DeKalb County vendor. Defendant appealed, arguing

that the trial court erred in (1) failing include in the jury charge certain language submitted by the defense, (2) allowing a special purpose grand juror to testify at trial in connection with the State's efforts to prove the perjury charges, and (3) prohibiting him from presenting any evidence of his interactions with other vendors who were not named in the indictment and from whom he attempted to solicit campaign contributions. The Supreme Court first held that the trial court's failure to charge the exact language requested was not a ground for reversal where the charge given substantially covered the principles of the requested charge. However, the Supreme Court did find error and harm from the trial court allowing a special purpose grand juror to testify at trial. The State introduced the testimony of the special purpose grand juror at trial in an effort to prove that defendant's false statements to the special purpose grand jury were material to the grand jury's investigation. However, the Court noted that whether a false statement was material is an issue for the jury. Instead of relying on such appropriate evidence to allow the jury to make an independent decision on the issue of materiality, the State offered evidence of an individual special purpose grand juror's subjective belief about the materiality of defendant's statements. The Court found that such testimony potentially caused significant prejudice to defendant, and thus reversed defendant's conviction for perjury. Further, the Court held that the trial court erred by excluding the evidence about defendant's interactions with other vendors because the State opened the door to the admission of the evidence. The Court noted that such error was not harmless because the Supreme Court could not say that it was highly probable that the exclusion of this evidence did not contribute to the verdict. Accordingly, the Supreme Court reversed defendant's conviction for attempt to commit theft by extortion as well.

C. Judicial Bias

1. CRENSHAW v. STATE, No. A17A0717, 341 Ga. App. 406 (2017)

Following a jury trial, defendant was convicted of rape, aggravated sodomy, burglary in the first degree, false imprisonment, and possession of a firearm during the commission of a crime against or involving the person of another. Defendant appealed, arguing that the trial judge commented on the evidence in violation of O.C.G.A. § 17-8-57 when the judge directed that the record reflect that the victim and the witnesses had identified defendant during their testimony. The Court disagreed. The trial judge's comment was not improper because the jurors were present in the courtroom and able to determine for themselves whether someone in the courtroom matched the man identified by the victim and by the witness. The trial judge's statement served to clarify the victim's and witness' words, as they would later be transcribed. The Court of Appeals affirmed the conviction.

2. COOPER v. STATE, No. A17A0010, 342 Ga. App. 351 (2017)

Following the denial of his motion for a new trial, defendant appealed his conviction for armed robbery, aggravated assault and possession of a firearm or knife during the commission of a felony. Defendant contended that the trial court's charge on inference of guilt based on recent possession of stolen property violated his privilege against self-incrimination because it required him to explain his possession of the property, and thus dispel an inference of guilt. The court disagreed, concluding that the jury charge did not reduce the State's burden of proving guilt. Defendant also argued that the charge was an

improper comment on his guilt by the trial judge in violation of O.C.G.A. § 17-8-57. The Court held that it was not improper because the trial court's comments did not constitute a comment before the jury on a disputed issue of fact or intimate an opinion about defendant's guilt. Rather, the comments merely instructed the jury on the permissible inference of possession.

3. ASHLEY v. STATE, No. A14A1848, 340 Ga. App. 539 (2017)

Following a jury trial, defendant was convicted of kidnapping, criminal attempt to kidnap, entering an automobile, and criminal trespass. Defendant appealed, *inter alia*, for the following two reasons. First, defendant argued that the trial court made an improper comment on the evidence while instructing the jury on similar transaction evidence. The Court of Appeals held that the trial court's comment was not improper as it did not express or intimate the trial court's opinion as to whether any fact had been or had not been proved and, before making the statement, the trial court told the jury that, by giving the instruction, the trial court in no way suggested to the jury that defendant had or had not committed any other acts, nor whether such acts, if committed, proved anything. Second, defendant argued that the trial court's sentencing of defendant was cruel and unusual. The Court of Appeals held that defendant's life sentence for kidnapping the seven-year-old girl and the 30-year sentence for criminal attempt to kidnap the two-year-old girl did not constitute cruel and unusual punishment forbidden by the Eighth Amendment because they fell within the statutory limits set by the legislature for those offenses, and were, furthermore, untimely as defendant did not make the challenge at the first available opportunity. The Court of Appeals affirmed defendant's conviction.

4. PERSON v. STATE, No. A16A1954, 340 Ga. App. 252 (2017)

Following a jury trial, defendant was convicted of one count each of aggravated assault, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. Defendant appealed for the following two reasons. First, defendant argued that the trial court abused its discretion by admitting other acts evidence pursuant to O.C.G.A. § 24-4-404(b), specifically defendant's prior difficulty with an individual who was not the victim of the assault. The Court of Appeals held that the trial court did not err because the prior difficulty was relevant to show motive as the jury would be authorized to conclude that defendant's actions toward the individual was motivated by defendant's desire to retaliate against the victim for continuing to intervene in defendant's physical abuse of the individual. Second, defendant argued that the trial court erred when it commented on the evidence at trial. The Court of Appeals held that the trial court did not express or intimate its opinion with regard to defendant's guilt or make a statement with respect to what had been proven but was instead announcing its ruling on the admissibility of the evidence and the purposes for which the jury could consider it. The Court of Appeals affirmed defendant's conviction.

5. DOHERTY v. BROWN, BROWN v. SOUTHEASTERN PAIN SPECIALISTS, P.C., SOUTHEASTERN PAIN AMBULATORY SURGERY CENTER, LLC v. BROWN, SOUTHEASTERN PAIN SPECIALISTS, P.C. v. BROWN, Nos. A16A0763, A16A0764, A16A0765, A16A0766, 339 Ga. App. 567 (2016)

These companion appeals arose from a medical malpractice action brought on behalf of Gwendolyn Lynette Brown, which alleged that she suffered catastrophic brain damage from oxygen deprivation while undergoing a procedure to relieve back pain. Mrs. Brown passed away while the suit was pending, and her complaint was amended to add a wrongful death claim by her surviving spouse, Sterling Brown, Sr. (collectively, “Brown”). On appeal, the Court of Appeals provided two rulings on evidentiary issues. First, the trial court did not abuse its discretion by refusing plaintiff’s request to present evidence of the doctor’s medical condition and history. The trial court properly found such evidence was not relevant without evidence of such condition and history existing on and during treatment of plaintiff’s decedent. Second, in a wrongful death action, the trial court did not abuse its discretion by not declaring a mistrial after the doctor placed evidence of the doctor’s financial condition and liability insurance before the jury. The Court of Appeals did not abuse its discretion because no insurance evidence was even introduced, the trial court undertook prompt, vigorous, and emphatic action, and plaintiff did not request curative instructions or strongly demand a mistrial. The Court of Appeals upheld the trial court.

D. Procedural Considerations

1. MORRIS v. STATE, No. A17A0615, 341 Ga. App. 568 (2017)

Following a jury trial, defendant was convicted of aggravated child molestation, child molestation, and aggravated sexual battery. Defendant appealed, arguing that the trial erred in granting the State’s motion in limine to prohibit cross-examination of the victim’s father as to whether he suffered sexual abuse as a child. The court found that such evidence was irrelevant under O.C.G.A. § 24-4-401 as there was no logical link between the fact that the victim had a father who also endured sexual abuse and the conclusion that the victim might therefore be an unreliable witness. Defendant also argued that the trial court erred in failing to limit two witnesses’ child-hearsay testimony to the specific facts to which the victim testified at trial. The trial court did not abuse its discretion as former O.C.G.A. § 24-3-16 did not require the child to corroborate the hearsay testimony. Further, defendant argued that the trial court improperly admitted evidence of a drawing made by the victim during a counseling session that the State did not produce during discovery. Given that defendant failed to show that the State acted in bad faith by not including the drawing in the discovery materials, or that defendant suffered prejudice as a result, the trial court did not abuse its discretion in admitting the drawing. The Court of Appeals affirmed defendant’s conviction.

2. HERNANDEZ v. STATE, No. S16A0936, 299 Ga. 796 (2016)

Defendant was convicted of malice murder and a firearm offense. Defendant appealed, arguing that the trial court erred in (1) soliciting the jury for questions to ask the witnesses, and (2) admitting defendant’s custodial statement to the police regarding the

shooting. At the beginning of the trial, the court told the jurors that they could submit written questions for the witnesses. After each witness had been examined by the parties, the jurors could submit their questions to the court. The questions were then shared with counsel, who were given an opportunity to object. The parties were also allowed to ask follow-up questions to the witness. The Supreme Court found no error in this procedure. After defendant's arrest, defendant was interviewed by the police. After the detective and the Spanish-speaking officer confirmed that defendant wanted a lawyer, they asked defendant some routine booking questions. But during that time, defendant stated that defendant felt sad for what defendant did, but that defendant did it. Defendant claimed that this somewhat incriminating statement was inadmissible because it came after he invoked his right to counsel. The Supreme Court disagreed, finding that the incriminating statement was volunteered rather than elicited by interrogation. The Court noted that when defendant unequivocally invoked the right to counsel, the police had an obligation to stop interrogating defendant, but they were not required to stop listening to what defendant chose to say. Therefore, the Court held the statement was properly admitted at trial. Judgment affirmed.

E. Judicial Administration

1. COLEMAN v. STATE, MALLORY v. STATE, No. S17A0818, No. S17A0819, 2017 Ga. LEXIS 625 (2017)

Defendants were tried jointly and convicted of malice murder. Both appealed, contending that the trial court's questioning of the State's forensic pathologist constituted an erroneous comment on the evidence. In this case, the trial court asked the State's expert witness a series of questions about the evidence presented; however, neither defendant objected to the questioning. It has been found that a trial court has discretion to "propound questions to a witness to develop the truth of the case ... [or] clarify testimony... to enforce its duty to ensure a fair trial to both sides." *Curry v. State*, 283 Ga. 99, 102 (2008). A review of the transcript of the witness' testimony revealed that the trial court did not express or intimate any opinion as to the evidence or the guilt of either defendant. It was found that the line of questioning was objective and did not press upon the witness any particular answer. Therefore, the Supreme Court found that the trial court acted within its discretion. Judgment affirmed.

F. Jury Instructions

1. COOPER v. STATE, No. A17A0010, 342 Ga. App. 351 (2017)

Following the denial of his motion for a new trial, defendant appealed his conviction for armed robbery, aggravated assault and possession of a firearm or knife during the commission of a felony. Defendant contended that the trial court's charge on inference of guilt based on recent possession of stolen property violated his privilege against self-incrimination because it required him to explain his possession of the property, and thus dispel an inference of guilt. The court disagreed, concluding that the jury charge did not reduce the State's burden of proving guilt. Defendant also argued that the charge was an improper comment on his guilt by the trial judge in violation of O.C.G.A. § 17-8-57. The Court held that it was not improper because the trial court's comments did not constitute

a comment before the jury on a disputed issue of fact or intimate an opinion about defendant's guilt. Rather, the comments merely instructed the jury on the permissible inference of possession.

2. REID v. STATE, No. A17A0481, 341 Ga. App. 604 (2017)

Following a jury trial, defendant was convicted of rape, aggravated sodomy, kidnapping, false imprisonment, aggravated assault, and possession of a firearm during the commission of a felony. Defendant appealed, arguing that the trial court improperly admitted bad character evidence. Specifically, that an officer's reference to him as a "violent felon" was false, irrelevant, and prejudicial. The court disagreed. Evidence presented prior to the officer's testimony showed that defendant had in fact committed several violent crimes against the victim, and, the same officer testified that his primary role is apprehending people that are wanted for violent crimes. Further, there was no evidence that defendant had been previously convicted of other violent crimes. As a result, the jury could have reasonably inferred that "violent felons" referred to defendant's instant crimes, rendering the reference to "violent felons" not false, irrelevant or unfairly prejudicial. Further, defendant argued that a witness for the State improperly commented on his right to remain silent. However, the arresting officer's statement indicating that defendant did not speak to him was not prejudicial as it was made during a narrative describing the circumstances of the arrest, the comment did not point at the substance of defendant's defense, and the comment did not speak to defendant's guilt or innocence. Additionally, defendant argued that the trial court violated former O.C.G.A. § 17-8-57 when it invited a hearsay objection to defendant's testimony about what the witnesses said to the defendant and to each other. The court found no error, however, as the trial judge did not express an opinion on defendant's guilt, or favor the State. Finally, the defendant argued that the trial court erred by failing to include a coercion charge in the jury instruction, but the court disagreed as there was no evidence to show that a risk of immediate violence forced the defendant to commit the offenses. The Court of Appeals affirmed defendant's conviction.

3. McMURTRY v. STATE, No. A16A1142, 338 Ga. App. 622 (2016)

Defendant was convicted of one count of sexual battery as a lesser included offense to child molestation and two counts of child molestation. The convictions resulted from his actions toward a ten-year-old girl. Defendant appealed from the denial of his motion for new trial, arguing that the trial court erred in refusing to instruct the jury on simple battery as a lesser included offense to child molestation and in admitting the victim's prior out-of-court statements. The Court of Appeals held that the trial court did not err in failing to instruct the jury on the lesser included offense of simple battery for two reasons: (1) the defendant did not submit a written request to charge on simple battery; and (2) the evidence presented established all the elements of the offense of child molestation but did not raise the lesser offense. The Court of Appeals further held that the trial court did not err in admitting the testimony of the victim's mother and a police officer regarding the victim's prior out-of-court statements to them about his inappropriate sexual contact with her. The statements were properly admitted under O.C.G.A. § 24-8-820 because the State provided the statutorily required notice of intent, the victim was under the age of

16, the victim testified at trial about the sexual abuse, and both her mother and the police officer were available for cross-examination about the out-of-court statements.

4. ORENGO v. STATE, No. A16A1171, 339 Ga. App. 117 (2016)

Following a 2009 jury trial, defendant was convicted of rape, false imprisonment, sexual battery, and battery. The trial court granted his subsequent motion for new trial solely as to the rape conviction, and in 2012, he was retried for rape and convicted. Defendant appealed the denial of his motions for new trial as to all four charges. With respect to the 2009 trial, defendant argued that the trial court erred by failing to *sua sponte* charge the jury on consent and by admitting testimony from an expert witness who was not timely disclosed by the State and whose testimony constituted improper bolstering. The Court of Appeals held that the trial court's failure to specifically charge the jury on consent was not reversible error when the case as a whole had been presented to the jury, and when the effect of a consent defense is simply to traverse the State's proof. The Court of Appeals found defendant had waived his arguments as to the inadmissibility of the State's expert testimony because he failed to object to this testimony with sufficient specificity at trial. With respect to the 2012 trial, defendant argued that the trial court erred by admitting improper bolstering testimony by the same expert witness for the State and by admitting testimony regarding the victim's sexual orientation and activity in violation of Georgia's Rape Shield Statute. The at-issue expert for the State testified regarding sexual assault victims' demeanor after an assault and possible disclosure delays. Defendant argued that, because the expert never observed the victim in this case, her testimony served only to improperly bolster the State's case. The Court of Appeals disagreed. Defendant argued at trial that the victim's behavior after the alleged incident—including the delay in reporting it—supported the conclusion that she fabricated the allegations. Based on this argument, the Court of Appeals found no abuse of discretion in admitting the expert's testimony. Likewise, the Court of Appeals found that the trial court did not abuse its discretion in admitting the victim's testimony that she had not had sex with anyone within a few days of the assault, because the Rape Shield Statute cannot be invoked by a defendant to prevent a victim from offering otherwise relevant evidence.

5. GERBERT v. STATE, No. A16A0868, 339 Ga. App. 164 (2016)

A jury convicted defendant of aggravated sodomy and sexual exploitation of children based on his possession of child pornography, including some sexually explicit photos he took himself. Defendant appealed, arguing that the trial court erred in admitting evidence that, in 1999, defendant's ex-wife discovered him crouched in the corner of her younger sister's bedroom, which he described as a "voyeuristic activity." The ex-wife also testified that the defendant's relationship with her younger sister was weird and embarrassing because they would often "spoon" on the couch when the younger sister was 11 years old. The trial court found this evidence relevant to show defendant's intent. The Court of Appeals affirmed, explaining that defendant's intent was at issue based on his plea of not guilty and his defense that the photos were on his computer because the victim's boyfriend had taken the photos and placed them on the laptop. The other acts evidence made it more probable that defendant took the pictures with the intent to arouse his sexual desires. Further, the Court of Appeals held that the probative value of the other acts evidence outweighed any undue prejudice, because it was relevant to disprove defendant's

claim that he did not take the photos and because any risk of unfair prejudice was mitigated by the trial court's limiting instruction that the jury could consider the other acts evidence only to the extent the evidence was relevant to show the defendant's knowledge and intent in the charged offenses.

6. WALKER v. STATE, No. S17A0385, 301 Ga. 482 (2017)

Defendant was convicted of malice murder and other crimes. He appealed contending that the trial court committed plain error in failing to charge the jury on voluntary manslaughter and defense of habitation and that the trial court abused its discretion in excluding testimony at trial. The facts of this case show that during the charge conference after the close of the evidence, defendant explicitly withdrew his request for a voluntary manslaughter instruction. Thus defendant affirmatively waived any right to a voluntary manslaughter charge. Furthermore, defendant argued that the trial court abused its discretion in excluding testimony by his father on the ground of hearsay. The defense counsel relied on O.C.G.A § 24-8-801(d)(2)(A) to admit the hearsay statement. This provision recognizes a blanket exclusion from the hearsay rule only for a statement by a party-opponent, not for a party's out-of-court statements offered by the party himself. The Supreme Court found that defendant lacked proof that the out-of-court statements would have been admissible at trial since they were not considered party-opponent statements. Therefore no error was found in the trial court's decision. Judgment affirmed.

7. SMITH v. STATE, No. S17A0183, 301 Ga. 79 (2017)

After a jury trial, defendant was found guilty of malice murder, felony murder, and other offenses. He appealed contending that the trial court committed plain error in its jury instruction on witness credibility and the trial court erred in its jury instruction on self-defense. In order for plain error to be satisfied, the error must: (1) be some sort of deviation from the law, (2) be clear and/or obvious, and (3) have affected the defendant's substantial rights. If all three of those prongs are found, it is in the court's discretion to remedy the error. Defendant argued that the charge of the witness credibility was in error because it included the "intelligence" of the witnesses as a factor that jurors were allowed to consider when evaluating credibility. The Supreme Court stated that courts have previously approved of jury charges where intelligence was given as a factor to be considered in regard to witness credibility. Therefore, no reversible error could be found. Defendant also argued that while the jury charge for self-defense was an accurate statement of the law, the charge was inappropriate because there was no evidence that defendant shot the victim out of a sense of revenge. However, the evidence at trial showed that defendant and the victim were arguing about a prior incident where the victim pushed defendant to the ground. This was found to be sufficient evidence to support the theory that defendant may have shot victim out of revenge. The Supreme Court found no error by the trial court. Judgment affirmed on these matters.

8. SHAW v. STATE, No. S17A0352, 301 Ga. 14 (2017)

Defendant was convicted of malice murder, attempt to commit murder, aggravated assault, and possession of a firearm. He contended that the trial court erred in excluding evidence of a witness' alleged gang affiliation and in not instructing the jury on voluntary

manslaughter as a lesser included offense. Regarding the exclusion of evidence, defendant argued that the trial court violated his constitutional right to confront the witnesses against him by refusing to allow him to cross-examine witnesses about the attempted murder victim's gang affiliation. "[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fenster*, 474 U.S. 15, 20 (1985). In this case, the trial court ruled that defendant failed to show that the victim's gang affiliation was related to the shooting death of another victim or claims of witness bias. The Supreme Court found no abuse of discretion by the trial court, finding that the evidence of the victim's gang affiliation would be highly prejudicial. Regarding the jury charge, a trial court is required to grant the defendant's request for a charge on the lesser included offense of voluntary manslaughter only if there is evidence to support the charge. *Johnson v. State*, 297 Ga. 839, 842 (2015). Voluntary manslaughter is found when there is evidence that the defendant acted solely as the result of sudden passion. However, in this case, there was no evidence to support that defendant acted out of sudden passion. Therefore, the Supreme Court affirmed the trial court's decision. Judgment affirmed.

9. ATKINSON v. STATE, No. S17A0611, 301 Ga. 518 (2017)

After a jury trial, defendant was found guilty of malice murder, aggravated assault, attempted armed robbery, possession of a firearm by a convicted felon, and various other offenses. He appealed the conviction arguing that the trial court erred by giving a "sequential charge" on armed robbery, failing to inform the jury that the State had to prove every material allegation in the indictment, and instructing the jury with respect to its duty to believe the most believable witness. These issues were subject to review for plain error on appeal. Plain error is satisfied when: (1) there is some sort of deviation from a legal rule, (2) the error is clear or obvious, (3) the appellants substantial rights were violated by the error, and (4) once the first three prongs are satisfied, it is within the court's discretion to remedy the error. In this case, defendant failed to show any error in the trial court's instruction to the jury. The Supreme Court found the instruction to be appropriate. Judgment affirmed for these matters.

10. JONES v. STATE, No. A16A2014, 340 Ga. App. 568 (2017)

Following a jury trial, defendant was convicted of the 2003 rape and child molestation of A. M., who was then ten years old. Defendant appealed, *inter alia*, for the following three reasons. First, defendant argued that the trial court erred in permitting the State to introduce evidence of the victim's earlier statements that were consistent with the victim's testimony at trial. The Court of Appeals held such evidence was permissible to refute defendant's allegation of recent fabrication. Second, defendant argued that the trial court improperly excluded evidence of the victim's older sister's sexual conduct. The Court of Appeals held that such evidence was properly excluded under the Rape Shield Statute, former O.C.G.A. § 24-2-3, because the evidence related to the past sexual behavior of the older sister and did not fall within the statutory exceptions, as the past sexual behavior of the older sister having sex with boys for money did not involve the participation of defendant and did not support an inference that defendant reasonably believed that the older sister consented to defendant's alleged sexual activities with the older sister. Third, defendant argued that the trial court improperly excluded defendant's requested charge

on credibility relating to a delay in reporting a crime. The Court of Appeals held that the trial court's exclusion was not an obvious error that likely affected the outcome of the trial and that seriously affected the fairness, integrity or public reputation of the judicial proceedings. The Court of Appeals affirmed defendant's conviction.

11. AGUILAR v. STATE, No. A16A1893, 340 Ga. App. 522 (2017)

Following a jury trial, defendant was convicted of one count of cruelty to a child in the first degree and two counts of sexual battery as lesser included charges of aggravated child molestation. Defendant appealed, *inter alia*, for the following three reasons. First, defendant argued that the trial court wholly failed to charge the essential element of the crime of sexual battery -- lack of consent to the touching. On this ground, the Court of Appeals reversed defendant's conviction as to the two counts of sexual battery. Second, defendant argued that the trial court improperly prohibited defendant from presenting good character evidence in defense of the maliciousness element of the charge of cruelty to a child. The Court of Appeals affirmed the trial court on this ground because defendant failed to proffer specific evidence defendant was prevented from presenting to the jury or how any testimony as to general good parenting would have countered the underlying allegations of sexual abuse of the victim that were the predicate acts supporting that count. Third, defendant argued that the trial court erred by permitting the State to present cumulative bolstering evidence from expert witnesses. The Court of Appeals held that this argument lacked merit as defendant conceded that such testimony was permitted, defendant failed to identify any specific expert testimony that should have been excluded, defendant presented no citation to authority supporting a claim that the sheer number of experts results in error, and the testimony was not cumulative because the various experts were called to testify as to the different roles they played in diagnosing or treating the victim. The Court of Appeals affirmed defendant's conviction as to the count of cruelty to a child in the first degree but reversed defendant's conviction as to the two counts of sexual battery.

12. MORRIS v. STATE, No. A16A1960, 340 Ga. App. 295 (2017)

Following a jury trial, defendant was convicted of criminal attempt to commit armed robbery, aggravated assault, aggravated battery, three counts of violation of the Georgia Street Gang Terrorism and Prevention Act, and possession of a firearm during the commission of a felony. Defendant appealed, *inter alia*, for the following three reasons. First, defendant argued that the trial court abused its discretion by admitting other acts evidence pursuant to O.C.G.A. § 24-4-404(b), specifically defendant's prior theft conviction in order to establish motive and intent. The Court of Appeals held that the trial court did not err, citing the Supreme Court for the proposition that exclusion under Rule 403's balancing test is an extraordinary remedy which should be used only sparingly, and observing that even if the trial court committed error, such error was harmless. Second, defendant argued the trial court committed plain error in issuing limiting instructions to the jury. The Court of Appeals held that the trial court did not commit plain error because each of the three complained-of instructions was immediately preceded by testimony from witnesses as to whom the trial court gave explicit, clear limiting instructions. Third, defendant argued that his convictions for criminal attempt to commit armed robbery, aggravated assault, and aggravated battery should have merged for purposes of

sentencing. The Court of Appeals agreed, stating defendant's conviction for aggravated assault should have merged with his conviction for criminal attempt to commit armed robbery because those acts were predicated upon the same act or transaction, i.e., defendant's use of a handgun to overpower and intimidate the victim for the purpose of attempting to rob the victim of his belongings. The Court of Appeals affirmed in part, vacated in part, and remanded the case to the trial court for resentencing.

13. *ISSA v. STATE*, No. A16A1495, 340 Ga. App. 327 (2017)

Following a jury trial, defendant was convicted of one count of conspiracy to commit armed robbery, one count of burglary, four counts of aggravated assault, three counts of attempt to commit armed robbery, three counts of false imprisonment, and one count of possession of a firearm during the commission of a felony. Defendant appealed, *inter alia*, for the following three reasons. First, defendant argued that the trial court's aggravated assault instruction constituted plain error. The Court of Appeals held that the aggravated assault instruction was proper as the transcript clearly showed that the court instructed the jury as to both forms of simple assault in its aggravated-assault instruction. Second, defendant contests the trial court erred in permitting the State to ask leading questions of a witness while on direct examination. The Court of Appeals held the trial court did not abuse its discretion because the witness testified that the witness did not want to testify and was afraid of the defendants, thus demonstrating both reluctance and nervousness. Third, defendant argues that the trial court failed to apply the rule of lenity when sentencing defendant. The Court of Appeals upheld the trial court's ruling and stated there was no ambiguity in the application of O.C.G.A. § 17-10-7(a) to the sentencing provision for attempted armed robbery, which under O.C.G.A. § 16-4-6(a), carried a maximum sentence of 30 years, given the fact that a completed armed robbery carries a maximum sentence of life imprisonment. The Court of Appeals affirmed defendant's conviction.

14. *LASTER v. STATE*, No. A16A1801, 340 Ga. App. 96 (2017)

Following a jury trial, defendant was convicted of child molestation and sexual battery against a child under the age of 16. Defendant appealed on the following two grounds. First, defendant contended that the trial court erroneously overruled his objection to the hearsay testimony of several witnesses who took the witness stand before the child victim and who relayed statements made to them by the child victim. The Court of Appeals held that the trial court did not err and that under the former Child Hearsay Statute, O.C.G.A. § 24-3-16 (2012), the order of witnesses is irrelevant to the question of the admissibility of child hearsay evidence. Second, defendant contended that the trial court erroneously instructed the jury that, as to the offense of sexual battery, a child under the age of 16 lacks the legal capacity to consent to sexual conduct. The Court of Appeals agreed with defendant's argument, citing the Supreme Court's holding that the crime of sexual battery "require[s] actual proof of the victim's lack of consent, regardless of the victim's age." *Watson v. State*, 297 Ga. 718, 720 (2015). The Court of Appeals reverse

15. MOSLEY v. STATE, No. A16A1096, 339 Ga. App. 480 (2016)

Following a jury trial, defendant was convicted of rape and of two counts of aggravated sodomy. Defendant appealed, inter alia, on the basis that the trial court committed reversible error because it had unduly coercive communications with the jury. Defendant argued that statements by the trial court such as the following constituted coercive communications: “And you don't think if I gave you a further charge on the law called an *Allen* charge it would make a difference? Basically *an Allen charge encourages you strongly to reach a unanimous verdict.*” (Emphasis in original). The Court of Appeals held that this statement, as well as similar ones, were proper and consistent with current law that encourages unanimous verdicts. The Court of Appeals affirmed defendant’s conviction.

16. WASHINGTON v. STATE, No. A16A1430, 339 Ga. App. 715 (2016)

Following a jury trial, defendant was convicted of possession of a firearm during the commission of a felony. Defendant appealed, inter alia, on the following two grounds. First, defendant argued that the trial court erred when it prevented defendant from calling two jurors as witnesses and admitting their affidavits into evidence. The Court of Appeals held that the trial court did not err because any error was rendered moot when the trial court cured any alleged error on remand by admitting both affidavit and oral testimony of the jurors during the remand hearing. Second, defendant argued that the trial court failed to inspect the verdict form and resolve the inherent ambiguity. The Court of Appeals agreed and reversed the trial court’s denial of defendant’s plea in bar and remanded the case for a new trial on voluntary manslaughter.

17. KING v. STATE, No. S16A1010, 300 Ga. 180 (2016)

Defendant was charged for a violation of Clayton County Code of Ordinances Section 62-202 (a), which makes it unlawful for the owner or occupant of real property "to utilize such property for the outside storage of . . . rubbish, trash, garbage or similar items, without a special permit therefore" Defendant demanded a jury trial. The county solicitor issued a formal accusation charging defendant with violation of the county ordinance. Defendant was convicted and sentenced. Defendant appealed, arguing that the trial court erred in denying his request to charge the jury on the solicitor's duty to file an affidavit in support of the accusation filed against him pursuant to O.C.G.A. § 17-7-71(a). The Supreme Court noted that the statute clearly states that an affidavit to support the accusation is required only where the accusation is to be used as the basis for the issuance of an arrest warrant. Since there was no evidence that a warrant was issued for defendant’s arrest in this case, the Court held that the requested instruction was not applicable or required. Judgment affirmed.

18. WRIGHT v. STATE, No. S16A1035, 300 Ga. 185 (2016)

Defendant was convicted of malice murder and other crimes. Defendant appealed, arguing that (1) the trial counsel failed to provide effective assistance because the counsel failed to object to the State’s cross-examination of defendant about his pre-arrest silence, (2) the trial court erred in prohibiting him from introducing evidence of specific violent

acts by the victim against third parties, and (3) the trial court erred in denying his request to charge the jury on the lesser included offense of voluntary manslaughter. First, the Supreme Court noted that although questions about defendant's failure to contact police following a confrontation and shooting ordinarily would constitute improper comments by the State on defendant's pre-arrest silence, the prosecution had every right to pursue a thorough and sifting examination after defense counsel opened the door to that line of questioning on direct examination. Thus, the Court held that the counsel's failure to make a meritless objection could not constitute ineffective assistance. Second, the Supreme Court recognized that under Georgia's former Evidence Code, a defendant claiming self-defense justification could introduce evidence of specific violent acts by the victim against third parties. However, the defendant was required to make a prima facie showing of justification—that the victim was the aggressor, the victim assaulted the defendant, and the defendant was honestly trying to defend himself. The Court found that testimony was not sufficient to show that the victim assaulted defendant, especially as there was no evidence presented at trial that the victim was armed at the time of the confrontation, and thus, the trial court did not err when it prohibited defendant from introducing evidence of specific acts of violence committed by the victim against third parties. Finally, to support a charge on voluntary manslaughter, there must be evidence that the accused acted solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. Because there was no evidence presented that defendant shot the victim due to an irresistible passion, there was no evidence to support a voluntary manslaughter charge and no error in the trial court's refusal to give such a charge. Judgment affirmed.

19. NGUMEZI v. STATE, No. S17A0417, 300 Ga. 764 (2017)

Defendant was convicted of murder, armed robbery, and other related charges. Defendant testified that, during the robbery, the victim reached under the seat for a pistol, and that defendant shot the victim out of fear for defendant's life, and for defendant's protection. Defendant appealed, arguing that the trial court erred by denying his request for a charge on the lesser included offense of voluntary manslaughter in addition to an instruction on self-defense. The Supreme Court rejected the argument because, even though jury charges on self-defense and voluntary manslaughter both require provocation, defendant's testimony did not "provide even slight evidence" that defendant shot the victim due to a sudden, irresistible passion. Affirmed.

20. UPSHAW v. STATE, No. S16A1524, 300 Ga. 442 (2017)

Defendant was tried and convicted of murder for a crime he committed more than a decade ago. Defendant appealed, arguing that the trial court erred when it (1) prevented defendant from interrogating a prosecution witness about the specific facts of a prior offer, (2) refused to grant a mistrial after another prosecution witness refused to be cross-examined, and (3) excepted the lead detective from the rule of sequestration. The Supreme Court has held that when a defendant seeks to impeach a witness with a prior conviction, the specific facts underlying the crime are irrelevant unless the witness attempts to rehabilitate himself by explaining the circumstances of his conviction. Thus, the trial court did not err when it prevented defendant from interrogating the prosecution witness about the specific facts of a prior offense because the witness explained that the

witness was on parole for aggravated assault and made no effort at rehabilitation. Further, when another prosecution witness refused to be cross-examined, the trial court provided a curative instruction for the jury to disregard any testimony about a statement defendant made to the witness instead of granting a mistrial. The Court found that the trial court acted within its discretion. Finally, the Court held that the trial court did not abuse its discretion when it permitted the lead detective to remain in the courtroom to assist the prosecution with the orderly presentation of evidence, because the presence of the lead detective was especially important because of the large number of witnesses that the detective had personally interviewed and the length of time between the murder (in 1996) and the trial (in 2012). Accordingly, the Supreme Court affirmed defendant's malice murder conviction.

21. ELLIS v. STATE, No. S16A1246, 300 Ga. 371 (2017)

Defendant, former DeKalb County Chief Executive Officer, was found guilty by a jury of attempt to commit theft by extortion and perjury. The charge for attempted extortion stemmed from defendant's alleged efforts to procure a \$2,500 political campaign contribution from a DeKalb County vendor by threatening to cut the vendor's contract with the County if the vendor did not contribute to defendant's campaign. The perjury charges stemmed from defendant allegedly lying to a special purpose grand jury about his role in cutting the contract of the DeKalb County vendor. Defendant appealed, arguing that the trial court erred in (1) failing include in the jury charge certain language submitted by the defense, (2) allowing a special purpose grand juror to testify at trial in connection with the State's efforts to prove the perjury charges, and (3) prohibiting him from presenting any evidence of his interactions with other vendors who were not named in the indictment and from whom he attempted to solicit campaign contributions. The Supreme Court first held that the trial court's failure to charge the exact language requested was not a ground for reversal where the charge given substantially covered the principles of the requested charge. However, the Supreme Court did find error and harm from the trial court allowing a special purpose grand juror to testify at trial. The State introduced the testimony of the special purpose grand juror at trial in an effort to prove that defendant's false statements to the special purpose grand jury were material to the grand jury's investigation. However, the Court noted that whether a false statement was material is an issue for the jury. Instead of relying on such appropriate evidence to allow the jury to make an independent decision on the issue of materiality, the State offered evidence of an individual special purpose grand juror's subjective belief about the materiality of defendant's statements. The Court found that such testimony potentially caused significant prejudice to defendant, and thus reversed defendant's conviction for perjury. Further, the Court held that the trial court erred by excluding the evidence about defendant's interactions with other vendors because the State opened the door to the admission of the evidence. The Court noted that such error was not harmless because the Supreme Court could not say that it was highly probable that the exclusion of this evidence did not contribute to the verdict. Accordingly, the Supreme Court reversed defendant's conviction for attempt to commit theft by extortion as well.

G. Sentencing

1. MORRIS v. STATE, No. A16A1960, 340 Ga. App. 295 (2017)

Following a jury trial, defendant was convicted of criminal attempt to commit armed robbery, aggravated assault, aggravated battery, three counts of violation of the Georgia Street Gang Terrorism and Prevention Act, and possession of a firearm during the commission of a felony. Defendant appealed, *inter alia*, for the following three reasons. First, defendant argued that the trial court abused its discretion by admitting other acts evidence pursuant to O.C.G.A. § 24-4-404(b), specifically defendant's prior theft conviction in order to establish motive and intent. The Court of Appeals held that the trial court did not err, citing the Supreme Court for the proposition that exclusion under Rule 403's balancing test is an extraordinary remedy which should be used only sparingly, and observing that even if the trial court committed error, such error was harmless. Second, defendant argued the trial court committed plain error in issuing limiting instructions to the jury. The Court of Appeals held that the trial court did not commit plain error because each of the three complained-of instructions was immediately preceded by testimony from witnesses as to whom the trial court gave explicit, clear limiting instructions. Third, defendant argued that his convictions for criminal attempt to commit armed robbery, aggravated assault, and aggravated battery should have merged for purposes of sentencing. The Court of Appeals agreed, stating defendant's conviction for aggravated assault should have merged with his conviction for criminal attempt to commit armed robbery because those acts were predicated upon the same act or transaction, i.e., defendant's use of a handgun to overpower and intimidate the victim for the purpose of attempting to rob the victim of his belongings. The Court of Appeals affirmed in part, vacated in part, and remanded the case to the trial court for resentencing.

2. ISSA v. STATE, No. A16A1495, 340 Ga. App. 327 (2017)

Following a jury trial, defendant was convicted of one count of conspiracy to commit armed robbery, one count of burglary, four counts of aggravated assault, three counts of attempt to commit armed robbery, three counts of false imprisonment, and one count of possession of a firearm during the commission of a felony. Defendant appealed, *inter alia*, for the following three reasons. First, defendant argued that the trial court's aggravated assault instruction constituted plain error. The Court of Appeals held that the aggravated assault instruction was proper as the transcript clearly showed that the court instructed the jury as to both forms of simple assault in its aggravated-assault instruction. Second, defendant contests the trial court erred in permitting the State to ask leading questions of a witness while on direct examination. The Court of Appeals held the trial court did not abuse its discretion because the witness testified that the witness did not want to testify and was afraid of the defendants, thus demonstrating both reluctance and nervousness. Third, defendant argues that the trial court failed to apply the rule of lenity when sentencing defendant. The Court of Appeals upheld the trial court's ruling and stated there was no ambiguity in the application of O.C.G.A. § 17-10-7(a) to the sentencing provision for attempted armed robbery, which under O.C.G.A. § 16-4-6(a), carried a maximum sentence of 30 years, given the fact that a completed armed robbery carries a maximum sentence of life imprisonment. The Court of Appeals affirmed defendant's conviction.

3. WARD v. STATE, No. A16A1339, 339 Ga. App. 621 (2016)

Following a jury trial, defendant was convicted of criminal attempt to commit armed robbery, two counts of burglary, possession of a firearm during the commission of a crime, possession of a tool for commission of a crime, possession of a controlled substance, and possession of a firearm by a convicted felon. Defendant appealed, *inter alia*, on the following two grounds. First, defendant argued that the trial court abused its discretion in permitting the jury to hear evidence of defendant's rap lyrics in which he references violence toward witnesses. The Court of Appeals held the trial court did not abuse its discretion in admitting such evidence as it was relevant to the issue of witness intimidation. Second, defendant contended that the attempted armed robbery and burglary offenses should have been merged for purposes of sentencing. The Court of Appeals held that the two burglary counts, which were based on a single illegal entry into a building, should have been merged. However, the attempted armed robbery and burglary offenses were not based on the same conduct and thus properly were not merged for sentencing. Accordingly, the Court of Appeals affirmed in part, vacated in part, and remanded for resentencing on the burglary counts.

H. Jurors

1. DOWDA v. STATE, No. A17A0531, 341 Ga. App. 295 (2017)

Following a jury trial, defendant was convicted of criminal trespass. Defendant appealed, arguing that the trial court erred in admitting hearsay. Specifically, the officer's testimony regarding the demeanor of defendant's parents. The court disagreed, finding that the admission of any hearsay was harmless. Indeed, it was highly probable that the testimony did not contribute to the jury's verdict in light of the eyewitness testimony and other cumulative evidence presented against the defendant. Defendant also argued that the trial court erred in failing to allow defense counsel to read and respond to a note the jury sent out during its deliberations that showed that the jury was confused and had not reached a unanimous verdict. The court agreed, finding that the trial court's failure to inform counsel of the contents of a jury note and to seek input for the court's response violated defendant's right to counsel. The Court of Appeals reversed the conviction.

2. ANDERSON v. STATE, No. S17A0894, 2017 Ga. LEXIS 768 (2017)

Defendant was found guilty of felony murder and other crimes, he appealed this conviction asserting that the trial court erred in denying his motion for new trial because one of the jurors stated he knew the victim during *voire dire*. Defendant argued that the juror could not be impartial because the juror was the embalmer of the victim's body and the juror knew the family of the victim. As the embalmer, defendant argued that the juror was biased because the juror saw extrinsic physical evidence on the body that other jurors did not have. However, the juror testified that he based his decision solely on the evidence presented at trial. The Supreme Court found that the defendant failed to show that the juror was biased, therefore failing to show that he was entitled to a new trial for juror misconduct. Judgment affirmed.

3. BENTON v. STATE, No. S17A0355, 301 Ga. 100 (2017)

After a jury trial, defendant was found guilty of malice murder, possession of a firearm by a convicted felon, and various other offenses. First, defendant claimed that the trial court erred when it allowed jurors to submit questions to be posed to the witnesses. It has been established that “jurors in Georgia courts may not ask questions of witnesses directly, a trial court may receive written questions from the jury and ask those questions which the court finds proper.” *Allen v. State*, 286 Ga. 392, 396 (3) (2010). In this case, the written questions were reviewed by the trial court and found proper before they were posed to the court. Therefore, no error was found. Second, defendant argued that by admitting the autopsy photographs into evidence, the trial court committed plain error. Plain error is found where an error is a deviation from the law, is clear and obvious, and affects defendant’s substantial rights. However, it is within the court’s discretion to correct this error if the other three prongs are satisfied. The Supreme Court first evaluated whether the photographs were relevant to the case. Relevancy is found where its probative value is not outweighed by unfair prejudice. O.C.G.A § 24-4-403. The Supreme Court found each of the photographs to be relevant to the case, therefore no error was found in the trial court’s decision. Judgment affirmed for these matters.

4. HOLMES v STATE, No. S17A0077, 301 Ga. 143 (2017)

Defendant appealed his convictions from a multi-victim crime spree. Appellant asserted that the trial court erred when it removed a juror for failing to follow its instructions. The trial court instructed the jurors not to discuss the case amongst themselves prior to deliberations. However, a bailiff overheard one of the jurors making substantive comments about the case in the jury room. The bailiff brought the issue to the trial judges. Since the juror seemed to have formed a fixed opinion prior to the close of evidence, the trial court decided to dismiss the juror for failing to follow its instructions, over appellant’s objection. The Supreme Court found that the trial court did not abuse its discretion in removing the juror. Judgment affirmed.

5. WASHINGTON v. STATE, No. A16A1430, 339 Ga. App. 715 (2016)

Following a jury trial, defendant was convicted of possession of a firearm during the commission of a felony. Defendant appealed, *inter alia*, on the following two grounds. First, defendant argued that the trial court erred when it prevented defendant from calling two jurors as witnesses and admitting their affidavits into evidence. The Court of Appeals held that the trial court did not err because any error was rendered moot when the trial court cured any alleged error on remand by admitting both affidavit and oral testimony of the jurors during the remand hearing. Second, defendant argued that the trial court failed to inspect the verdict form and resolve the inherent ambiguity. The Court of Appeals agreed and reversed the trial court’s denial of defendant’s plea in bar and remanded the case for a new trial on voluntary manslaughter.

6. GILMER v. STATE, No. A16A0919, 339 Ga. App. 593 (2016)

Following a jury trial, defendant was convicted of child molestation and aggravated child molestation against a then 11-year-old victim. Defendant appealed, *inter alia*, on the basis

that the trial court improperly removed a juror after the close of evidence. The juror had acknowledged that he recognized defendant's mother from church and had discussed the matter with the other jurors. The Court of Appeals held that a trial court could remove a juror at any time if good cause is shown. *See Moon v. State*, 288 Ga. 508, 512 (2011). Here, the trial court removed the juror following its investigation into the juror's familiarity with the defense witness and his statements made to and in the presence of the other jurors, thus having formed sufficient factual and legal support for its decision to remove the juror. The Court of Appeals affirmed defendant's conviction.

I. Verdict

1. WASHINGTON v. STATE, No. A16A1430, 339 Ga. App. 715 (2016)

Following a jury trial, defendant was convicted of possession of a firearm during the commission of a felony. Defendant appealed, inter alia, on the following two grounds. First, defendant argued that the trial court erred when it prevented defendant from calling two jurors as witnesses and admitting their affidavits into evidence. The Court of Appeals held that the trial court did not err because any error was rendered moot when the trial court cured any alleged error on remand by admitting both affidavit and oral testimony of the jurors during the remand hearing. Second, defendant argued that the trial court failed to inspect the verdict form and resolve the inherent ambiguity. The Court of Appeals agreed and reversed the trial court's denial of defendant's plea in bar and remanded the case for a new trial on voluntary manslaughter.

J. Grand Jury Proceedings

1. DIMAURO v. STATE, No. A17A0180, 341 Ga. App. 710 (2017)

Following a jury trial, defendant, a former police officer, was convicted of aggravated assault, aggravated battery, and two counts of violating his oath of office. Defendant appealed the convictions, arguing that the trial court erred in admitting evidence of a similar transaction under O.C.G.A. § 24-4-404. Specifically, an assault against another detainee. The court disagreed as such evidence was relevant to show that defendant committed a similar act against the victim with a similar intent. Indeed, the probative value of the assault video was not substantially outweighed by any undue prejudice. Defendant also argued that the trial court erred in admitting evidence that defendant and other police officers harassed a witness. The court disagreed, finding this evidence relevant as a defendant's attempt to intimidate a witness can serve as circumstantial evidence of guilt. Further, defendant argued that the trial court improperly admitted opinion evidence from various police officials. The court disagreed. Officers' testimony that defendant had been administered an oath of office and that defendant's use of force violated police policy was relevant to whether defendant violated the oath. Defendant also argued that the trial court erred in admitting a witness' prior consistent statements. The trial court did not abuse its discretion as defendant's cross-examination of the witness strongly implied that the witness's direct testimony was a recent fabrication and the prior consistent statement was made to an investigator before the allegedly fabricated trial testimony. Additionally, defendant argued the trial court erred by excluding impeachment evidence regarding the victim. Specifically, one of the victim's prior

burglary convictions. The court found no reversible error as the conviction was more than ten years old, and, the probative value of the conviction did not outweigh its prejudicial impact. Finally, defendant argued the trial court erred by failing to dismiss the indictment on the ground that he was prohibited from presenting evidence to the grand jury. The court disagreed. While former O.C.G.A. § 45-11-4(g) entitles a police officer charged with a crime occurring in the course of his duties to notice of grand jury proceedings and an opportunity to make a sworn statement, the phrase “sworn statement” does not contemplate presenting documentary evidence. The Court of Appeals affirmed defendant’s conviction.

VIII. PRIVILEGES

A. Privilege Against Self-Incrimination

1. COOPER v. STATE, No. A17A0010, 342 Ga. App. 351 (2017)

Following the denial of his motion for a new trial, defendant appealed his conviction for armed robbery, aggravated assault and possession of a firearm or knife during the commission of a felony. Defendant contended that the trial court’s charge on inference of guilt based on recent possession of stolen property violated his privilege against self-incrimination because it required him to explain his possession of the property, and thus dispel an inference of guilt. The court disagreed, concluding that the jury charge did not reduce the State’s burden of proving guilt. Defendant also argued that the charge was an improper comment on his guilt by the trial judge in violation of O.C.G.A. § 17-8-57. The Court held that it was not improper because the trial court’s comments did not constitute a comment before the jury on a disputed issue of fact or intimate an opinion about defendant’s guilt. Rather, the comments merely instructed the jury on the permissible inference of possession.

2. BULLARD v. STATE, No. S16A0797, 299 Ga. 695 (2016)

After a jury trial, defendant was convicted for malice murder and other crimes related to the stabbing death of the victim. Defendant appealed, arguing that the State violated his right to remain silent and that the trial court erred in failing to grant his motion for a mistrial that was based on that violation. Defendant’s defense was that someone else killed the victim and planted the bloody shirt in his home along with the victim’s driver’s license. The court ruled it was not improper for the prosecutor to question the investigator regarding the failure of the defendant to mention that the red shirt was not his and that someone else put it in his home with the blood on it. This did not violate the defendant’s right to remain silent. Judgment affirmed.

IX. RAPE SHIELD STATUE

A. Generally

1. BILL v. STATE, No. A17A0790, 341 Ga. App. 340 (2017)

Following a jury trial, defendant was convicted of kidnapping, aggravated assault, aggravated sodomy, aggravated sexual battery, rape, and false imprisonment. Defendant appealed, arguing that the trial court improperly excluded evidence that the victim engaged in prostitution. Under O.C.G.A. § 24-2-3(a), the Rape Shield Statute applicable at the time of trial, evidence relating to a victim's past sexual behavior is generally not admissible in a rape trial. Past sexual behavior, however, may be admitted when the trial court finds that such behavior directly involved the accused's participation, and the evidence expected to be introduced supports an inference that the accused could have believed the witness consented. However, even if the evidence might be admissible despite the limitations of the Rape Shield Statute, the Court agreed that the evidence was irrelevant, speculative, and highly prejudicial as defendant drew no nexus between the victim's history of prostitution and the assault in this case. Further, even if some nexus had been shown, exclusion of the evidence was harmless as further testimony regarding the victim's behavior would have been cumulative. Defendant additionally argued that the trial court improperly prevented him from impeaching the victim with the prostitution-related evidence. While evidence of prior sexual behavior may be admissible to impeach a victim's trial testimony, the impeachment evidence cited by defendant related only to general allegations, which did not contradict any testimony in the record. Further, defendant argued that the State improperly called the victim as a rebuttal witness to bolster her prior testimony. The Court found no error; a trial court may allow relevant evidence during rebuttal even if such evidence tends to bolster the State's case more than to directly impeach defense evidence. Finally, defendant challenged the trial court's exclusion of evidence regarding the death of defendant's friend to explain his alcoholism. However, the Court found no error as this evidence shed no light on the assault in this case. The Court of Appeals affirmed the conviction.

2. ORENGO v. STATE, No. A16A1171, 339 Ga. App. 117 (2016)

Following a 2009 jury trial, defendant was convicted of rape, false imprisonment, sexual battery, and battery. The trial court granted his subsequent motion for new trial solely as to the rape conviction, and in 2012, he was retried for rape and convicted. Defendant appealed the denial of his motions for new trial as to all four charges. With respect to the 2009 trial, defendant argued that the trial court erred by failing to *sua sponte* charge the jury on consent and by admitting testimony from an expert witness who was not timely disclosed by the State and whose testimony constituted improper bolstering. The Court of Appeals held that the trial court's failure to specifically charge the jury on consent was not reversible error when the case as a whole had been presented to the jury, and when the effect of a consent defense is simply to traverse the State's proof. The Court of Appeals found defendant had waived his arguments as to the inadmissibility of the State's expert testimony because he failed to object to this testimony with sufficient specificity at trial. With respect to the 2012 trial, defendant argued that the trial court erred by admitting improper bolstering testimony by the same expert witness for the State and by admitting

testimony regarding the victim's sexual orientation and activity in violation of Georgia's Rape Shield Statute. The at-issue expert for the State testified regarding sexual assault victims' demeanor after an assault and possible disclosure delays. Defendant argued that, because the expert never observed the victim in this case, her testimony served only to improperly bolster the State's case. The Court of Appeals disagreed. Defendant argued at trial that the victim's behavior after the alleged incident—including the delay in reporting it—supported the conclusion that she fabricated the allegations. Based on this argument, the Court of Appeals found no abuse of discretion in admitting the expert's testimony. Likewise, the Court of Appeals found that the trial court did not abuse its discretion in admitting the victim's testimony that she had not had sex with anyone within a few days of the assault, because the Rape Shield Statute cannot be invoked by a defendant to prevent a victim from offering otherwise relevant evidence.

3. JONES v. STATE, No. A16A2014, 340 Ga. App. 568 (2017)

Following a jury trial, defendant was convicted of the 2003 rape and child molestation of A. M., who was then ten years old. Defendant appealed, *inter alia*, for the following three reasons. First, defendant argued that the trial court erred in permitting the State to introduce evidence of the victim's earlier statements that were consistent with the victim's testimony at trial. The Court of Appeals held such evidence was permissible to refute defendant's allegation of recent fabrication. Second, defendant argued that the trial court improperly excluded evidence of the victim's older sister's sexual conduct. The Court of Appeals held that such evidence was properly excluded under the Rape Shield Statute, former O.C.G.A. § 24-2-3, because the evidence related to the past sexual behavior of the older sister and did not fall within the statutory exceptions, as the past sexual behavior of the older sister having sex with boys for money did not involve the participation of defendant and did not support an inference that defendant reasonably believed that the older sister consented to defendant's alleged sexual activities with the older sister. Third, defendant argued that the trial court improperly excluded defendant's requested charge on credibility relating to a delay in reporting a crime. The Court of Appeals held that the trial court's exclusion was not an obvious error that likely affected the outcome of the trial and that seriously affected the fairness, integrity or public reputation of the judicial proceedings. The Court of Appeals affirmed defendant's conviction.

X. MISCELLANEOUS

A. Confessions

1. PORTER v. STATE, No. A17A0046, 341 Ga. App. 632 (2017)

Following a jury trial, defendant was convicted of armed robbery. Defendant appealed, arguing that the trial court erred in admitting her custodial statement. However, defendant never unambiguously and unequivocally invoked her right to remain silent; thus, her statements during the interrogation were properly admitted. Defendant also argued that the trial court improperly admitted evidence of the victims' showup identification of her as one of the offenders in the armed robbery. The court disagreed as the defendant failed to show that there was a substantial likelihood of irreparable

misidentification under the totality of the circumstances. In particular, testimony indicating that defendant wore the same clothes during the robbery and showup, that one victim observed defendant at close-range during the robbery, and testimony by a co-defendant identifying defendant as a participant. The Court of Appeals affirmed defendant's conviction.

2. SHEPARD v. STATE, No. S16A0884, 300 Ga. 167 (2016)

Defendant was convicted of murder and unlawful possession of a firearm during the commission of a crime. Defendant appealed, arguing that (1) the trial court erred in denying his motion to suppress a statement he made to detectives after he was arrested, and that (2) he was denied effective assistance of counsel because the trial counsel failed to object and moved for a mistrial when the State elicited improper character evidence. Former O.C.G.A. § 24-3-50 provides that confession is inadmissible if it was "induced by another by the slightest hope of benefit." The Supreme Court has held that "the slightest hope of benefit" means promises of reduced criminal punishment -- a shorter sentence, lesser charges, or no charges at all. Here, the detectives merely acknowledged that defendant wanted a deal, that defendant perhaps could get some arrangement, and that they would talk with the district attorney, but that any agreement would require the assent of the district attorney. Defendant's personal belief that talking to detectives would gain him favor from the State did not render his statements involuntary. The Court found that there was no "the slightest hope of benefit," and thus, the trial court properly denied defendant's motion to suppress. Further, the testimony defendant sought to object was relevant to show the pretext that defendant and an accomplice planned to use to draw the victim out of the house as part of their common purpose to assault and murder the victim. Consequently, the Court held that the testimony was admissible as evidence of an integral part of the res gestae of the crime even though it placed defendant's character in evidence. Judgement affirmed.

3. BRADSHAW v. STATE, No. S16A1070, 300 Ga. 1 (2016)

Defendant was convicted of malice murder and related offenses. Defendant appealed, arguing that the trial court erred in admitting his custodial statements at trial. Defendant claimed that the custodial statements were not freely and voluntarily given. The Supreme Court noted that defendant was informed of and understood his Miranda rights and, although there was no written waiver, the record clearly shows that he was verbally advised of these rights. After receiving the verbal warnings, defendant agreed to speak with law enforcement without an attorney, never requested to stop the interview, was not promised a hope of benefit, and was not coerced into making his statements. Based on the totality of the circumstances, the Supreme Court found no error in trial court's admission of the evidence. Judgement affirmed.

4. HUFF v. STATE, No. S16A0996, 299 Ga. 801 (2016)

Defendant was convicted of the murders of three victims. Defendant appealed, arguing that the trial court erred in (1) denying defendant's motion to suppress the custodial statement he made to the investigator and (2) admitting certain testimony at trial. Defendant first alleged that the investigator to whom he made the statement made several

comments about defendant being present “for his children as they grew up” and that “the truth will set you free.” Defendant claimed that these comments generated a hope of benefit, which improperly induced him to give the statement. The Supreme Court noted that “hope of benefit” refers to “promises related to reduced criminal punishment -- a shorter sentence, lesser charges, or no charges at all,” and that encouragement or admonitions to tell the truth will not invalidate a confession. Thus, there was no clear error in the trial court’s finding that there was no improper hope of benefit. Also, defendant claimed that he gave part of his statement after invoking his right to remain silent. However, the recording of the interrogation shows that, every time defendant made a statement that hinted at a desire to end the interrogation (by saying, for instance, that he would “rather do this in court”), defendant nevertheless continued talking to the investigators without additional prompting. The Court thus concluded that the trial court’s finding that defendant did not unequivocally assert his right to remain silent was not erroneous. Accordingly, the Supreme Court affirmed defendant’s convictions.

5. HERNANDEZ v. STATE, No. S16A0936, 299 Ga. 796 (2016)

Defendant was convicted of malice murder and a firearm offense. Defendant appealed, arguing that the trial court erred in (1) soliciting the jury for questions to ask the witnesses, and (2) admitting defendant’s custodial statement to the police regarding the shooting. At the beginning of the trial, the court told the jurors that they could submit written questions for the witnesses. After each witness had been examined by the parties, the jurors could submit their questions to the court. The questions were then shared with counsel, who were given an opportunity to object. The parties were also allowed to ask follow-up questions to the witness. The Supreme Court found no error in this procedure. After defendant’s arrest, defendant was interviewed by the police. After the detective and the Spanish-speaking officer confirmed that defendant wanted a lawyer, they asked defendant some routine booking questions. But during that time, defendant stated that defendant felt sad for what defendant did, but that defendant did it. Defendant claimed that this somewhat incriminating statement was inadmissible because it came after he invoked his right to counsel. The Supreme Court disagreed, finding that the incriminating statement was volunteered rather than elicited by interrogation. The Court noted that when defendant unequivocally invoked the right to counsel, the police had an obligation to stop interrogating defendant, but they were not required to stop listening to what defendant chose to say. Therefore, the Court held the statement was properly admitted at trial. Judgment affirmed.

B. Eyewitness Identification

1. PORTER v. STATE, No. A17A0046, 341 Ga. App. 632 (2017)

Following a jury trial, defendant was convicted of armed robbery. Defendant appealed, arguing that the trial court erred in admitting her custodial statement. However, defendant never unambiguously and unequivocally invoked her right to remain silent; thus, her statements during the interrogation were properly admitted. Defendant also argued that the trial court improperly admitted evidence of the victims’ showup identification of her as one of the offenders in the armed robbery. The court disagreed as the defendant failed to show that there was a substantial likelihood of irreparable

misidentification under the totality of the circumstances. In particular, testimony indicating that defendant wore the same clothes during the robbery and showup, that one victim observed defendant at close-range during the robbery, and testimony by a co-defendant identifying defendant as a participant. The Court of Appeals affirmed defendant's conviction.

2. MARTIN v. STATE, No. A17A0503, 340 Ga. App. 773 (2017)

Following a jury trial, defendant was convicted of armed robbery. Defendant appealed, arguing that the trial court improperly admitted other-crimes evidence under O.C.G.A. § 24-4-404(b). The court disagreed, as this evidence was admitted to establish defendant's identity as a participant in the robbery. The trial court did not err in admitting the evidence because the two incidents at issue occurred within approximately one month of each other, both involved the armed robbery of a Hispanic woman walking alone in Gainesville, during which a purse was snatched, the perpetrators wore dark clothing and used a small handgun, as well as a white SUV, to carry out the crimes. Further, in both instances, the stolen purses were later found discarded on a roadway. These circumstances allowed the trial court to find that the modus operandi for each robbery was sufficiently similar to mark the offenses as defendant's. Defendant also challenged an in-court identification based on a single photograph as improper. The court found no error as the extra safeguards applicable to pretrial identification did not apply to a prior victim's in-court identification of defendant from a photograph via Skype. The Court of Appeals affirmed the conviction.

3. BLACKMON v. STATE, No. S16A1306, 300 Ga. 35 (2016)

Defendant was convicted of felony murder and other offenses in connection with the shooting death of one victim and the aggravated assault and battery of the other victim. During a pre-trial photographic lineup, the surviving victim identified defendant as the person who shot him. Defendant appealed, arguing that the trial court erred by admitting the pre-trial identification evidence because it was the result of an impermissibly suggestive photographic lineup which gave rise to a substantial likelihood of misidentification. The Supreme Court disagreed. First, defendant's claim that the victim was under the influence of prescription pain medications at the time he identified defendant in the photographic lineup does not establish that the identification procedure was impermissibly suggestive. Second, the photo array consisted of photographs of defendant and five other males of similar age and with similar physical characteristics and facial feature. Moreover, the victim's identification of defendant was unequivocal and not influenced by words or actions of detectives. Therefore, the identification procedure in this case was not impermissibly suggestive. The Court affirmed defendant's convictions.

4. BOWEN v. STATE, No. S16A0850, 299 Ga. 875 (2016)

Defendant was found guilty by a jury of felony murder and other crimes. Defendant appealed, arguing that the trial court erred in admitting evidence at trial of the pre-trial photographic identifications of defendant by several witnesses. Defendant did not provide any specifics, but generally asserted that the pre-trial identification procedures

used by the officers who conducted the photographic identifications were unduly suggestive and unreliable. The Supreme Court noted that testimony regarding a witness' pre-trial identification of the defendant must be excluded if the identification procedure was unduly suggestive and, under the totality of the circumstances, resulted in a substantial likelihood of misidentification. Here, the Court held that the photographic lineups as presented to the witnesses were not impermissibly suggestive because the lineups consisted of six pictures of black males with similar hairstyles, the officers read the witnesses a standard admonition and did not threaten them or suggest a certain photograph should be selected. Judgment affirmed.

5. RAINWATER v. STATE, No. S16A1532, 300 Ga. 800 (2017)

Defendant was convicted of felony murder in the shooting death of the victim. Three witnesses picked defendant out of photographic lineups following the shooting, and two made in-court identifications of defendant. Defendant appealed, arguing that the trial court erred in allowing the State's photographic lineup admonition forms that contained handwritten statements by the witnesses explaining the actions of defendant they witnessed on the day of the murder to go back with the jury. The Supreme Court acknowledged that to the extent the photographic lineup admonition forms contained statements beyond the identification of defendant, and allowing them to go back with the jury violated the continuing witness rule. However, the Supreme Court affirmed the rejection to defendant's request for new trial because it found such violation did not amount to plain error in light of the strong evidence that defendant was a party to the crimes, and trial counsel's cross-examination of one of the witnesses regarding the statements made on the lineup admonition.

C. Closing Arguments

1. SATTERFIELD v. STATE, No. A16A1278, 339 Ga. App. 15 (2016)

Defendant was convicted of terroristic threats and intent to retaliate against a judge after sending a five-page, typewritten letter to the judge's wife in which he revealed that he had previously intended to kill her family. According to the letter, the recipient's husband—the judge—had acted in a biased, unethical, and spiteful manner during defendant's divorce proceedings, and defendant was seeking revenge. Defendant explained that, although he no longer wanted to kill the judge's family, he wanted to warn the judge's wife about others who have suffered from similar behavior by the judge. The letter went on to state that, in preparation for punishing those responsible for his unhappiness, defendant gave away all of his money, land, and vehicles. Defendant was arrested on the day that the judge received the letter, and at the time of his arrest, officers found defendant in possession a \$71,500 check written to his ex-wife and an unloaded Taurus revolver in his vehicle. At the conclusion of the trial, defendant's motion for a new trial was denied. On appeal, defendant argued that the trial court erred by (1) allowing the State to introduce into evidence the gun found in his vehicle at the time of his arrest, and (2) by allowing the State's "golden rule" argument during closing arguments and denying the defendant's request for a curative instruction. As to the gun, defendant argued that it was *res gestae* and constituted evidence wholly unconnected to the charges against him. The Court of Appeals found that the trial court did not abuse its discretion in admitting the revolver

for two reasons. First, the gun was relevant to the charges the defendant was facing because at the time of his arrest, he possessed the gun, the gun box, ammunition, and a large check, indicating that he was in the process of executing the steps outlined in the letter in that he was disposing of his assets and arming himself to follow through on his plan to murder the judge’s family. The gun was thus inextricably intertwined with the evidence of the charged offenses. Second, the gun was relevant because it made defendant’s defense—that he did not intend to kill the judge’s family, but rather to warn them that others like him might harm them because of the judge’s actions—less likely to be true. As to defendant’s “golden rule” argument, the Court of Appeals held that the trial court did not abuse its discretion in denying the defendant’s motion for mistrial following a portion of the State’s closing argument in which the prosecutor argued “Again, just – man, read the letter. Read the letter. It will make your heart skip a beat A mother and father read this letter. You can just imagine how they felt.” Defendant argued that this argument violated the “golden rule” by asking the jurors to place themselves in the victim’s position. The Court of Appeals disagreed, finding that the prosecutor’s statement was not concerned with how a juror would feel if he or she were the victim; rather, it asked the jurors to imagine how the victims felt when they received the letter. How the victims felt when they received the letter was relevant because whether the letter constituted a threat was an issue to be decided by the jury.

2. KENNEBREW v. STATE, No. S16A0844, 299 Ga. 864 (2016)

Defendant was tried with two other defendants and was found guilty of malice murder and other related crimes. Defendant appealed, claiming ineffective assistance by his trial counsel. The Supreme Court affirmed the convictions of the other defendants, but reversed defendant’s convictions. During the State’s closing argument, the prosecutor blatantly commented on defendant’s pre-arrest silence, yet defendant’s counsel did not object or move for a mistrial. Under Georgia’s old Evidence Code, which governed this case, the Supreme Court had established a bright-line rule prohibiting the State from commenting on a defendant’s pre-arrest silence or failure to come forward because such comments were “far more prejudicial than probative.” The Court found that the State clearly violated the rule as the State’s discussion of defendant’s failure to come forward to the police was not just a passing or equivocal remark that the jury might have overlooked, but a specific, extended argument aimed directly at demonstrating defendant’s guilt. Given defendant’s defense theory and the importance of the State’s silence-equalled-guilt argument to its case against defendant, the Supreme Court concluded that the trial counsel’s failure to object was deficient performance and that defendant had shown the prejudice needed to prevail on his claim. Therefore, the Supreme Court reversed defendant’s convictions.

D. Res Gestae (Non-Hearsay Context)

1. SATTERFIELD v. STATE, No. A16A1278, 339 Ga. App. 15 (2016)

Defendant was convicted of terroristic threats and intent to retaliate against a judge after sending a five-page, typewritten letter to the judge’s wife in which he revealed that he had previously intended to kill her family. According to the letter, the recipient’s husband—the judge—had acted in a biased, unethical, and spiteful manner during defendant’s

divorce proceedings, and defendant was seeking revenge. Defendant explained that, although he no longer wanted to kill the judge's family, he wanted to warn the judge's wife about others who have suffered from similar behavior by the judge. The letter went on to state that, in preparation for punishing those responsible for his unhappiness, defendant gave away all of his money, land, and vehicles. Defendant was arrested on the day that the judge received the letter, and at the time of his arrest, officers found defendant in possession a \$71,500 check written to his ex-wife and an unloaded Taurus revolver in his vehicle. At the conclusion of the trial, defendant's motion for a new trial was denied. On appeal, defendant argued that the trial court erred by (1) allowing the State to introduce into evidence the gun found in his vehicle at the time of his arrest, and (2) by allowing the State's "golden rule" argument during closing arguments and denying the defendant's request for a curative instruction. As to the gun, defendant argued that it was *res gestae* and constituted evidence wholly unconnected to the charges against him. The Court of Appeals found that the trial court did not abuse its discretion in admitting the revolver for two reasons. First, the gun was relevant to the charges the defendant was facing because at the time of his arrest, he possessed the gun, the gun box, ammunition, and a large check, indicating that he was in the process of executing the steps outlined in the letter in that he was disposing of his assets and arming himself to follow through on his plan to murder the judge's family. The gun was thus inextricably intertwined with the evidence of the charged offenses. Second, the gun was relevant because it made defendant's defense—that he did not intend to kill the judge's family, but rather to warn them that others like him might harm them because of the judge's actions—less likely to be true. As to defendant's "golden rule" argument, the Court of Appeals held that the trial court did not abuse its discretion in denying the defendant's motion for mistrial following a portion of the State's closing argument in which the prosecutor argued "Again, just – man, read the letter. Read the letter. It will make your heart skip a beat A mother and father read this letter. You can just imagine how they felt." Defendant argued that this argument violated the "golden rule" by asking the jurors to place themselves in the victim's position. The Court of Appeals disagreed, finding that the prosecutor's statement was not concerned with how a juror would feel if he or she were the victim; rather, it asked the jurors to imagine how the victims felt when they received the letter. How the victims felt when they received the letter was relevant because whether the letter constituted a threat was an issue to be decided by the jury.

2. BOOTH v. STATE, No. S17A0705, 2017 Ga. LEXIS 634 (2017)

Defendant was convicted of malice murder. He appealed, arguing that the trial court erred by: (1) allowing the State to make improper arguments during closing statement; and (2) admitting evidence of other acts to prove intent to commit the charged crimes. Rule 404 (b), provides that "evidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including, but not limited to, proof of ... intent... ." Other acts evidence must be meet the test which requires that the moving party show that the evidence is (1) relevant; (2) the probative value is not substantially outweighed by undue prejudice; and (3) there is sufficient proof that the jury can find that the defendant committed the acts. Defendant argued that the acts were not relevant because the intent required for one of his convictions was not required for the offenses

charged in the case. Relevant evidence is evidence that tends “to make the existence of any fact more probable or less probable than it would be without the evidence.” O.C.G.A. § 24-4-401. In this case, defendant was charged with aggravated assault which required proof that defendant had the intent to injure victim with a weapon, which in this case were defendant’s hands. Both offenses showed an intent to cause harm by hitting the victim in the head with hands or fists and such actions are likely to cause serious bodily injury. The Supreme Court concluded that those offenses were the same intent required to prove aggravated assault. Defendant also argued that the trial court erred in overruling his objection to the State’s allegedly improper comments during closing arguments. The comments are in regards to the testimony of a defense expert witness in forensic DNA analysis. Defendant asserts that the State mischaracterized the expert witness’ testimony which improperly allowed the jury to believe that DNA evidence can be time-stamped. The Supreme Court found the State’s comments to be within the bounds of permissible closing arguments stating, “[A] prosecutor is granted wide latitude in the conduct of closing argument, the bounds of which are in the trial court’s discretion[.]” *Scott v. State*, 290 Ga. 883, 885 (2012). Therefore, the Supreme Court found no error in the closing.

3. SHEPARD v. STATE, No. S16A0884, 300 Ga. 167 (2016)

Defendant was convicted of murder and unlawful possession of a firearm during the commission of a crime. Defendant appealed, arguing that (1) the trial court erred in denying his motion to suppress a statement he made to detectives after he was arrested, and that (2) he was denied effective assistance of counsel because the trial counsel failed to object and moved for a mistrial when the State elicited improper character evidence. Former O.C.G.A. § 24-3-50 provides that confession is inadmissible if it was “induced by another by the slightest hope of benefit.” The Supreme Court has held that “the slightest hope of benefit” means promises of reduced criminal punishment -- a shorter sentence, lesser charges, or no charges at all. Here, the detectives merely acknowledged that defendant wanted a deal, that defendant perhaps could get some arrangement, and that they would talk with the district attorney, but that any agreement would require the assent of the district attorney. Defendant’s personal belief that talking to detectives would gain him favor from the State did not render his statements involuntary. The Court found that there was no “the slightest hope of benefit,” and thus, the trial court properly denied defendant’s motion to suppress. Further, the testimony defendant sought to object was relevant to show the pretext that defendant and an accomplice planned to use to draw the victim out of the house as part of their common purpose to assault and murder the victim. Consequently, the Court held that the testimony was admissible as evidence of an integral part of the res gestae of the crime even though it placed defendant’s character in evidence. Judgement affirmed.

E. Continuing Witness Rule

1. RAINWATER v. STATE, No. S16A1532, 300 Ga. 800 (2017)

Defendant was convicted of felony murder in the shooting death of the victim. Three witnesses picked defendant out of photographic lineups following the shooting, and two made in-court identifications of defendant. Defendant appealed, arguing that the trial court erred in allowing the State’s photographic lineup admonition forms that contained

handwritten statements by the witnesses explaining the actions of defendant they witnessed on the day of the murder to go back with the jury. The Supreme Court acknowledged that to the extent the photographic lineup admonition forms contained statements beyond the identification of defendant, and allowing them to go back with the jury violated the continuing witness rule. However, the Supreme Court affirmed the rejection to defendant's request for new trial because it found such violation did not amount to plain error in light of the strong evidence that defendant was a party to the crimes, and trial counsel's cross-examination of one of the witnesses regarding the statements made on the lineup admonition.